

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

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UNITED STATES OF AMERICA	§	
	§	
v.	§	No. 4:08-CR-119-Y
	§	
JAMES MICHAEL ATCHLEY (33)	§	

**GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION FOR VARIANCE**

TO THE HONORABLE TERRY R. MEANS, UNITED STATES DISTRICT JUDGE:

The United States hereby provides its response to the defendant’s motion for variance from the calculated guidelines level.

**A. Base Offense Level is Flawed:**

The defendant’s initial complaint with the guidelines is based upon the fact that the defendant’s guideline sentence is below that of other offenses that he views as more serious. As noted in the policy statement of the Sentencing Guidelines, “Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.” U.S.S.G. Chapter 1, Part A (3). Far from being “meritless,” the addendum’s benchmark guideline is based upon the facts in the instant case.

The defendant also alleges that there was not credible information to establish the quantities involved in the defendant’s narcotics dealing. However, as noted in the government’s objections to the PSR, the reason that specific amounts had not been provided regarding the defendant’s distribution of MDMA was because his co-

conspirators had not been specifically asked. Once asked, they did provide that information.

### **B. Availability of Safety Valve**

The defendant's arguments regarding the application of the Safety Valve are without merit. Regardless of whether the Safety Valve *could* be applied in this case, the defendant does not qualify for such a reduction. First, the defendant has not truthfully provided to the Government all information regarding his offense of conviction. As evidenced by his objections to the PSR and his motion for variance, the defendant is continuing to contest his actual conduct. Apart from his initial post-arrest interview, the defendant has not been interviewed by government agents.

Secondly, the defendant was a manager/supervisor. As noted in both the PSR and the addendum to the PSR, the defendant *directed* the activities of Stephen Scherzer during the conspiracy. Therefore, he fails to qualify for the Safety Valve for this reason as well. As noted in the government's response to the defendant's objections to the PSR, in *United States v. Job*, 101 F.3d 1046, 1065 (5<sup>th</sup> Cir. 1996), the Court held that in order to receive the enhancement, a defendant must be the organizer or leader of at least one other participant in the crime and he must assert control or influence over that participant.

### **C. The Third Point**

The defendant asks that this court grant him an additional one point reduction for his plea of guilty pursuant to USSG §3E1.1(b). In support of this notion, he alleges that the trial court may grant the third point in its sentencing discretion. He cites *United States v. Newson*, 515 F3d 374 (5<sup>th</sup> Cir. 2008) for this argument.

However, *Newson* stands for the proposition that the authority to request the third point for acceptance rests solely with the government. *Id.* at 377-378. The *Newson* court further held that the defendant's refusal to waive his right to appeal is a proper basis for the Government to decline to make such a motion. *Id.* at 378.

The defendant was provided with plea paperwork that allowed him to waive his right to appeal. He chose not to waive his right to appeal. Email conversations ensued between government counsel and defense counsel. At one point, government counsel stated that he would not move for the additional point for acceptance if the defendant did not waive appeal, and cited the *Newson* case. The defendant was given additional time to decide if he wanted to move forward without a waiver of appeal. He chose to plead guilty without such a waiver.

The defendant made an educated decision, with the assistance of counsel, to preserve his appellate rights. However, he may not have his cake and eat it too. The United States anticipates it will face further litigation as a result of his appeal in this case and therefore has not and will not move for a third point for acceptance.

**D. 18 U.S.C. § 3553(a) Factors**

Sadly, there is nothing exceptionally unique about the background of the defendant that would warrant any sort of variance or departure. If anything, the fact that the defendant was raised in an intact family from the age of three weeks actually separates him from most defendants. A within guidelines sentence is appropriate.

For the reasons set forth above, the United States respectfully requests that the defendant be sentenced within the applicable guideline range.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

This is to certify that on this the 20th day of May, 2009, the foregoing Government's Response to the Defendant's Motion for Variance was served by hand-delivery to Ms. Karen Collins, United States Probation Office, United States Courthouse, 501 W. 10<sup>th</sup> Street, Fort Worth, Texas, 76102 and by mail to Peter Smythe, 211 N. Record Street, Suite 400, Dallas, Texas 75202, counsel for the defendant.

/s/ Joshua T. Burgess  
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