UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA Plaintiff	)	
	)	Cr. No. 03-1111
v.	)	
JOHN DOE	)	
Defendant	)	

MOTION REQUESTING THE COURT TO DECLARE U.S.S.G. § 3E1.1 UNCONSTITUTIONAL AS APPLIED TO THE INSTANT CASE BECAUSE THE DISPARITY BETWEEN A GUIDELINE SENTENCE AFTER PLEA VERSUS AFTER TRIAL WOULD CAUSE A CHILLING EFFECT ON THE SIXTH AMENDMENT RIGHT TO TRIAL

COMES NOW defendant by and through his attorney of record, who hereby moves this Honorable Court for an Order declaring U.S.S.G. § 3E1.1 unconstitutional as applied to the instant case in that the difference between a Guideline sentence after a plea versus after trial would cause a chilling effect on the free exercise of the Sixth Amendment right to trial.

I. U.S.S.G. § 3E1.1, AS AMENDED, VIOLATES DEFENDANT'S SIXTH AMENDMENT RIGHT TO TRIAL

> *In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the Compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.*
>
> United States Constitution, Sixth Amendment

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . " Bordenkircher v. Hayes , 434 U.S. 357, 363 (1978) (citation omitted). It is thus a violation of due process to penalize a criminal defendant for exercising his constitutional rights, see United States v. Jackson , 390 U.S. 570, 581 (1968), or for pursuing a statutory right of appeal or collateral remedy, North Carolina v. Pearce, 395 U.S. 711, 723-24 (1969). See also United States v. Mazzaferro, 865 F.2d 450, 460 (1st Cir. 1989). ("The law is clear beyond peradventure that a sentence based on retaliation for exercising the constitutional right to stand trial is invalid")(Bownes, J.).

In every F.R.Cr.P. Rule 11 hearing, consistent with the Sixth Amendment, the defendant is informed that he has "a right to plead not guilty and to persist in that plea if it has already been made, the right to a jury trial..." Rule 11(c)(3). The defendant is not informed at such a hearing, but the applicable provision of the United States Sentencing Guidelines, U. S. S.G. § 3E1.1(b), as amended, makes clear: that the cost of exercising the right to a jury trial **will result** in a sentence that is **significantly longer than a sentence after plea** if the defendant is to lose at trial.

There is little question, therefore, that defendant's exercise of his constitutional right to require the government to prove its case against him at trial would cost him a sentence of at **least [in most circumstances] several years longer** than if he

pleads guilty, simply because he may choose to exercise his right to trial.

Defendant is mindful of decisions of the First Circuit which have upheld the constitutionality of U.S.S.G. § 3E1.1. "We note that although "[t]he guideline admittedly imposes a tough choice on a defendant . . ., it is not unconstitutional . . . ." See United States v. DeLeón Ruiz, 47 F.3d 452, 456 (1st Cir. 1995) (citations omitted); United States v. Muñnoz, 36 F.3d 1229, 1236-37 (1st Cir. 1994).

The First Circuit, and other courts, see e.g. United States v. Frazier, 971 F.2d 1076 (4th Cir.1992); United States v.Jones, 934 F.2d 1199,1200 (11th Cir. 1991), have predicated their reasoning on the United States Supreme Court's decisions in Corbitt v. New Jersey, 439 U.S. 212, 224, 58 L. Ed. 2d 466, 99 S. Ct. 492 (1978) and Brady v. United States, 397 U.S. 742, 751, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970) that the law has allowed sentencing judges to show **leniency** to defendants who demonstrate contrition and acceptance of responsibility for their crimes. The United States Supreme Court has also encouraged the practice of plea bargaining by stating: "Although every [plea bargain] has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas." Chaffin v. Stynchcombe, 412 U.S. 17, 30-31, 36 L. Ed. 2d 714, 93 S. Ct. 1977 (1973).

On the other hand, "if the only objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional'") Chaffin v. Stynchcombe at 33 n. 20 citing Shapiro v. Thompson, 394 U.S. 618, 631 (1969). Plea bargaining necessarily entails hard negotiation between the parties. While it may be the **government's position** to encourage a criminal defendant to plead guilty and give up his or her right to trial by offering a more lenient sentence if he pleads guilty, or even threatening harsher punishment if he refuses to plead guilty, that can not be the legitimate interest of the judicial system that under our constitution guarantees the fundamental right to trial. The courts must be vigilant of whether a particular "state practice" violates a constitutionally protected right. Cf. Chaffin v. Stynchcombe supra at 33 n. 20.

Under the new PROTECT Act, Public Law 108-21, Section 401(g), U.S.S.G. § 3E1.1(b) was specifically amended to require that the third level reduction for "acceptance of responsibility" only be available to a defendant "upon motion of the government." While such statutory requirement brings into serious question a "Separation of Powers" argument, see infra, the decision on whether a defendant should plea must now be predicated on the effect of the "state practice," the sentence enumerated in the United States Sentencing Guidelines together with the reduction for "acceptance of responsibility," that may or may not be recommended by the government. It is, therefore, the court's direct implementation of that "state practice" not the

prosecutor's offer of leniency, which is being utilized to encourage a plea and discourage a trial.

Although "[a] criminal justice system that tolerates and encourages plea negotiations must allow **prosecutors** to impose difficult choices on defendants even though the risk of more severe punishment may discourage a defendant from asserting his trial rights," Bordenkircher , 434 U.S. at at 364, *emphasis added,* discouraging trials can not be the practice of the court's themselves that must guarantee the constitutional right to trial.

As the First Circuit and other courts have, however, noted: U.S.S.G § 3E1.1 "merely codify[s] a tradition of leniency and are not an impermissible burden on the exercise of constitutional rights." United States v. Paz Uribe, 891 F.2d 396, 400 (1st Cir.1989); *cert. denied* 110 S.Ct. 2216, 109 L.Ed.2d 542 (1990),(upheld the constitutionality of §§ 3E1.1 against a challenge brought under the Fifth Amendment) See also United States v. Frazier, supra, 971 F.2d at 1084 ("[t]he acceptance of responsibility reduction essentially codifies the **judicial practice of sentencing more leniently** defendants who evidence contrition and cooperate with law enforcement authorities," *emphasis added).*

While the general practice of plea bargaining and the application of U.S.S.G. § 3E1.1, prior to amendment, may be constitutionally acceptable, its application to the case at bar

would be unconstitutional. As Justice Stewart, concurring in Corbett v. New Jersey, supra explained:

"Could a state legislature provide that the penalty for every criminal offense to which a defendant pleads guilty is to be one-half the penalty to be imposed upon a defendant convicted of the same offense after a not guilty plea? **I suppose such a sentence would be clearly unconstitutional** under United States v. Jackson..." *(emphasis added).*

The codification in the Guidelines of the plea bargaining practice of a defendant receiving a substantial reduction in sentence for saving the government the expense of a trial, comes with a heavy constitutional price. Such practice as applied in the case at bar, amounts to nothing less than punishment for proceeding to trial. As Judge Young in United States v. Berthoff, 140 F.Supp.2d 50,53(D.C. Mass 2001)(aff'm, 308 F.2d 124 (1st Cir.2002) explained:

> Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. True, there was always a sentencing discount for those who plead guilty and turn state's evidence. In this District that discount used to range from 33% to 45%. Today, under the Sentencing Guidelines regime with its vast shift of power to the executive, that disparity has widened to an incredible 500%. ...
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> Not surprisingly, such disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. **Criminal trial rates in the United States and in this District are plummeting due to the simple fact that we punish people-punish them severely- simply for going to trial.** It is the sheerest sophistry to pretend otherwise. This is nothing new, of course. Sugarcoat it as

> we may with terms like "acceptance of responsibility" for those who cooperate, we have always punished those who demand that the government carry its constitutionally-mandated burden of persuasion beyond a reasonable doubt before an American jury.

Berthoff, 140 F.Supp. at 67-70, *citations and empirical studies omitted, emphasis added.*

The United States Court of Appeals for the First Circuit, in addressing Judge Young's concerns, specifically noted that: "[w]e acknowledge that the district court raises serious and troubling issues regarding sentencing disparity that merit careful consideration in an appropriate case..." 308 F.3d at 129.

The PROTECT Act now brings those Sixth Amendment concerns to the forefront. Defendant respectfully submits that the cost of exercising his constitutional right to require the government to prove its case against him at trial would be a sentence, at the sole discretion of the government, of months, if not years, higher than if he pleads guilty with a government motion. Such a disparity is without constitutional justification.

II. IMPOSITION OF U.S.S.G. § 3E1.1(b), AS AMENDED, WOULD VIOLATE THE "SEPARATION OF POWERS" CLAUSE OF THE CONSTITUTION

The PROTECT act now leaves a fundamental sentencing consideration, the amount of time that can be reduced for "acceptance of responsibility" from an otherwise applicable Guideline sentence, to the sole discretion of the government.

Defendant respectfully submits that this sentencing function belongs with the courts and not the executive branch of government, especially in view of the above argument, that this guideline provision, U.S.S.G. § 3E1.1 has a chilling effect on the Sixth Amendment right to trial.

The meaning of the Constitution's "Separations of Powers" clause has been explained by the United States Supreme Court as follows:

> The Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." U. S. Const., Art. I, § 1. From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." Mistretta v. United States, 488 U.S. 361, 371, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989).
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> We have long recognized that "the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. Id., at 372. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409, 72 L. Ed. 624, 48 S. Ct. 348 (1928).
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> Touby v. United States, 500 U.S. 160, 164-65 (1991)

> This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, "the

> separation of governmental powers into three coordinate Branches is essential to the preservation of liberty. See, e.g., Morrison v. Olson, 487 U.S. 654, 685-696 (1988); Bowsher v.Synar, 478 U.S.,[714] at 725 [1986]. Madison, in writing about the principle of separated powers, said: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, p. 324 (J. Cooke ed. 1961).

Mistretta v. United States, 488 U.S. at 380.

As set forth above, U.S.S.G. § 3E1.1, has been constitutionally approved because it allowed sentencing judges to show leniency, see United States v. Frazier, supra, 971 F.2d at 1084, a role that has now been delegated solely to the government. Such delegation of authority, makes the right to trial meaningless because while it is said that there is a right to require the government to prove its case, the government can can, in its sole discretion and without judicial oversight, chill that right by refusing to move for the additional third point reduction under U.S.S.G. § 3E1.1(b).

In Mistretta, the Supreme Court, in approving the constitutionality of the United States Sentencing Commission, explained that it was doing so because the delegation of sentencing authority to the commission was "sufficiently specific and detailed to meet constitutional requirements."(Id. at 374). The current amendment to U.S.S.G. § 3E.1.1(b) provides no such guidance. In fact it leaves the sentencing decision of whether a defendant can receive a reduction for acceptance of

responsibility that could, for example, mean a disparity of as much life versus 27 years (Offense Level 37, Category VI, versus Level 36, Category VI) or 33 years versus 24 years (Offense Level 36, Category VI versus Level 35, Category VI) solely at the discretion of the government. Even at relatively low Guideline Offense Levels such as Level 22, Category I, and Level 21, Category I, the potential disparity caused by the one level additional reduction is as much as 14 months, over one year, simply based on the government's discretionary decision on whether to file a motion for the additional reduction.

Following Mistretta, without specific and detailed guidelines as to how and when the motion by the government should be made, the amendment violates the Constitution's "Separation of Powers" requirement.

WHEREFORE, for each of the reasons set forth above, defendant respectfully requests this Honorable Court to declare that the application of U.S.S.G. § 3E1.1, as amended, and as applied to the present case, would be an unconstitutional burden on the exercise of defendant's Sixth Amendment right to trial as well as a violation of the "Separation of Powers."

Date: Respectfully submitted,

MICHAEL C. BOURBEAU BBO # 545908
21 Union Street
Boston, MA 02108
(617) 722-9292
Attorney for Defendant