

Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the US Sentencing Guidelines

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Like the Hydra slain by Hercules, prosecutorial misconduct has many heads.

Justice John Paul Stevens¹

INTRODUCTION

Lashawn Dwayne Divens, charged with possession of crack cocaine with intent to distribute, was presented with a plea agreement requiring him to waive certain rights to appellate review and collateral attack.² Although Divens declined to sign the agreement, he took action the very next day, filing a motion notifying the court of his intention to plead guilty.³ Divens also signed an acceptance of responsibility statement admitting his guilt of the charged crime and expressing remorse.⁴

Divens fully expected to receive an additional one-level reduction in his sentence under § 3E1.1(b) of the United States Sentencing Guidelines (Guidelines), which states that a defendant is eligible for the reduction

upon motion of the government stating that [he] has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.⁵

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¹ *United States v Williams*, 504 US 36, 60 (1992) (Stevens dissenting).

² *United States v Divens*, 650 F3d 343, 344 (4th Cir 2011).

³ *Id.*

⁴ *Id.*

⁵ United States Sentencing Guidelines (USSG) § 3E1.1(b).

The Government, however, refrained from moving for the reduction, citing Divens's refusal to waive his right to appellate review and collateral attack.⁶

Divens appealed and, in *United States v Divens*,⁷ the Fourth Circuit held that the Government *cannot* withhold a § 3E1.1(b) motion based on any rational interest.⁸ The Second Circuit has since accepted the Fourth Circuit's interpretation of § 3E1.1(b) in *United States v Lee*.⁹

Importantly, the Fourth and Second Circuits' approach toward determining prosecutorial discretion under § 3E1.1(b) was a marked departure from the approach of their sister circuits. The First,¹⁰ Fifth,¹¹ Seventh,¹² Eighth,¹³ Ninth,¹⁴ and Tenth¹⁵ Circuits assert that the Government may withhold a § 3E1.1(b) motion based on "any rational interest"¹⁶—that is, the Government may refuse to file the motion so long as the refusal is both "rationally related to a legitimate government end" and not "animated by an unconstitutional motive."¹⁷ In so holding, these "any rational interest" courts reason that the Government possesses the same broad discretion under § 3E1.1(b) that it enjoys under § 5K1.1 of the Guidelines, which applies to defendants providing substantial assistance to authorities. This conclusion is based on Congress's insertion of § 5K1.1's "upon motion of the government" language into § 3E1.1(b) as a part of the PROTECT Act¹⁸ generally known as the Feeney Amendment.¹⁹ The any rational interest courts have relied on this insertion to discern

⁶ *Divens*, 650 F3d at 344.

⁷ 650 F3d 343 (4th Cir 2011).

⁸ *Id* at 347 ("[U]nder § 3E1.1(b) the Government retains discretion to refuse to move for an additional one-level reduction, but only on the basis of an interest recognized by the guideline itself—not . . . on the basis of any conceivable legitimate interest.").

⁹ 653 F3d 170 (2d Cir 2011).

¹⁰ *United States v Beatty*, 538 F3d 8, 15 (1st Cir 2008).

¹¹ *United States v Newson*, 515 F3d 374, 378 (5th Cir 2008).

¹² *United States v Deberry*, 576 F3d 708, 711 (7th Cir 2009).

¹³ *United States v Smith*, 422 F3d 715, 726 (8th Cir 2005).

¹⁴ *United States v Johnson*, 581 F3d 994, 1001 (9th Cir 2009); *United States v Espinoza-Cano*, 456 F3d 1126, 1136 (9th Cir 2006).

¹⁵ *United States v Moreno-Trevino*, 432 F3d 1181, 1186 (10th Cir 2005).

¹⁶ *Divens*, 650 F3d at 347.

¹⁷ *Moreno-Trevino*, 432 F3d at 1186, quoting *United States v Duncan*, 242 F3d 940, 947 (10th Cir 2001). See also *Beatty*, 538 F3d at 15 (comparing the Government's discretion under § 3E1.1(b) to the essentially "unfettered" and "unbridled" discretion it is afforded under § 5K1.1); *Newson*, 515 F3d at 378, quoting *Moreno-Trevino*, 432 F3d at 1186; *Deberry*, 576 F3d at 711; *Smith*, 422 F3d at 726; *Johnson*, 581 F3d at 1001; *Espinoza-Cano*, 456 F3d at 1136.

¹⁸ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub L No 108-21, 117 Stat 650, codified in various sections of Title 18 and the USSG.

¹⁹ PROTECT Act § 401(g), 117 Stat at 671-72.

congressional intent and use § 5K1.1 to inform their analysis of § 3E1.1(b).

In light of the recent Second and Fourth Circuit decisions, the conclusion of other courts that the Government is permitted to withhold a § 3E1.1(b) motion based on any rational interest has been thrown into question. Despite the fact that the majority of circuits have applied the any rational interest standard to § 3E1.1(b), it is unclear how the Supreme Court would decide the issue, as “counting courts in a circuit split is not th[e] Court’s usual method for deciding important questions of law.”²⁰

This Comment rejects a pure application of either the any rational interest approach or the Second and Fourth Circuits’ approach to prosecutorial discretion. In doing so, this Comment’s solution argues for a modified *Divens* approach:

(1) the Government may determine only whether the defendant’s notification of his intention to plead guilty was sufficiently timely to alleviate its burden of trial preparation and to conserve trial resources—with “trial” defined narrowly; but

(2) once the Government has concluded under (1) that the defendant’s notification was sufficiently timely, it must grant the § 3E1.1(b) motion.²¹

That is, only after the Government has concluded that the defendant’s notification was insufficiently timely to allow it to avoid trial preparation or preserve trial resources can the § 3E1.1(b) motion be withheld. This solution limits the discretion afforded to prosecutors,

²⁰ *Global-Tech Appliances, Inc v SEB SA*, 131 S Ct 2060, 2073 (2011) (Kennedy dissenting).

²¹ The *Divens* court similarly noted that “the Government retains discretion to determine *whether* the defendant’s assistance has relieved it of preparing for trial” and “once the Government has exercised that discretion and determined that a defendant has in fact alleviated the burden of trial preparation, the defendant merits an additional reduction.” *Divens*, 650 F3d at 346. Importantly, however, this language was *not* adopted by the *Lee* court, which only emphasized *Divens*’s conclusion that the Government “determine[s] simply whether the defendant has ‘timely’ entered a ‘plea of guilty’ and thus furthered the guideline’s purposes in that manner.” *Lee*, 653 F3d at 175, citing *Divens*, 650 F3d at 348.

This Comment argues not only that the former *Divens* statement ought to be embraced—as it is significantly more illustrative—but also that the consideration of *trial resources* should explicitly factor into the determination of sufficient timeliness, and that specific impermissible factors should be provided. This Comment’s solution also ensures that under prong two of its § 3E1.1(b) inquiry, the Government *must* move for the reduction. In comparison, the *Divens* language leaves open the problematic interpretation that an affirmative finding under prong one makes available the option to move for the reduction but does not necessarily force the Government’s hand; the court notes only that “the defendant *merits* an additional reduction” or that “he *becomes entitled* to the reduction.” *Divens*, 650 F3d at 346 (emphasis added).

while acknowledging the importance of trial preparation and resource allocation under § 3E1.1(b).

Because *Divens* did not clarify specifically what the prong one determination should entail, this Comment completes the analysis, detailing precisely which factors the Government can permissibly consider when withholding a § 3E1.1(b) motion and which it cannot. As argued below, the purposes of the Guidelines, the plain text of § 3E1.1(b) and its commentary, the legislative intent surrounding the PROTECT Act, and the PROTECT Act amendments themselves combine to compel this solution.

Part I begins with a brief overview of the Guidelines, with a particular focus on § 3E1.1 and § 5K1.1. Part II examines the various approaches taken by the courts of appeals to determine what level of discretion is afforded to the Government in refusing to move for the § 3E1.1(b) reduction. Part III develops and presents a modified and extended *Divens* approach as an optimal resolution to the circuit split. Parts III.A and III.B provide justifications for rejecting the any rational interest approach and adopting this Comment's solution, which is further developed in Part III.C. This Comment concludes with Part IV, which delves into the intricacies of the solution, illustrating its applications and revisiting the circuit split.

I. THE SENTENCING GUIDELINES

In order to better understand and evaluate the circuit split surrounding prosecutorial discretion under § 3E1.1(b), it is necessary to examine the purposes of the Guidelines, as well as the foundations of both § 3E1.1 and § 5K1.1. The relationship between these specific provisions is at the core of the circuit split.

A. Background: A Cure for Sentencing Disparity

Prior to the enactment of the Sentencing Reform Act of 1984²² (SRA), “indeterminate sentencing gave judges so much discretion that criminal defendants faced starkly different levels of punishment depending on which judge happened to draw the case.”²³ As part of

²² Pub L No 98-473, 98 Stat 1987, codified as amended at 18 USC § 3551 et seq and 28 USC § 991 et seq.

²³ Ryan W. Scott, *Inter-judge Sentencing Disparity after Booker: A First Look*, 63 *Stan L Rev* 1, 6 (2010). See also Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 *Wake Forest L Rev* 223, 227 (1993) (noting that pre-Guidelines sentencing was criticized because “indeterminacy bred anxiety among prisoners because of uncertainty in their release dates” and that the “discrepancy in sentences was said to be fundamentally at odds with ideals of equality and the rule of law”);

the SRA, Congress created the United States Sentencing Commission, which promulgates the Guidelines. In enacting the SRA, Congress sought to cabin judicial discretion and promote “reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.”²⁴ The Guidelines are thus aimed at reducing unwarranted disparities in sentencing.

According to the Supreme Court in *United States v Booker*,²⁵ “Congress’ basic statutory goal—a system that diminishes sentencing disparity—depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.”²⁶ The Sentencing Commission’s system of “real offense” sentencing allows courts to base sentences upon a defendant’s actual conduct as it relates to the charges at issue.²⁷ Such a real offense system might be contrasted with a system in which the charge alone is determinative of the length of a defendant’s sentence. From a functional standpoint, the real offense system

looks to the offense *charged* to secure the “base offense level.” It then modifies that level in light of several “real” aggravating or mitigating factors, (listed under each separate crime), several “real” general adjustments (“role in the offense,” for example) and several “real” characteristics of the offender, related to past record.²⁸

Courts are permitted to depart from a Guidelines-specified sentence only upon finding that an aggravating or mitigating circumstance has not adequately been considered by the Sentencing Commission.²⁹ The ability to depart from the Guidelines reflects a general trend in the realm of sentencing toward treating each defendant as an individual. As the Supreme Court has noted, “It has been uniform and constant in the federal judicial tradition for the sentencing judge

Kevin Clancy, et al, *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J Crim L & Criminol 524, 534–54 (1981).

²⁴ USSG § 1A1.3. See also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 Hofstra L Rev 1, 4–5 (1988).

²⁵ 543 US 220 (2005).

²⁶ Id at 250 (Breyer).

²⁷ USSG § 1A1.1(4)(a).

²⁸ Breyer, 17 Hofstra L Rev at 11–12 (cited in note 24), quoting USSG §§ 1B1.1(b), 2B3.1(b)(1)–(5), 3B1.1, 4A.1.

²⁹ See 18 USC § 3553(b) (directing the courts to consider only “the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission” when determining whether the Commission has adequately considered any factor). See also Albert W. Alschuler, *Departures and Plea Agreements under the Sentencing Guidelines*, 117 FRD 459, 460 (1988).

to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.”³⁰

The Sentencing Commission promulgated the first set of Guidelines in 1987 and the Guidelines regime remained mandatory until 2005. It was then that the *Booker* Court held that the provisions of the SRA making the Guidelines mandatory violated the Sixth Amendment and that only by excising those provisions could the constitutional defect be cured.³¹ Following *Booker* and its progeny, the Guidelines are advisory at both the federal and state levels.³² However, judges must consider them when determining a sentence even if they are not required to issue sentences within the dictated range.³³ In addition, states can institute their own guideline schemes.³⁴ Although strict adherence to the Guidelines is no longer mandatory, the focus on real offense sentencing thus remains.³⁵

The importance of real offense sentencing and its practical role in criminal proceedings is exemplified by the presentence report (PSR). PSRs emerged in the 1840s from the efforts of prison reformer John Augustus, who campaigned to allow discretion in sentencing in order to assist defendants deemed undeserving of harsh sentences or capable of reformation.³⁶ By the 1920s, the practice of issuing PSRs was firmly entrenched in American criminal procedure.³⁷

³⁰ *Gall v United States*, 552 US 38, 52 (2007), quoting *Koon v United States*, 518 US 81, 113 (1996).

³¹ *Booker*, 543 US at 245 (Breyer).

³² See *id.* at 246–67. See also *Pepper v United States*, 131 S Ct 1229, 1247 (2011) (“[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission’s views.”).

³³ *Booker*, 543 US at 264 (Breyer) (“The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”). Judges are compelled to state the reasons for each sentence in court and to issue a written statement explaining why the sentence issued fell outside the Guidelines range. See 18 USC § 3553(c).

³⁴ See *Blakely v Washington*, 542 US 296, 318 (2004) (O’Connor dissenting) (noting that while the majority’s decision “exact[ed] a substantial constitutional tax,” it was “not a constitutional prohibition on guidelines schemes”).

³⁵ See notes 31–32 and accompanying text. See also *Booker*, 543 US at 246 (Breyer).

³⁶ See *The History of the Pre-sentence Investigation Report* *1–2 (Center on Juvenile and Criminal Justice), online at http://www.cjcj.org/files/the_history.pdf (visited Nov 24, 2012); Ricardo J. Bascuas, *The American Inquisition: Sentencing after the Federal Guidelines*, 45 Wake Forest L Rev 1, 11–12 (2010).

³⁷ See Edgardo Rotman, *Failure of Reform: United States, 1865–1965*, in Norval Morris and David J. Rothman, eds, *The Oxford History of the Prison: The Practice of Punishment in Western Society* 151, 151–68 (Oxford 1998); *History of the Pre-sentence Investigation Report* at *1–2 (cited in note 36).

Following the enactment of the SRA and emergence of the Guidelines, “the importance of the presentence report has increased because the document is now designed to frame factual and legal issues for sentencing.”³⁸ A PSR is prepared by a probation officer and reflects the results of the officer’s presentence investigation of a defendant. The PSR provides the sentencing court with a description of the nature and circumstances of the offense, the history and characteristics of the defendant, the application of the Guidelines, and the available sentencing options—all factors that a judge must weigh in making a sentencing determination.³⁹ Consistent with the SRA’s requirement that judges impose sentences that “reflect the seriousness of the offense, [] promote respect for the law, and [] provide just punishment for the offense,”⁴⁰ judges have “long looked to real conduct when sentencing”⁴¹ by relying on the information provided in PSRs to determine appropriate sentences. Thus, in perpetuating the SRA’s mandate of real offense sentencing, the PSR’s role is invaluable.

Since the SRA, Congress’s sentencing legislation has been focused on not only “reducing unwarranted disparities”—and thus furthering the goals of real offense sentencing—but also “increasing the harshness of sentences.”⁴² Because of these dual, somewhat dichotomous goals, legislative intent in the sentencing arena has proved difficult to discern.⁴³ It is in this climate that the PROTECT Act was enacted, and the difficulties in interpreting the Act’s amendments to § 3E1.1(b) have resulted in this circuit split.

³⁸ John P. Storm, *What United States Probation Officers Do*, 61 Fed Probation 13, 13 (1997).

³⁹ See 18 USC § 3552; FRCrP 32(c)–(d) (detailing the presentence investigation and the PSR, specifically noting what the PSR must contain and must exclude). See also *Black’s Law Dictionary* 1303 (West 9th ed 2009) (defining “presentence-investigation report” as “[a] probation officer’s detailed account of a convicted defendant’s educational, criminal, family, and social background, conducted at the court’s request as an aid in passing sentence”).

⁴⁰ SRA § 212(a)(2), 98 Stat at 1989, codified at 18 USC § 3553(a)(2)(A) (listing “[f]actors to be considered in imposing a sentence”).

⁴¹ *Booker*, 543 US at 251 (Breyer) (“Federal judges have long relied upon a presentence report, prepared by a probation officer, for information . . . relevant to the manner in which the convicted offender committed the crime of conviction.”).

⁴² Thomas E. Gorman, Comment, *Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split*, 77 U Chi L Rev 479, 484 (2010). See also Rachel E. Barkow, *Administering Crime*, 52 UCLA L Rev 715, 769–70 & n 198 (2005); The Honorable Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L Rev 185, 197–98 (1993).

⁴³ See Gorman, Comment, 77 U Chi L Rev at 499–508 (cited in note 42) (addressing the circuit split relating to fast-track sentencing disparity that arose in part due to differing interpretations of legislative intent).

B. Section 3E1.1: The Acceptance of Responsibility Provision

Section 3E1.1, the “acceptance of responsibility” provision, was included in the original Guidelines that were issued by the Sentencing Commission in 1987. Subsection (a) provides that a defendant who “clearly demonstrates acceptance of responsibility for his offense” shall receive a two-level reduction for his offense.⁴⁴ Subsection (b) states, in its entirety,

If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.⁴⁵

The additional one-level reduction under § 3E1.1(b) can have a tremendous impact on a defendant’s sentence. At the low end, a defendant’s sentencing range is reduced by as little as 3 months, but at the high end, a defendant facing life imprisonment might reduce his sentence down to 360 months.⁴⁶

The two-level reduction for an “acceptance of responsibility” under § 3E1.1 has been described as

[A]n “add on”—an extra benefit that a defendant receives after striking a bargain with an Assistant United States Attorney: “Come to our showroom; make your best deal with one of our friendly sales personnel; and then use the enclosed certificate—Guidelines section 3E1.1—to receive an additional 20 percent discount from the price of your new car.”⁴⁷

This same add-on framing applies to subsection (b) as well—should a defendant meet the requirements under § 3E1.1(b), he would be eligible for the additional one-level reduction upon the Government’s motion.⁴⁸

⁴⁴ USSG § 3E1.1(a).

⁴⁵ USSG § 3E1.1(b).

⁴⁶ See USSG § 5A, Sentencing Table.

⁴⁷ Alschuler, 117 FRD at 472 (cited in note 29).

⁴⁸ USSG § 3E1.1(b).

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This governmental motion requirement was only added to § 3E1.1(b) in the PROTECT Act.⁴⁹ It is the meaning of this amendment that has spurred disagreement among the circuit courts. The minority interpretation provides that the amendment simply changed *which actor* is charged with initiating the motion, not the underlying discretionary standard required under § 3E1.1(b). That is, the “key inquiry” should still be “whether the confession was complete and timely.”⁵⁰ It is important to emphasize the minimal discretion allowed under § 3E1.1(b) before the passage of the PROTECT Act. Courts were in complete agreement: as long as a defendant timely entered a guilty plea, the one-level reduction was compulsory.⁵¹

However, the majority interpretation provides that the old discretionary standard no longer applies and the Government may withhold its motion based on any rational interest. Courts embracing the latter interpretation rely on an analogy between § 3E1.1(b) and § 5K1.1.⁵²

C. Section 5K1.1: The Substantial Assistance to Authorities Provision

Section 5K1.1, the “substantial assistance to authorities” provision, was also included in the original Guidelines. Section 5K1.1 provides that “[u]pon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”⁵³

In *Wade v United States*,⁵⁴ the Supreme Court held that, under § 5K1.1, the prosecution has discretion to refuse to file a motion for any reason rationally related to a legitimate government interest.⁵⁵ In

⁴⁹ See PROTECT Act § 401(g), 117 Stat at 671–72.

⁵⁰ *United States v Johnson*, 581 F3d 994, 1005–06 (9th Cir 2009), quoting *United States v Blanco-Gallegos*, 188 F3d 1072, 1077 (9th Cir 1999). See also *United States v Borer*, 412 F3d 987, 990 (8th Cir 2005).

⁵¹ See, for example, *Blanco-Gallegos*, 188 F3d at 1077; *United States v Rice*, 184 F3d 740, 742 (8th Cir 1999); *United States v McPhee*, 108 F3d 287, 290 (11th Cir 1997) (“Section 3E1.1(b) directs the district court to grant an additional point based on the ‘timeliness’ of acceptance of responsibility.”); *United States v Townsend*, 73 F3d 747, 755 (7th Cir 1996) (stating that § 3E1.1 “provides an additional one-level reduction when the defendant’s conduct is timely enough to avoid trial preparation and scheduling”); *United States v Talladino*, 38 F3d 1255, 1266 (1st Cir 1994) (noting that the proper inquiry into whether a § 3E1.1(b) motion is warranted is “based on the timeliness of [a defendant’s] acceptance of responsibility”).

⁵² See, for example, *United States v Beatty*, 538 F3d 8, 13–15 (1st Cir 2008); *United States v Espinoza-Cano*, 456 F3d 1126, 1136 (9th Cir 2006).

⁵³ USSG § 5K1.1.

⁵⁴ 504 US 181 (1992).

⁵⁵ *Id* at 186 (“Wade would be entitled to relief if the prosecutor’s refusal to move was not rationally related to any legitimate Government end.”).

so holding, the Court could “see no reason why courts should treat a prosecutor’s refusal to file a substantial-assistance motion differently from a prosecutor’s other decisions.”⁵⁶ Thus, after *Wade*, the level of discretion afforded to the Government under § 5K1.1 is no longer an issue, having been clearly resolved by the Court in 1992.

As explained in Part II, a number of circuits have used § 5K1.1 to aid in their interpretation of § 3E1.1(b) because both sections contain an identically worded governmental motion requirement. The “[u]pon motion of the government” language of § 5K1.1 and the *Wade* decision predate the PROTECT Act. Congress’s subsequent addition of the same phrase to § 3E1.1(b) has thus been interpreted by courts as indicating Congress’s intention to extend the *Wade* Court’s generous grant of prosecutorial discretion under § 5K1.1 to § 3E1.1(b).

II. THE CIRCUIT SPLIT: HERCULEAN EFFORTS TO SOLVE THE PROSECUTORIAL DISCRETION DILEMMA

The cases at issue arise when the Government refuses to request the § 3E1.1(b) reduction for defendants, who are subsequently sentenced without the benefit of the one-level downward departure that the motion would support. Until the *Divens* decision in 2011, all circuit courts to address the issue came to the conclusion that the Government may withhold a § 3E1.1(b) motion based on any rational interest—a grant of prosecutorial discretion on par with that provided under § 5K1.1. However, the Fourth Circuit parted from its sister circuits in *Divens*, and the Second Circuit subsequently followed suit in *Lee*. This Part will detail the contours of the split.

A. The “Any Rational Interest” Camp: The First, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits

The First, Fifth, Seventh, Eighth, Ninth, and Tenth Circuits have each held that the Government may withhold a § 3E1.1(b) motion based on any rational interest.⁵⁷ All of these circuits have applied *Wade*’s § 5K1.1 any rational interest standard to § 3E1.1(b). The Tenth Circuit provided the most extensive analysis of § 3E1.1’s relationship to *Wade* in *United States v Moreno–Trevino*.⁵⁸ In *Moreno–Trevino*, the

⁵⁶ *Id.* at 185.

⁵⁷ See notes 10–17.

⁵⁸ 432 F3d 1181, 1186 (10th Cir 2005). The Eighth Circuit had previously concluded that “the Government’s failure to file a § 3E1.1(b) motion must be rationally related to a legitimate governmental end” but failed to offer any justification for the application of *Wade* to § 3E1.1.

Government refused to move for the additional one-level reduction under § 3E1.1(b) where the defendant “implied that he might breach his promise not to return to the United States.”⁵⁹ Holding that this was permissible, the court analogized § 3E1.1(b) to § 5K1.1—an analogy that would reverberate among the circuit courts until *Divens*.

In extending the Supreme Court’s interpretation of prosecutorial discretion under § 5K1.1 to § 3E1.1(b), the Tenth Circuit modeled its own analysis of § 3E1.1 after the *Wade* Court’s analysis of § 5K1.1. Just as in *Wade*, the court found that § 5K1.1’s similar language required a showing of assistance as a *necessary* condition but did not make that showing *sufficient* for the one-level reduction. According to the court, § 3E1.1 should be interpreted consistently as “confer[ring] on the government ‘a power, not a duty’” to move for the reduction.⁶⁰ Echoing the holding in *Wade*, the Tenth Circuit recognized only two limits on the Government’s discretion under § 3E1.1(b): the Government may not refuse to file a motion (1) because of “an unconstitutional motive” or (2) for reasons “not rationally related to a legitimate government end.”⁶¹

Other circuits have adopted this *Wade*-based line of reasoning with regard to a defendant’s decision to not waive appellate rights,⁶² to proceed by way of a stipulated bench trial,⁶³ to pursue a suppression of evidence issue on appeal,⁶⁴ and to refuse to admit certain facts on a PSR.⁶⁵

In addition to comparing § 3E1.1(b) with § 5K1.1, several other rational interest courts have adopted a broad interpretation of “trial,” bestowing expansive discretion upon prosecutors to determine whether a defendant’s timely notification of his intent to plead guilty allows them to “avoid preparing for trial.”⁶⁶ For example, the Fifth Circuit has held that the necessity for the Government to defend

United States v Smith, 422 F3d 715, 726 (8th Cir 2005), citing *United States v Borer*, 412 F3d 987, 991 n 4 (8th Cir 2005). Subsequent circuits to face the issue offered more extensive explanations for such an equivalence. See, for example, *United States v Johnson*, 581 F3d 994, 1001–02 (9th Cir 2009).

⁵⁹ *Moreno–Trevino*, 432 F3d at 1183.

⁶⁰ *Id* at 1186, quoting *Wade*, 504 US at 185.

⁶¹ *Moreno–Trevino*, 432 F3d at 1186, quoting *United States v Duncan*, 242 F3d 940, 947 (10th Cir 2001).

⁶² See, for example, *United States v Deberry*, 576 F3d 708, 710 (7th Cir 2009); *United States v Newson*, 515 F3d 374, 375–78 (5th Cir 2008).

⁶³ See, for example, *United States v Espinoza–Cano*, 456 F3d 1126, 1134–36 (9th Cir 2006).

⁶⁴ See, for example, *Johnson*, 581 F3d at 1002.

⁶⁵ See, for example, *United States v Beatty*, 538 F3d 8, 15 (1st Cir 2008).

⁶⁶ USSG § 3E1.1(b).

“*post-judgment* proceedings”—in that case, a necessity triggered by the defendant’s refusal to waive his right to appeal—can be considered in determining whether a defendant has enabled the Government to “avoid preparing for *trial*.”⁶⁷ Similarly, the Ninth Circuit has permitted the Government to consider the expenditure of “additional resources to anticipate and defend a complete appeal”⁶⁸ and interpreted the word “prosecution” expansively “to encompass the entirety of the criminal proceedings in a particular case until judgment is final and certain.”⁶⁹ Thus, when the Government assesses whether a “defendant has assisted authorities in the investigation or *prosecution* of his own misconduct,”⁷⁰ as required under § 3E1.1, it can consider significantly “more than simply trial preparation.”⁷¹

Lastly, these any rational interest courts have permitted prosecutors to consider interests *outside* those explicitly enumerated in the text of § 3E1.1(b). For example, in *Moreno–Trevino*, the Tenth Circuit concluded that the Government had a legitimate interest in showing defendants “that prosecutors will file acceptance-of-responsibility motions only for defendants who fully cooperate and intend to abide by their plea agreements, supervised release conditions, and federal law relating to their offenses of conviction,” even though these interests are not listed in § 3E1.1(b).⁷² These considerations are outside the scope of the text of § 3E1.1, which demonstrates a concern for a defendant’s actions prior to—not following—sentencing proceedings. Any interests related to a defendant’s future compliance with postsentencing obligations are therefore absent from the face of the provision.

Another extratextual interest was considered by the First Circuit in *United States v Beatty*.⁷³ The court determined that “rather than turning on the timeliness of the plea and the avoidance of trial preparation”—the key considerations pre-PROTECT Act—“the entitlement to the third-level reduction [under § 3E1.1(b)] turns on whether both the court and the government are satisfied that the acceptance of responsibility is genuine.”⁷⁴ Like the extratextual interests that the *Moreno–Trevino* court permitted prosecutors to consider,

⁶⁷ *Newson*, 515 F3d at 377 (emphasis added) (accepting the Government’s rationale as appropriate under § 3E1.1).

⁶⁸ *Espinoza–Cano*, 456 F3d at 1134, 1136.

⁶⁹ *Johnson*, 581 F3d at 1002–03.

⁷⁰ USSG § 3E1.1(b) (emphasis added).

⁷¹ *Johnson*, 581 F3d at 1002.

⁷² *Moreno–Trevino*, 432 F3d at 1187.

⁷³ 538 F3d 8 (1st Cir 2008).

⁷⁴ *Id* at 16 (quotation marks omitted).

whether a defendant is sincere is not a concern manifested in either the text of § 3E1.1(b) or its commentary.

B. The Emerging Rebels: The Fourth and Second Circuits

Judge Milan D. Smith Jr, concurring in part and dissenting in part, in *United States v Johnson*⁷⁵ was the first to cast serious doubt upon the well-trodden road established by the any rational interest circuits.⁷⁶ While Judge Smith ultimately agreed with the majority that the Government acted within its discretion when it refused to file a § 3E1.1(b) motion due to the defendant's decision to pursue a suppression of evidence issue on appeal, he disagreed with the majority's application of the any rational interest standard to § 3E1.1(b).⁷⁷

After examining both pre- and post-PROTECT Act versions of § 3E1.1, Judge Smith concluded that "the PROTECT Act amended § 3E1.1, but only by: (1) changing *who* initiates the adjustment and giving that decision deference; (2) removing the defendant's provision of information as a basis for receiving the adjustment; and (3) adding the consideration of government resources in preparing for trial."⁷⁸ Therefore, "while the PROTECT Act undoubtedly abrogated [the pre-PROTECT Act] holding as to *who or what entity initiates the process* for the third-point adjustment and the deference afforded that decision, its holding as to *the substantive basis for the adjustment* remains good law."⁷⁹ That is, Judge Smith conceded that Congress intended to place the initiation of the § 3E1.1 reduction in the hands of prosecutors, thus allowing them some latitude in determining whether a defendant's plea was timely. But he rejected the position that, in so doing, Congress had essentially conferred unchecked discretion to prosecutors to withhold § 3E1.1 motions. Thus, Judge Smith argued that the Circuit's pre-PROTECT Act precedent—which effectively rendered the reduction mandatory once a defendant provided timely notification of his intention to plead guilty⁸⁰—should still apply.

Judge Smith's conclusions echo in the subsequent *Divens* and *Lee* holdings: "Section 3E1.1(b) [] instructs the Government to determine simply whether the defendant has 'timely' entered a 'plea of guilty' and thus furthered the guideline's purposes in that manner."⁸¹

⁷⁵ 581 F3d 994 (9th Cir 2009).

⁷⁶ See id at 1007–13 (Smith concurring in part and dissenting in part).

⁷⁷ Id at 1007–08.

⁷⁸ Id at 1010.

⁷⁹ *Johnson*, 581 F3d at 1010–11 (Smith concurring in part and dissenting in part).

⁸⁰ See id at 1010–11, citing *United States v Vance*, 62 F3d 1152, 1157 (9th Cir 1995).

⁸¹ *Divens*, 650 F3d at 348; *Lee*, 653 F3d at 174–75.

In *Divens*, the Fourth Circuit focused on a textualist interpretation of § 3E1.1(b), relying on *Webster's* definition of “by” as “through the means or instrumentality of”⁸² in stating

[Section] 3E1.1(b) simply does not require that a defendant provide the prosecution with the type of assistance that might reduce the “expense and uncertainty” attendant to an appeal. Instead, § 3E1.1(b) provides that a defendant earns an additional one-level reduction by providing the government one specific form of assistance, *i.e.* by “timely notifying authorities of his intention to enter a plea of guilty.”⁸³

This strict, plain-language reading of § 3E1.1 thus led the court to conclude that a defendant need only provide timely notification to be entitled to the reduction. The fact that the Government “avoid[s] preparing for trial” and “allocate[s its] resources efficiently”⁸⁴ was framed as a mere *consequence* arising from such timely notification, not a *prerequisite* of such a notification:

[A]lthough § 3E1.1(b) subsequently identifies general interests—resource allocation and trial avoidance—the syntax of the guideline dictates that the furtherance of these interests must again derive from this same single source: the defendant’s “timely notif[ication of] authorities of his intention to enter a plea of guilty.” This is so because the word “thereby” is defined as “by *that* means,” . . . and in this case “that” refers back to the description in the previous clause of timely notification.⁸⁵

Accordingly, the Fourth Circuit rejected the view that resource allocation and trial avoidance were separate considerations to be determined by prosecutors. Rather, they were the benefits accruing from a defendant’s timely notification.

Importantly, the court distinguished § 3E1.1 from § 5K1.1 by focusing on the Guidelines commentary.⁸⁶ In justifying its reliance on commentary, the court cited Supreme Court precedent holding that “Guidelines commentary controls judicial interpretation of a

⁸² *Webster's Third New International Dictionary of the English Language: Unabridged* 307 (Merriam-Webster 1993).

⁸³ *Divens*, 650 F3d at 348, quoting USSG § 3E1.1(b).

⁸⁴ USSG § 3E1.1(b).

⁸⁵ *Divens*, 650 F3d at 348 (citation omitted) (second alteration in original), quoting *Webster's Third* at 2372 (cited in note 82).

⁸⁶ See *Divens*, 650 F3d at 345–47, citing USSG § 3E1.1, Application Note 6.

Guidelines provision unless the commentary is ‘inconsistent with, or a plainly erroneous reading of’ a guideline.”⁸⁷

Specifically, the court turned its attention to Application Note 6 and the Background. Application Note 6 states that “Subsection (b) *provides* an additional 1-level decrease in offense level for a defendant . . . who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b).”⁸⁸ The Background states, “Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, *thereby* appropriately *meriting* an additional reduction.”⁸⁹ To the *Divens* court, the inclusion of such terms in the commentary emphasized the minimal room for discretion under § 3E1.1.⁹⁰ In addition, because this “mandatory commentary” has no analogue under § 5K1.1 and was left untouched by the PROTECT Act, the court concluded that the examination of prosecutorial discretion under § 3E1.1(b) should not be informed by § 5K1.1.⁹¹

The Fourth Circuit ultimately held that the Government could determine only whether a defendant’s entry of a guilty plea was sufficiently timely to relieve it of trial preparation—it could not consider the defendant’s refusal to perform some other act to assist the Government and certainly not factors entirely unrelated to timely notification. The court agreed with Judge Smith that after finding a defendant’s notification sufficiently timely, the Government was obligated to move for the reduction.⁹²

Although the court did not state which factors the Government can consider in determining whether a defendant’s assistance has relieved it of trial preparation,⁹³ it made clear that preserving the right to appeal was not one of them.⁹⁴ The court turned to the text of the Guideline itself, arguing that it “reveals a concern for the efficient allocation of *trial* resources, not *appellate* resources.”⁹⁵ The court based this conclusion on its belief that the context surrounding the term “the court” in § 3E1.1(b) indicates that it refers only to the district court.⁹⁶ Regarding the Guideline text itself, § 3E1.1(b) requires

⁸⁷ *Divens*, 650 F3d at 346, quoting *Stinson v United States*, 508 US 36, 38 (1993).

⁸⁸ USSG § 3E1.1, Application Note 6 (emphasis added).

⁸⁹ USSG § 3E1.1, Background (emphasis added).

⁹⁰ *Divens*, 650 F3d at 346.

⁹¹ *Id.* at 347.

⁹² *Id.*

⁹³ See *id.* at 348. This Comment, however, aims to do just this. See Part III.A.

⁹⁴ *Divens*, 650 F3d at 348.

⁹⁵ *Id.*

⁹⁶ *Id.* at 348–49.

the defendant to “permit[] the government to avoid preparing *for trial*.”⁹⁷ The court also referenced several Application Notes indicating that appellate resources were not at issue under § 3E1.1(b): Application Note 2 states that the reduction is intended to relieve the Government of meeting “its burden of proof *at trial*”;⁹⁸ Application Note 5 states that the “*sentencing judge* is in a unique position to evaluate a defendant’s acceptance of responsibility”;⁹⁹ and Application Note 6 states that a defendant must “notif[y] authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that [. . .] the court may schedule its calendar efficiently.”¹⁰⁰ The court added that had Congress also intended to conserve not only district court resources but also appellate court resources, “it would have referred to ‘courts,’ not ‘the court.’”¹⁰¹

The *Divens* court also rejected the argument that appellate waivers furthered Congress’s purpose in amending § 3E1.1(b). Citing the House Report on the PROTECT Act, the court concluded that the “amendments’ overarching goal was to address the ‘longstanding problem of downward departures’ in cases involving ‘sexual abuse.’”¹⁰² To further this objective, Congress sought to allow appellate courts to more effectively review inappropriate downward departures issued by sentencing courts.¹⁰³ According to the court, requiring a defendant to waive his right to appeal in order to obtain a § 3E1.1(b) reduction would thus thwart Congress’s desire to ensure effective appellate review.

The Second Circuit has adopted the *Divens* holding that under § 3E1.1(b), the Government “determine[s] simply whether the defendant has ‘timely’ entered a ‘plea of guilty’ and thus furthered the guideline’s purposes in that manner.”¹⁰⁴ In *Lee*, the Government refused to request the § 3E1.1(b) reduction because it had invested resources in preparing for a *Fatico* hearing,¹⁰⁵ which it considered “akin

⁹⁷ Id at 348 (alteration in original), quoting USSG § 3E1.1(b).

⁹⁸ *Divens*, 650 F3d at 348–49, quoting USSG § 3E1.1, Application Note 2.

⁹⁹ *Divens*, 650 F3d at 349, quoting USSG § 3E1.1, Application Note 5.

¹⁰⁰ *Divens*, 650 F3d at 349 (first alteration in original), quoting USSG § 3E1.1, Application Note 6.

¹⁰¹ *Divens*, 650 F3d at 348 & n 3, quoting USSG § 3E1.1(b).

¹⁰² *Divens*, 650 F3d at 348, quoting *Conference Report on S 151, Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*, HR Rep No 108-66, 108th Cong, 1st Sess 58–59 (2003), in 149 Cong Rec 8965, 8980 (Apr 9, 2003).

¹⁰³ See *Divens*, 650 F3d at 349, citing HR Rep No 108-66 at 58–59 (cited in note 102).

¹⁰⁴ *Lee*, 653 F3d at 175, quoting *Divens*, 650 F3d at 348.

¹⁰⁵ A *Fatico* hearing is a presentencing hearing at which parties may offer evidence as to appropriate sentencing. See generally *United States v Fatico*, 603 F2d 1053 (2d Cir 1979).

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to preparing for trial.”¹⁰⁶ The court, however, ruled that the Government could not refuse to move for the additional reduction because conserving resources used in nontrial hearings, while a legitimate governmental interest, is not one mentioned in § 3E1.1.¹⁰⁷

Unlike the Fourth Circuit, the Second Circuit conditioned its ruling on the defendant’s good faith.¹⁰⁸ That is, a defendant disputing the accuracy of a factual assertion in his PSR must do so in good faith to remain eligible for the § 3E1.1(b) reduction. Despite its discussion of good faith, *Lee*’s core reliance on *Divens* holds, and both the Second and Fourth Circuits opt for an approach to prosecutorial discretion under § 3E1.1(b) that is as limited as the any rational interest approach is broad.

* * *

As described above, the majority of circuits have concluded that the Government may withhold a § 3E1.1(b) motion based on any rational interest. In doing so, these courts have analogized § 3E1.1(b) to § 5K1.1 based on the belief that Congress, in its amendment of the former as part of the PROTECT Act, intended for the Government to possess the same broad discretion under both. The Second and Fourth Circuits have since departed from their sister circuits, relying primarily on the text of § 3E1.1 and its commentary to hold that the Government’s discretion under § 3E1.1(b) is limited to determining whether the defendant’s guilty plea was sufficiently timely.

III. THE SOLUTION: *DIVENS* REIMAGINED

At the heart of this circuit split is the meaning of the PROTECT Act amendments to § 3E1.1(b). Finding the amendments limited in scope, this Comment rejects the any rational interest approach’s needless application of § 5K1.1’s expansive discretionary standard to § 3E1.1(b) as inconsistent with the underlying principles of the Guidelines. However, this Comment also rejects a straight application of

¹⁰⁶ *Lee*, 653 F3d at 172–73, quoting Benton J. Campbell, US Attorney, Sentencing Memorandum to the Honorable Sandra L. Townes, US District Court Judge for the Eastern District of New York, United States v. Christopher Lee, et al. *Criminal Docket No. 05-869 (S-5) (SLT)* 3 n 1 (EDNY filed May 26, 2009).

¹⁰⁷ *Lee*, 653 F3d at 173–74 (stating that “the government could not refuse to move on the grounds that it had been required to prepare for a *Fatico* hearing” because “[a] *Fatico* hearing is not a trial”).

¹⁰⁸ *Id.* at 174 (“As long as the defendant disputes the accuracy of a factual assertion in the PSR in good faith, the government abuses its authority by refusing to move for a third-point reduction because the defendant has invoked his right to a *Fatico* hearing.”).

Divens and *Lee* for neither opinion went far enough in recognizing the level of discretion that *is* warranted by the PROTECT Act amendments.

This Comment's solution gives those amendments effect without adopting an overly broad reading of discretion under § 3E1.1(b). At its core is *Divens*'s assertion that the Government can determine *whether* the defendant's guilty plea was sufficiently timely, but once the Government answers this inquiry in the affirmative, moving for the reduction is compulsory.¹⁰⁹ The necessity of maintaining the pre-PROTECT Act understanding that the reduction is compulsory is explained in Parts III.A and III.B while an examination of what discretion should be afforded to prosecutors post-PROTECT Act is set forth in Part III.C.

This Comment argues that when determining the timeliness of a defendant's plea—which remains the key consideration under § 3E1.1(b)—the Government should consider not only its ability to avoid trial preparation, but also factors related to the conservation of trial resources. Further, this Comment identifies such factors, which include the defendant's refusal to admit aspects of the crime that would otherwise need to be proved at trial. This completes *Divens*'s analysis by providing more practical, tangible insight into how courts and the Government should interpret § 3E1.1(b). Such an extension of *Divens* is necessary to provide useful guidance both to the Government, when it assesses whether it must move for the additional one-level reduction, and to the bench, when courts must determine whether the Government's actions were permissible.

This solution is the only interpretation of prosecutorial discretion under § 3E1.1(b) that can be squared with the plain text of the Guideline and its commentary in light of the PROTECT Act amendments. It functions as a happy medium between the two current approaches, permitting discretion only where prosecutors have experience—that is, dealing with a defendant's real conduct, determining what hinders trial preparation, and evaluating the expenditure of trial resources.

A. Divorcing § 3E1.1 from § 5K1.1

Analogizing § 3E1.1(b) to § 5K1.1 and looking to *Wade* as the guiding star, as the any rational interest circuits have, is mistaken. Examining how the PROTECT Act amended—and failed to amend—§ 3E1.1, as well as understanding the inherent functional

¹⁰⁹ *Divens*, 650 F3d at 346.

differences between § 3E1.1 and § 5K1.1, makes clear that an analysis of § 3E1.1(b) should be conducted independently from § 5K1.1. As such, the any rational interest approach is inappropriate for § 3E1.1(b).

1. Distinguishing *Wade*.

The any rational interest circuits have relied on the *Wade* interpretation of prosecutorial discretion under § 5K1.1 to determine what discretion the Government is permitted under § 3E1.1(b). The insertion of the “upon motion of the government” language into § 3E1.1(b) spurred these courts to apply *Wade*, since § 5K1.1 includes the same phrase.¹¹⁰ This Subsection argues that analogizing the two Guidelines is flawed and that *Wade* does not control in this instance.

The upon motion of the government requirement added to § 3E1.1(b) can be interpreted in one of two ways: as *allocating* discretion or as *altering* the level of discretion under the Guideline.¹¹¹ Congress, in trying to effect one interpretation, was misunderstood as effecting both. The any rational interest circuits misconstrue the PROTECT Act amendment as both allocating discretion from the judiciary to the Government *and* increasing the Government’s discretion. The more accurate interpretation of the PROTECT Act amendment is that it affected only *who* was charged with initiating the reduction: prosecutors rather than judges.

First, there is nothing to suggest that the PROTECT Act amendments were meant to confer upon prosecutors the nearly “unfettered” and “unbridled” discretion they enjoy under § 5K1.1.¹¹² Rather, legislative records reveal a concern for restricting exercises of judicial discretion. The PROTECT Act emerged “as part of an overarching initiative to respond to a purported increase in departures from the guidelines and provide meaningful appellate review of such cases.”¹¹³ So too, the Feeney Amendment was aimed at “sharply limit[ing] both downward departures and judicial discretion at sentencing.”¹¹⁴ But there is nothing in the Guideline commentary or legislative

¹¹⁰ See Part II.A.

¹¹¹ USSG § 3E1.1(b).

¹¹² *Beatty*, 538 F3d at 15.

¹¹³ *United States v Reyes–Hernandez*, 624 F3d 405, 410 (7th Cir 2010). See also *Divens*, 650 F3d at 349; HR Rep No 108-66 at 58 (cited in note 102); PROTECT Act § 401(m)(2)(A), 117 Stat at 675.

¹¹⁴ Gorman, Comment, 77 U Chi L Rev at 488 (cited in note 42), citing 149 Cong Rec H 2420 (daily ed Mar 27, 2003) (statement of Rep Tom Feeney). See also Margareth Etienne, *Acceptance of Responsibility and Plea Bargaining under the Feeney Amendment*, 16 Fed Sent Rptr (Vera) 109, 109 (2003) (noting the “amendment’s restrictions of judicial departure authority”).

history to suggest that Congress had the aim of simultaneously creating practically boundless prosecutorial discretion under § 3E1.1(b) akin to that afforded under § 5K1.1. Thus, the addition of the upon motion of the government language simply serves to indicate which party is charged with making the motion—the Government, not the judiciary.¹¹⁵

Second, the textual analysis of § 3E1.1 conducted by Judge Smith in *Johnson* further supports the conclusion that Congress was focused on limiting the sentencing court's discretion.¹¹⁶ Judge Smith traced the evolution of § 3E1.1(b) as follows (with the underscore indicating PROTECT Act additions and the strikethrough indicating deletions),

If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by ~~taking one or more of the following steps: (1) timely providing complete information to the government concerning his own involvement in the offense; or (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate its—their~~ resources efficiently, decrease the offense level by 1 additional level.¹¹⁷

Judge Smith concluded that, based on the limited nature of the textual changes to § 3E1.1(b), the PROTECT Act's insertion of the governmental motion requirement served only to “chang[e] *who* initiates the adjustment and giving that decision deference.”¹¹⁸ This textual reading is consistent with the legislative intent discussed above, which emphasizes the desire to curb judicial discretion. Accordingly, the upon motion of the government language reallocates discretion from the judiciary to prosecutors, serving only to indicate *which party* has the power to move for the reduction, not to alter the level of discretion.

Some might argue that the in pari materia canon of statutory interpretation applies in this case, directing one to use other Guidelines

¹¹⁵ USSG § 3E1.1.

¹¹⁶ See notes 78–80 and accompanying text.

¹¹⁷ *Johnson*, 581 F3d at 1010 (Smith concurring in part and dissenting in part) (alterations in original).

¹¹⁸ *Id.*

employing the same terminology, such as § 5K1.1, to illuminate the Guideline being interpreted, such as § 3E1.1(b).¹¹⁹ However, the Supreme Court has held that “canons are not mandatory rules. They are guides that need not be conclusive. They are designed to help judges determine the Legislature’s intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force.”¹²⁰ In this instance, congressional intent *is* discernible—as evidenced by the clear legislative history focused on limiting judicial discretion and the specific amendments to § 3E1.1(b) itself—thus rendering any need for invoking the *in pari materia* canon moot.

In sum, the PROTECT Act amendments were targeted at limiting *judicial* discretion, not expanding prosecutorial discretion or attempting to fashion § 3E1.1 like § 5K1.1. The insertion of the critical upon motion of the government language into § 3E1.1(b) serves to allocate discretion, not alter the level of discretion afforded under the Guideline. Accordingly, the amendment ensures that once the Government moves for a § 3E1.1(b) reduction, the court *must* reduce the defendant’s sentence by an additional level—the amendment strips a court of the ability to determine whether the one-level reduction ought to be granted.

2. Applying *Kimbrough*.

Once the upon motion of the government language is interpreted as merely altering which party makes the § 3E.1(b) motion, it becomes necessary to determine whether any other amendments explicitly indicate that the any rational interest standard ought to apply. The answer to this is no, evidenced by what Congress *did not do* in amending the Guideline in 2003.

¹¹⁹ For a discussion of the *in pari materia* canon of statutory interpretation, see William N. Eskridge Jr, Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 1039 (West 3d ed 2001); Norman J. Singer and J.D. Shambie Singer, *Statutes and Statutory Construction* § 51:3 (Thomson/West 7th ed 2008). For examples of courts applying the *in pari materia* canon to the Guidelines, see *United States v Rivera*, 662 F3d 166, 173 (2d Cir 2011); *In re Sealed Case No. 97-3112*, 181 F3d 128, 136 (DC Cir 1999) (en banc); *United States v Arnold*, 213 F3d 894, 896 (5th Cir 2000) (reaching its conclusion by “reading the sentencing guidelines *in pari materia*”); *United States v Rodriguez*, 60 F3d 193, 196 (5th Cir 1995); *United States v Kikumura*, 918 F2d 1084, 1109 (3d Cir 1990) (“Because the Sentencing Commission obviously intended for the guidelines to operate as a cohesive and integrated whole, we have a duty to construe them *in pari materia*.”), abrogation recognized *United States v Fisher*, 502 F3d 293 (3d Cir 2007).

¹²⁰ *Chickasaw Nation v United States*, 534 US 84, 94 (2001) (quotation marks and citations omitted).

In *Kimbrough v United States*,¹²¹ the Supreme Court held that “[d]rawing meaning from silence is particularly inappropriate [in the sentencing context], for Congress has shown that it knows how to direct sentencing practices in express terms.”¹²² Circuit courts have extended the *Kimbrough* reasoning to the PROTECT Act amendments.¹²³ Although these courts dealt with implicit *limits* on discretion, nothing in *Kimbrough* suggests that its holding cannot extend to implicit *expansions* of discretion—the Court’s broad language in *Kimbrough* suggests that if Congress wants to direct sentencing practices, it does so explicitly.¹²⁴

Accordingly, if Congress sought to expand the standard of discretion under § 3E1.1(b), it would have done so explicitly. Such explicit action would have required ridding the provision of the language denoting the compulsory nature of the reduction, either conforming § 3E1.1(b) commentary to § 5K1.1 commentary¹²⁵ or expressing a concern for more than just trial preparation and resources. However, Congress failed to make any such amendment. In fact, Judge Smith’s comparison of the Guideline’s text pre- and post-PROTECT Act demonstrates that there were three explicit changes to § 3E1.1(b),¹²⁶ none of which can be read as having an express impact on the Guideline’s discretionary standard. First, as explained in the previous Subsection, the insertion of the upon motion of the government language—the only explicit amendment relied upon to analogize § 3E1.1 and § 5K1.1—can be interpreted as merely changing which party should initiate the motion.¹²⁷ Second, the removal of the defendant’s provision of information as a basis for receiving the reduction simply limits the means by which a given defendant can benefit under § 3E1.1(b). Third, adding the consideration of government

¹²¹ 552 US 85 (2007).

¹²² *Id.* at 103.

¹²³ See, for example, *United States v Jimenez-Perez*, 659 F3d 704, 710–11 (8th Cir 2011) (concluding, based on *Kimbrough*, that Congress makes its intended limits on sentencing discretion explicit); *United States v Reyes-Hernandez*, 624 F3d 405, 418 (7th Cir 2010) (discussing *Kimbrough*’s effect on interpretation of specific Guidelines); *United States v Camacho-Arellano*, 614 F3d 244, 249 (6th Cir 2010) (reading *Kimbrough* as allowing district courts to disagree with the Sentencing Commission on certain policy grounds); *United States v Arrelucea-Zamudio*, 581 F3d 142, 150–51 (3d Cir 2009) (noting that *Kimbrough* does not allow courts to depart from the Guidelines when the Guideline policy in question was set out by Congress itself); *United States v Rodríguez*, 527 F3d 221, 229 (1st Cir 2008) (applying the principle behind *Kimbrough* to the question of whether disparities in sentences resulting from fast-track procedures in some districts are a valid consideration).

¹²⁴ *Kimbrough*, 552 US at 102–03.

¹²⁵ See *Divens*, 650 F3d at 347, quoting USSG § 3E1.1, Application Note 6.

¹²⁶ See text accompanying note 117.

¹²⁷ See Part III.A.1.

resources in preparing for trial can be explained as being a logical addition given that the Government is now the party charged with moving for the reduction, and thus its resources should be considered alongside general court resources. None of these amendments explicitly demonstrates that the limited pre-PROTECT Act discretion afforded under the Guideline should be replaced with the extremely broad discretion of the any rational interest approach.

Congress's decision to leave § 3E1.1 commentary undisturbed is further evidence of its intent not to change the degree of discretion afforded under the Guideline. The first courts to examine which discretionary standard applied to § 3E1.1(b) prior to the enactment of the PROTECT Act relied heavily upon this commentary, which emphasized the minimal room for discretion under § 3E1.1(b).¹²⁸ As discussed in Part I.B, these courts had established that the pre-PROTECT Act version of § 3E1.1(b) "directs the district court to grant an additional point based on the 'timeliness' of acceptance of responsibility."¹²⁹

Applying *Kimbrough* to the § 3E1.1 commentary is appropriate given that Guidelines commentary is consistently well regarded when it comes to issues of interpretation. The Supreme Court has held that "commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."¹³⁰ Circuit courts have similarly emphasized the importance of the commentary.¹³¹ Most notably, the Eleventh Circuit found the new commentary to § 3E1.1 dispositive to its interpretation of the Guideline,¹³² and the Sixth Circuit found the failure to amend the commentary to other Guidelines dispositive.¹³³

¹²⁸ See, for example, *United States v Townsend*, 73 F3d 747, 755 (7th Cir 1996); *United States v Eyster*, 67 F3d 1386, 1390–91 (9th Cir 1995); *United States v Hopper*, 27 F3d 378, 384 (9th Cir 1994), quoting USSG § 3E1.1, Application Note 6.

¹²⁹ *United States v McPhee*, 108 F3d 287, 290 (11th Cir 1997), quoting *United States v McConaghy*, 23 F3d 351, 353 (11th Cir 1994). See also note 51 and accompanying text.

¹³⁰ *Stinson v United States*, 508 US 36, 38, 42–43 (1993).

¹³¹ See, for example, *United States v Pace*, 17 F3d 341, 344 (11th Cir 1994); *United States v Guerra*, 962 F2d 484, 486 (5th Cir 1992) ("This court relies on the official commentary to determine the intent of the Sentencing Commission."); *United States v Doe*, 960 F2d 221, 225 (1st Cir 1992); *United States v Brigman*, 953 F2d 906, 908 (5th Cir 1992).

¹³² *Pace*, 17 F3d at 344.

¹³³ *United States v Wynn*, 579 F3d 567, 574–75 (6th Cir 2009). Commentary notes to both § 2L1.2 and § 4B1.2 include "forcible sex offenses" as an enumerated offense that was a per se "crime of violence." USSG § 2L1.2, Application Note 1 (defining crime of violence as used in the Guideline governing crimes involving smuggling, transporting, or harboring an unlawful alien); USSG § 4B1.2, Application Note 1 (defining crime of violence as used in the Guideline governing career offender sentencing). In 2008, the § 2L1.2 commentary was amended: parenthetical

In sum, the § 3E1.1(b) commentary relied upon in establishing the limited discretion afforded under the Guideline pre-PROTECT Act was not explicitly amended. This—in conjunction with the minor amendments made to the text of § 3E1.1(b) that fail to expressly alter the level of discretion under the Guideline—makes it problematic for courts to imply an any rational interest standard in light of *Kimbrough*. Implicitly applying the any rational interest standard to the Guideline thus violates *Kimbrough*, which holds that it is inappropriate to imply congressional intent in the absence of explicit amendments.

3. Functional distinctions between § 3E1.1 and § 5K1.1.

Further weakening the case for analogizing § 3E1.1 and § 5K1.1 is the fact that each Guideline invokes different roles performed by different institutional players—§ 3E1.1 invokes a role traditionally performed by the judiciary, while § 5K1.1 invokes a role traditionally performed by prosecutors. Given this fundamental distinction between the two provisions and the relative institutional competencies at issue, it might come as no surprise that a rationale suggesting that one role ought to be left to prosecutors might not apply equally to the other.

Section 5K1.1 concerns a specific form of discretion traditionally left to prosecutors: the discretion exercised with respect to charging decisions (a type of discretion not at issue in § 3E1.1).¹³⁴ Section 5K1.1 commentary summarizes this distinction, which will be fleshed out below: “Substantial assistance is directed to the *investigation and prosecution of criminal activities by persons other than the defendant*, while acceptance of responsibility is directed to the *defendant’s affirmative recognition of responsibility for his own conduct*.”¹³⁵

language was added to clarify the scope of the “forcible sex offenses” term as it applied to § 2L1.2. The Sixth Circuit held that a similar amendment could not be read into § 4B1.2, stating “Section 4B1.2’s commentary did not receive such an amendment, even though it was within the Sentencing Commission’s discretion so to amend that section.” *Wynn*, 579 F3d at 575. The Fourth Circuit has recently followed *Wynn*’s reasoning in addressing a similar issue regarding the Guidelines. See *United States v Leshen*, 453 Fed Appx 408, 416 (4th Cir 2011), citing *Wynn*, 579 F3d at 575.

¹³⁴ See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 Ohio St J Crim L 369, 424 (2009); *Prosecutorial Discretion*, 34 Georgetown L J Ann Rev Crim Proc 197, 197–202 (2005). See also Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 Seton Hall Cir Rev 1, 13–15 (2009).

¹³⁵ USSG § 5K1.1, Application Note 2 (emphasis added).

As the Supreme Court stated in *Bordenkircher v Hayes*,¹³⁶ “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”¹³⁷ In the § 5K1.1 context, the *Wade* Court found “no reason why courts should treat a prosecutor’s refusal to file a substantial-assistance motion differently from a prosecutor’s other decisions.”¹³⁸ While the Court offered no further explanation on the matter, it cited *Wayte v United States*,¹³⁹ in which the Court quoted *Bordenkircher* in its discussion of the broad discretion afforded to the Government regarding whom to prosecute.¹⁴⁰

The basic rationales for granting such broad discretion with respect to charging decisions are based on the separation of powers doctrine and on the belief that these types of decisions are “ill-suited to judicial review.”¹⁴¹ First, the separation of powers doctrine demands broad prosecutorial discretion because prosecutors “are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”¹⁴² Such a rationale holds under § 5K1.1. Where the Government seeks to gain information from Defendant A in order to pursue the prosecution of Defendants B and C, the any rational interest standard can—and should—be imposed without question because such action is the quintessential exercise of broad prosecutorial discretion. In other words, it is for the Government to decide how much of a “break” it wants to give to Defendant A in order to levy charges against Defendants B and C—the balancing of the relative importance of the three crimes is properly in a prosecutor’s hands and is almost entirely unreviewable.¹⁴³

Second, a prosecutor’s inquiry under § 5K1.1 is one that a judge cannot perform. Appropriately, judicial scrutiny has never had a role in the decision to move for a § 5K1.1 departure.¹⁴⁴ Whether a

¹³⁶ 434 US 357 (1978).

¹³⁷ Id at 364. See also *United States v Batchelder*, 442 US 114, 124 (1979); *United States v Nixon*, 418 US 683, 693 (1974), citing *Confiscation Cases*, 74 US 454 (1869).

¹³⁸ *Wade*, 504 US at 185.

¹³⁹ 470 US 598 (1985).

¹⁴⁰ Id at 607–10, quoting *Bordenkircher*, 434 US at 364.

¹⁴¹ *Prosecutorial Discretion*, 34 Georgetown L J Ann Rev Crim Proc at 197 (cited in note 134), quoting *Wayte*, 470 US at 607.

¹⁴² *United States v Armstrong*, 517 US 456, 464 (1996), quoting US Const Art II, § 3.

¹⁴³ See Krauss, 6 Seton Hall Cir Rev at 1 (cited in note 134). See, for example, *United States v Scott*, 631 F3d 401, 404–05 (7th Cir 2011).

¹⁴⁴ Compare USSG § 5K1.1 (1987) (failing to grant the courts review over prosecutors’ decisions to move for departure under the Guideline), with USSG § 5K1.1 (2011) (same).

defendant is entitled to this departure based on the assistance he provides to authorities is thus a question of pure prosecutorial discretion and the requisite inquiry under § 5K1.1 is one that falls squarely within the traditional realm of prosecutorial discretion.¹⁴⁵

Yet these basic rationales for permitting expansive exercises of prosecutorial discretion do not extend to § 3E1.1 because the characteristically prosecutorial decision making inherent in the § 5K1.1 inquiry is simply not at issue under § 3E1.1. First, the separation of powers doctrine dictates that “it is as an officer of the executive department that [the prosecutor] exercises a discretion as to whether or not there shall be a prosecution in a particular case,” and thus “courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”¹⁴⁶ While under § 5K1.1 a prosecutor has appropriately broad discretion to determine whether to move for “potentially limitless downward departure”¹⁴⁷ for Defendant A in exchange for the ability to bring Defendants B and C to justice, there is no such tradeoff at issue under § 3E1.1. Rather, § 3E1.1 concerns only Defendant A’s *own* acceptance of responsibility and the subsequent limited reduction¹⁴⁸ in his *own* sentence that such acceptance entails—it by no means contemplates a prosecutor’s desire to impose charges on others. Recall that this dichotomy is explicitly noted in § 5K1.1 commentary.¹⁴⁹

Second, the inquiry under § 3E1.1(b) is not one “ill-suited to judicial review.”¹⁵⁰ To the contrary, it is not difficult for judges to evaluate a prosecutor’s finding that the timeliness of a defendant’s plea was or was not adequate to conserve resources and alleviate trial preparation. Such an inquiry is well within the bounds of judicial review—indeed, judges performed just this type of review from 1987 until 2003, as prior to the PROTECT Act they were charged with

¹⁴⁵ See *Wade*, 504 US at 185.

¹⁴⁶ *United States v Cox*, 342 F2d 167, 171 (5th Cir 1965). See also *Armstrong*, 517 US at 464 (holding that the separation of powers doctrine demands broad prosecutorial discretion); *Heckler v Chaney*, 470 US 821, 832 (1985) (“[T]he decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch.”).

¹⁴⁷ Michael M. O’Hear, *The Need to Reform the “Acceptance of Responsibility” Adjustment*, 9 Fed Sent Rptr (Vera) 101, 104 (1996).

¹⁴⁸ A defendant’s sentence can only be reduced by a maximum of three levels under § 3E1.1—two levels under subsection (a) and an additional level under subsection (b). USSG § 3E1.1. This can be contrasted with the provisions of § 5K1.1.

¹⁴⁹ See note 135 and accompanying text.

¹⁵⁰ *Prosecutorial Discretion*, 34 Georgetown L J Ann Rev Crim Proc at 197 (cited in note 134), quoting *Wayte*, 470 US at 607.

determining eligibility for § 3E1.1(b) reductions.¹⁵¹ Thus, the traditional justifications for permitting broad prosecutorial discretion are not applicable under § 3E1.1.

The underlying goals of the Guidelines are to reduce discretion in sentencing and promote real offense sentencing, goals that are ill served by the any rational interest approach.¹⁵² As described above, allowing the any rational interest standard under § 5K1.1 makes intuitive sense given that the decision to move for a § 5K1.1 departure is quintessentially prosecutorial in nature and thus merits an exception to the general rule. However, circumventing such goals with respect to § 3E1.1 is unwarranted—the justification for applying the any rational interest standard to § 5K1.1 simply does not exist in the § 3E1.1 context.

* * *

Based on the arguments put forth above, extending § 5K1.1's any rational interest standard to § 3E1.1(b) is inappropriate. It is incongruent with the legislative intent surrounding the PROTECT Act, unsupported by Guideline commentary, violative of *Kimbrough*, and contrary to the functional differences between § 3E1.1 and § 5K1.1. The next Section demonstrates that the any rational interest standard is also at odds with the fundamental purposes of the Guidelines.

B. Consistency with the Guidelines

The flaw in the any rational interest regime, however, is not only that it ignores the history of § 3E1.1(b) and its difference from § 5K1.1, as established in Part III.A. This Section argues that the regime also leads to results that are incompatible with the purposes of the Guidelines.¹⁵³ Indeed, the grant of rudderless discretion that the any rational interest circuits suggest is entirely inappropriate in a system designed to promote uniformity by creating real offense sentencing—as the modern Guidelines system is.

1. Real offense sentencing.

The Supreme Court has praised the “strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress

¹⁵¹ See Part I.B.

¹⁵² See Part I.A.

¹⁵³ See Part I.A.

intended its Guidelines system to achieve.”¹⁵⁴ The Court has held that diminishing sentencing disparity “depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction.”¹⁵⁵ These principles are echoed in Attorney General Eric Holder’s memorandum to all federal prosecutors regarding charging and sentencing. In the memorandum, Attorney General Holder emphasized the Guidelines’ “important[ce] in furthering the goal of national uniformity throughout the federal system,” as well as the need for “an individualized assessment of the facts and circumstances of each particular case.”¹⁵⁶

As discussed in Part I.A, a critical aspect of real offense sentencing lies with the power of the PSR to shape the defendant’s ultimate sentence. However, the essential role of PSRs in guaranteeing that a defendant is sentenced in accordance with the real conduct underlying his crime is shaken to its core under the any rational interest approach, jeopardizing the entire doctrine of real offense sentencing. If the Government can prohibit defendants from challenging the characterization of their relevant real conduct in their PSRs or require them to sign off on inaccurate PSRs in order to receive the additional one-level reduction under § 3E1.1(b), their ultimate sentences no longer reflect their real conduct. Consequently, the PSR backbone behind real offense sentencing is shattered.

For example, if a defendant waives his right to challenge an inaccurate PSR in order to ensure that the Government moves for the § 3E1.1(b) reduction, he is bound by such facts at the sentencing stage. As such, he may ultimately receive the increased sentence appropriate to a crime other than that which he actually committed. Thus, the any rational interest approach not only results in a defendant having to serve a sentence that does not accurately reflect his relevant real conduct, but also nullifies any benefits obtained from the additional one-level reduction under § 3E1.1(b) when his PSR warrants a higher sentence.

Given these detrimental effects, it may seem odd that a defendant would sign an inaccurate PSR or stipulate to facts that do not reflect his real conduct in order to obtain the one-level reduction under § 3E1.1(b). For example, the *Beatty* court noted that “the government’s broad discretion to withhold the motion would create

¹⁵⁴ *Booker*, 543 US at 246 (Breyer).

¹⁵⁵ *Id.* at 250.

¹⁵⁶ Eric H. Holder Jr., Attorney General, Memorandum to All Federal Prosecutors, *Department Policy on Charging and Sentencing* 2–3 (May 19, 2010), online at <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf> (visited Nov 24, 2012).

a disincentive for challenging issues relevant to sentencing,” but also that “such disincentives are not improper” because “the defendant is free to weigh the disincentive against the benefit that may result from contesting the sentencing issues.”¹⁵⁷ However, these concerns were improperly dismissed by the *Beatty* court—defendants notoriously suffer from a severe lack of information when it comes to plea bargaining, which leads them to disesteem “fuzzy” benefits and favor those that are more concrete, such as the one-level reduction.¹⁵⁸ Similarly, defendants discount future costs, thus favoring immediate gains even when subsequent losses might in actuality be more substantial.¹⁵⁹

While the one-level reduction is relatively certain to be granted upon the Government’s motion, the chances of securing other reductions are less clear, less immediate, and consequently, less compelling. As such, information-deficient, myopic defendants might sign plea agreements to ensure a one-level reduction under § 3E1.1(b) all the while sacrificing more uncertain—but more significant—reductions elsewhere.

In ensuring that the Government’s discretion under § 3E1.1(b) does not encompass such action with respect to PSRs, this Comment’s solution maintains the crucial nexus between a defendant’s real conduct and his subsequent sentence—one of the focal points of Congress’s enactment of the Guidelines nearly three decades ago.¹⁶⁰

This nexus also plays a critical role in broader sentencing matters outside the PSR context. The tendency of defendants to relinquish worthy defenses by pleading guilty—and to ultimately serve sentences that fail to reflect their real conduct—has been borne out in empirical studies. Professor Ronald Wright’s article, published when the any rational interest standard was applied unquestioningly to § 3E1.1(b), examined the patterns of guilty pleas and acquittals in the federal criminal justice system.¹⁶¹ Professor Wright found that the frequent use of both § 3E1.1 and § 5K1.1 in certain districts led to higher guilty plea rates and lower acquittal rates due to the “trial penalty,” which is the difference between a sentence following a

¹⁵⁷ *Beatty*, 538 F3d at 16.

¹⁵⁸ See Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 Harv L Rev 2464, 2493–96 (2004).

¹⁵⁹ See *id.* at 2504–07 (discussing studies showing the results of varying discount rates for defendants’ likelihood to plea bargain and the characteristics that correlate with high discount rates).

¹⁶⁰ See text accompanying notes 26–28.

¹⁶¹ Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U Pa L Rev 79, 84–85 (2005).

guilty plea and a sentence following trial.¹⁶² According to Professor Wright, this trial penalty “convinced more defendants to abandon worthwhile defenses” and therefore enabled prosecutors to “distort trial outcomes.”¹⁶³ That is, defendants who forgo worthwhile defenses face sentences disproportionate to those they would face had their conduct been assessed and properly defended at trial—an affront to real offense sentencing.

Professor Margareth Etienne makes a similar point regarding the role § 3E1.1 plays in regulating what “judges perceive to be overzealous advocacy [on the part of defense attorneys] by imposing harsher sentences on their clients.”¹⁶⁴ Professor Etienne argues that judges seek to minimize overzealous advocacy due to their belief that it results in the inefficient administration of justice.¹⁶⁵ She concludes that the pressure to plead guilty and forgo zealous representation inappropriately burdens defendants who might benefit from the sort of advocacy that is deterred.¹⁶⁶ Defendants thus serve sentences incommensurate with their real conduct, a result completely at odds with the concept of real offense sentencing.

2. Broader goals of the Guidelines.

In addition to being contrary to real offense sentencing, the any rational interest approach stands in direct opposition to some of the larger goals of sentencing reform: practicability, predictability, and uniformity in sentencing.¹⁶⁷ Due to the lack of guidance provided by the any rational interest approach, neither prosecutors nor defendants have the ability to determine which circumstances warrant moving for the § 3E1.1(b) reduction. This magnifies uncertainty and undermines uniformity in sentencing—consequences that are antithetical to the primary motives behind Congress’s enactment of the SRA in 1984.¹⁶⁸

The SRA was intended to limit *judicial* discretion in the realm of sentencing—not to shift that discretion onto prosecutors and grant

¹⁶² Id at 85–86.

¹⁶³ Id at 86.

¹⁶⁴ Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 NYU L Rev 2103, 2105 (2003) (suggesting that courts view tactics such as the presentation of legally or factually dubious arguments as evidence of remorselessness on the part of the defendant such that an acceptance of responsibility reduction is unmerited).

¹⁶⁵ Id at 2104.

¹⁶⁶ Id at 2172–73.

¹⁶⁷ See USSG § 1A1.3.

¹⁶⁸ See text accompanying note 24.

the Government unbridled discretion.¹⁶⁹ One of the key criticisms of the pre-SRA regime was that it “permit[ed] judges and parole officials to exercise unguided discretion [that] assertedly resulted in ‘unwarranted disparity’ (including alleged bias against minorities) in criminal sentences.”¹⁷⁰ The Guidelines are thus designed to ensure that discretion is limited such that similarly situated defendants do not face entirely different sentences.

Efforts to promote uniform sentencing by limiting judicial discretion are thwarted under an any rational interest interpretation of § 3E1.1(b) because prosecutors are empowered to make decisions regarding sentencing that can result in disparate sentences between similarly situated defendants. As Professor Kate Stith notes, “If the Sentencing Guidelines were to achieve the goal of reducing inter-judge disparity throughout the federal system, it would be necessary to attend more directly to wide variances in prosecutorial charging and plea bargaining.”¹⁷¹ However, if the Government inherits the heightened discretion that the SRA sought to strip from judges, the result will be that the very same unwarranted disparities that the SRA and the Guidelines were enacted to combat will continue to plague the sentencing world. These unwarranted disparities are precisely what hinder the primary purposes of the Guidelines: ensuring both *ex ante* predictability and *ex post* uniformity in sentencing.

The need for both predictability and uniformity in sentencing is further enhanced by the fact that the Government already enjoys broad discretion with respect to charging decisions.¹⁷² Broad discretion in this context is permitted particularly because it encourages plea bargaining, which is looked upon favorably by the Supreme

¹⁶⁹ See Kate Stith, *Two Fronts for Sentencing Reform*, 20 Fed Sent Rptr (Vera) 343, 344 (2008) (expressing concern over the “extraordinary leverage that prosecutors are able to exert under the present set of Guidelines”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L J 1420, 1440 (2008) (“[T]he Guidelines’ requirement of ‘real offense’ sentencing and nonadversarial judicial fact-finding directly constrained only judges. . . . There were no comparable directions to prosecutors.”); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L J 1681, 1698 (1992) (discussing the negative effects of “enhanced prosecutorial power [] fill[ing] the judicial vacuum created by the guidelines”).

¹⁷⁰ Stith and Koh, 28 Wake Forest L Rev at 227 (cited in note 23).

¹⁷¹ Stith, 117 Yale L J at 1440 (cited in note 169).

¹⁷² See *Bordenkircher*, 434 US at 364; *Oyler v Boles*, 368 US 448, 456 (1962) (holding that within the limits set by the legislature’s constitutionally valid definition of chargeable offenses, “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation” so long as “the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification”).

Court.¹⁷³ However, in *Bordenkircher*, the Court noted that “[t]here is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.”¹⁷⁴ While this potential for abuse might be tolerable in contexts where prosecutorial discretion is traditionally accepted,¹⁷⁵ there is nothing to suggest that one should welcome any and all *increases* in this potential for abuse by further extending broad prosecutorial discretion. Assuming the risk of abuse in one context does not necessitate assuming that same risk in another. Extending this broad discretion to § 3E1.1(b), when the Government already enjoys such expansive discretion on the charging front, arms prosecutors with an additional weapon to be used against defendants. Ultimately, this gives the state an unwarranted advantage and unjustifiably increases the opportunities for the prosecutorial misconduct Hydra to rear another head.¹⁷⁶

For example, Professor Wright noted that “the combination of charging and sentencing options gave federal prosecutors the power to distort trial outcomes,” specifically referencing the broad prosecutorial discretion enjoyed under § 3E1.1(b) and § 5K1.1.¹⁷⁷ Such distortion reflects abuses of prosecutorial discretion that, at best, impair the “truth-seeking mission of the legal process”¹⁷⁸ and, at worst, stand in the face of the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”¹⁷⁹

The potential for such misconduct is particularly problematic when it comes to § 3E1.1(b). This is because, for the large number of defendants who cannot qualify for the “potentially limitless downward

¹⁷³ See *Blackledge v Allison*, 431 US 63, 71 (1977) (“[T]he guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered, they can benefit all concerned.”). See also *Bordenkircher*, 434 US at 372 (Powell dissenting):

The plea-bargaining process, as recognized by this Court, is essential to the functioning of the criminal-justice system. It normally affords genuine benefits to defendants as well as to society. And if the system is to work effectively, prosecutors must be accorded the widest discretion, within constitutional limits, in conducting bargaining.

¹⁷⁴ *Bordenkircher*, 434 US at 365.

¹⁷⁵ See text accompanying notes 137–38.

¹⁷⁶ See *United States v Williams*, 504 US 36, 60 (1992) (Stevens dissenting).

¹⁷⁷ Wright, 154 U Pa L Rev at 85–87 (cited in note 161).

¹⁷⁸ *United States v Tedder*, 801 F2d 1437, 1441 (4th Cir 1986). See also David W. Ogden, Deputy Attorney General, Memorandum for Department Prosecutors, *Guidance for Prosecutors Regarding Criminal Discovery* (Jan 4, 2010), online at <http://www.justice.gov/dag/discovery-guidance.html> (visited Nov 24, 2012).

¹⁷⁹ *In re Winship*, 397 US 358, 372 (1970) (Harlan concurring).

departure” under § 5K1.1, accepting responsibility under § 3E1.1 becomes the only action they have the power to take in order to reduce their sentence.¹⁸⁰ As defendants are armed with a relatively weak sword, it is important to ensure that the prosecution is not granted a virtually impenetrable shield. Professor Etienne aptly concludes, “By creating one more benefit that the defendant cannot obtain without currying favor with her adversary (and one that cannot be reviewed by an impartial judiciary), the Feeney Amendment marks an important episode in the continued erosion of the adversarial system.”¹⁸¹

* * *

As outlined above, the any rational interest approach is incompatible with real offense sentencing, as well as the broader purposes and principles behind the Sentencing Guidelines that strive for practicability, predictability, and uniformity in sentencing. The essential nexus between a defendant’s relevant real conduct and his subsequent sentence cannot be forged under the regime advocated by the any rational interest circuits. As such, it cannot be that this discretionary standard applies to § 3E1.1(b).

C. Determining Prosecutorial Discretion under § 3E1.1(b)

This Comment has argued that the analysis of prosecutorial discretion under § 3E1.1(b) must be unshackled from *Wade*’s any rational interest standard. As the inquiry shifts toward determining what standard should govern in its place, only one reading of prosecutorial discretion is consistent with the Guideline’s plain language, commentary, legislative intent, and purpose. Under this Comment’s solution, the Government

(1) may determine whether the defendant’s notification of his intent to plead guilty was sufficiently timely to alleviate its burden of trial preparation and to conserve trial resources—with “trial” defined narrowly—but

(2) must request the § 3E1.1(b) reduction once the defendant satisfies the requirements of (1).

¹⁸⁰ O’Hear, 9 Fed Sent Rptr (Vera) at 104 (cited in note 147). Notably, § 5K1.1 departures are available only to defendants who are able to “provide[] substantial assistance in the investigation or prosecution of another person who has committed an offense.” USSG § 5K1.1. See also Part I.C.

¹⁸¹ Etienne, 16 Fed Sent Rptr (Vera) at 113 (cited in note 114).

While Parts III.A and III.B focused on justifying the compulsory second prong of this solution, this Section fleshes out the discretionary determination under the first prong.

If the upon motion of the government language is viewed merely as relating to the question of “*who* initiates the adjustment,”¹⁸² it may seem as though the same standard of discretion that existed under § 3E1.1(b) pre-PROTECT Act should apply post-PROTECT Act. As the *Johnson* majority noted, the “‘key inquiry’ under the old version of § 3E1.1(b) was simply ‘whether the confession was complete and timely.’”¹⁸³ Proponents of the view that the PROTECT Act simply changed *who* initiates the § 3E1.1(b) motion might therefore be concerned that this Comment’s solution is too radical a departure from the pre-PROTECT Act standard given that the essential text of § 3E1.1(b) itself was, for the most part, left unchanged. However, this Comment argues that an emphasis on not only temporal timeliness but also trial resources has always been inherent in the plain text of the Guideline.

As Application Note 6 reveals, the Government’s expenditure of resources related to trial preparation should also be considered in the timeliness inquiry.¹⁸⁴ The insertion of the governmental motion language into § 3E1.1(b) notwithstanding, the inclusion of the additional paragraph to Application Note 6 was the only other significant PROTECT Act amendment to the Guideline.¹⁸⁵ Application Note 6 now includes the following statement: “Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing.”¹⁸⁶ Accordingly, this Comment’s solution allows the Government to exercise its discretion in “determin[ing] whether the defendant has assisted authorities in a manner that avoids preparing for trial.”¹⁸⁷

Section 3E1.1(b) requires a defendant to “timely notify[] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.”¹⁸⁸ The

¹⁸² *Johnson*, 581 F3d at 1010 (Smith concurring in part and dissenting in part).

¹⁸³ *Id.* at 1005 (majority), quoting *United States v Blanco-Gallegos*, 188 F3d 1072, 1077 (9th Cir 1999).

¹⁸⁴ USSG § 3E1.1, Application Note 6.

¹⁸⁵ See PROTECT Act § 401(g), 117 Stat at 671–72.

¹⁸⁶ USSG § 3E1.1, Application Note 6.

¹⁸⁷ USSG § 3E1.1, Application Note 6.

¹⁸⁸ USSG § 3E1.1(b).

Divens court observed that “thereby” suggests that all terms following it should be considered as enumerated consequences arising from timely notification.¹⁸⁹ However, even under this interpretation, if timely notification fails to either alleviate trial preparation or effectuate the efficient allocation of resources, the Government is justified in refusing to move for the § 3E1.1(b) reduction: the Government cannot be expected to move for the reduction if the defendant’s notification was insufficiently timely to successfully bring about the enumerated consequences. The clause “thereby . . . efficiently” therefore serves to provide the Government with guidance regarding whether § 3E1.1(b) reductions ought to be requested. Without the clause, it would be unclear what the Government should consider in making this decision.

Further, Judge Smith’s pure textual analysis of § 3E1.1(b), conducted without reference to either Guideline commentary or the PROTECT Act’s purported aims, accords with this solution’s allowance of prosecutorial discretion in determining whether a defendant’s timely plea has relieved the Government of expending trial resources.¹⁹⁰ Judge Smith concluded that the PROTECT Act “add[ed] the consideration of government resources in preparing for trial” and that “the only ‘resources’ that may be considered in gauging the defendant’s satisfaction of the guideline are those resources devoted to trial preparation.”¹⁹¹

Even the any rational interest courts would concede that the Government’s discretion under § 3E1.1(b) is limited to some degree by considerations of resource allocation and trial preparation. For example, the Eighth Circuit speculated that under the post-PROTECT Act version of § 3E1.1(b), the Government might be able to move for a § 3E1.1(b) reduction when a defendant “timely notifie[s] authorities of his intention to enter a plea of guilty, and permit[s] the government to allocate its resources efficiently.”¹⁹² The Tenth Circuit was concerned with the expenditure of additional resources and trial preparation when the defendant’s response in a PSR “implied future action,”¹⁹³ stating that the Government should determine “what constitutes timeliness and what constitutes trial preparation.”¹⁹⁴ The First Circuit also considered the fact that “the

¹⁸⁹ See note 85 and accompanying text.

¹⁹⁰ See notes 78–80 and accompanying text.

¹⁹¹ *Johnson*, 581 F3d at 1010–11 (Smith concurring in part and dissenting in part).

¹⁹² *United States v Borer*, 412 F3d 987, 991 n 4 (8th Cir 2005).

¹⁹³ *Moreno–Trevino*, 432 F3d at 1183.

¹⁹⁴ *Id* at 1186, quoting Etienne, 16 Fed Sent Rptr (Vera) at 112 (cited in note 114).

government invested significant time and resources in gathering evidence.”¹⁹⁵ The Fifth Circuit similarly considered the conservation of resources,¹⁹⁶ as did the Ninth Circuit.¹⁹⁷ Thus, the baseline of prosecutorial discretion under the any rational interest approach has not appeared to reflect the Government’s exercise of complete, unfettered discretion that one might think applies under such a regime. Although the Government is certainly granted wide discretion, its discretion is guided by considerations related, in some form, to resource allocation and trial preparation.

Once the alleviation of trial preparation and the conservation of trial resources are acceptable considerations, it becomes necessary to define the scope of “trial” in order to best define the scope of discretion under § 3E1.1(b). While the any rational interest circuits broadly define “trial” to encompass all “post-judgment proceedings”¹⁹⁸ or “the entirety of the criminal proceedings in a particular case until judgment is final and certain,”¹⁹⁹ this Comment argues that the term should be defined narrowly.

Under this Comment’s solution, “trial” refers only to the initial determination of guilt at either a bench trial or a jury trial regarding the crimes with which the defendant has been charged. Despite the fact that criminal trials are typically considered “bifurcated trials” that include both the guilt phase and the sentencing phase,²⁰⁰ such an interpretation is inappropriate in the context of § 3E1.1. First, other Guidelines make clear that “trial” and “sentencing” are distinct. For example, § 4A1.3 discusses “[w]hether the defendant was pending trial *or* sentencing,”²⁰¹ and § 3C1.1 Application Note 4 states that the adjustment at issue applies where a defendant “escap[es] or attempt[s] to escape from custody before trial *or* sentencing.”²⁰² Similarly, the Background to § 2J1.6 states “This section applies to a failure to appear by a defendant who was released pending trial, sentencing, appeal, *or* surrender for service of sentence.”²⁰³

¹⁹⁵ *Beatty*, 538 F3d at 12.

¹⁹⁶ *United States v Newson*, 515 F3d 374, 377 (5th Cir 2008).

¹⁹⁷ *United States v Espinoza-Cano*, 456 F3d 1126, 1138 (9th Cir 2006); *Johnson*, 581 F3d at 1002–03.

¹⁹⁸ *Newson*, 515 F3d at 377.

¹⁹⁹ *Johnson*, 581 F3d at 1002.

²⁰⁰ See *Blakely v Washington*, 542 US 296, 319 (2004); *Gregg v Georgia*, 428 US 153, 221 n 9 (1976) (White concurring); *Bullington v Missouri*, 451 US 430, 445, 448 (1852).

²⁰¹ USSG § 4A1.3(a)(2)(D) (emphasis added).

²⁰² USSG § 3C1.1, Application Note 4(E) (emphasis added). See also USSG § 3A1.1(a); USSG § 2H1.1, Application Note 4; USSG § 2J1.6.

²⁰³ USSG § 2J1.6, Background (emphasis added).

Second, in focusing on § 3E1.1 itself, the Guideline's macroscopic role in criminal proceedings supports such an interpretation. A § 3E1.1(b) reduction is at issue immediately preceding the commencement of the guilt phase and concerns a defendant's entry of a *guilty* plea that must translate into the Government's ability to avoid assessing *guilt* via formal proceedings.²⁰⁴ As such, any such references to "trial" under the Guideline most logically refer to the only "trial" relevant to this inquiry—that where guilt is determined. Notably, § 3E1.1 commentary further indicates that only the guilt phase should be at issue. Application Note 2 states that the § 3E1.1 "adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of *guilt*, is convicted, and only then admits guilt and expresses remorse."²⁰⁵ While this clarification indicates when § 3E1.1 reductions should *not* apply, it also sheds light on when the Sentencing Commission believes they should. Application Note 2 similarly indicates that the emphasis is on the guilt phase, discussing instances "where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)"²⁰⁶—such instances never arise at sentencing.

Third, § 3E1.1(b)'s interest in enabling more efficient resource allocation and reduced trial preparation is not well served by collapsing both the guilt and the sentencing phases into the definition of "trial" under the Guideline. Whether a defendant pleads guilty in accordance with § 3E1.1 or proceeds to trial and is convicted, the Government must expend resources on and adequately prepare for the defendant's sentencing. Accordingly, to allow the consideration of governmental resources and preparation at sentencing would mean that the Government could always find grounds to withhold a § 3E1.1(b) reduction, rendering the provision superfluous.

In further defining the boundaries of the term "trial," this Comment argues that it does not include appeals, *Fatico* hearings, or pre-trial hearings, nor does it include other postconviction challenges such as habeas corpus petitions. This limitation on the definition of "trial" is supported by the fact that nothing in the text of § 3E1.1(b) or its commentary explicitly or implicitly suggests that "trial" should be interpreted broadly; as described in Part II.B, the *Divens* court

²⁰⁴ See USSG § 3E1.1.

²⁰⁵ USSG § 3E1.1, Application Note 2 (emphasis added).

²⁰⁶ USSG § 3E1.1, Application Note 2.

examined the text of § 3E1.1(b) and its commentary in concluding that “trial” should be construed as proceedings at the district court level.²⁰⁷ It is also consistent with the dictionary definition of “trial” — “[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding.”²⁰⁸

Confining prosecutorial discretion to the consideration of timeliness, trial preparation, and resource allocation furthers the larger goals of sentencing reform: practicability, predictability, and uniformity in sentencing.²⁰⁹ Under the proposed reading, defendants and prosecutors alike can better delineate what warrants withholding a § 3E1.1(b) motion and what does not. For example, this approach does not attempt to evaluate whether a defendant’s “acceptance of responsibility is genuine,”²¹⁰ nor does it seek to determine whether a defendant acts “in good faith.”²¹¹ As such, it avoids the potential that such requirements become empty statements due to a lack of effective procedural mechanisms for assessing whether § 3E1.1(b)’s requirements have actually been met.

Lastly, once the Government has exercised its discretion and determined that the defendant’s timely notification of his intention to plead guilty has assisted it in conserving trial resources or avoiding trial preparation, the Government is obligated to move for a § 3E1.1(b) reduction.²¹² Because nothing added or excised by the Feeney Amendment supports rejecting the pre-PROTECT Act compulsory nature of moving for the reduction once relevant factors are satisfied, this Comment’s solution maintains this aspect of the pre-PROTECT Act standard.

* * *

This Comment’s solution offers the most plausible interpretation of prosecutorial discretion under § 3E1.1(b): The Government has the *power* to determine whether a defendant’s timely notification of his intention to plead guilty has conserved resources and eased its burden of preparing for trial, with “trial” narrowly defined.

²⁰⁷ *Divens*, 650 F3d at 348. See also notes 95–101 and accompanying text.

²⁰⁸ *Black’s Law Dictionary* at 1644 (cited in note 39). See also *Webster’s Third* at 2439 (cited in note 82) (defining “trial” as “the formal examination of the matter in issue in a cause before a competent tribunal for the purpose of determining such issue”).

²⁰⁹ See Part III.B.2.

²¹⁰ *Beatty*, 538 F3d at 16 (quotation marks omitted), quoting *United States v Sloley*, 464 F3d 355, 360 (2d Cir 2006).

²¹¹ *Lee*, 653 F3d at 174.

²¹² See Parts III.A and III.B.

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However, once a defendant's actions satisfy this inquiry, the Government has the *duty* to move for the § 3E1.1(b) reduction. Such a reading reconciles the text of § 3E1.1(b) and its commentary—both before and after the PROTECT Act—with legislative intent. It also ensures consistency with real offense sentencing and the broader principles of the Guidelines in a way that the any rational interest approach does not.

IV. ILLUMINATING THE SOLUTION: REVISITING THE CIRCUIT SPLIT

No court has delineated precisely what factors can and cannot be considered when the Government determines whether the defendant's assistance has in fact relieved it of preparing for trial. This Part revisits the cases at the heart of the split to complete the analysis and describe both permissible and impermissible factors that the Government can consider under § 3E1.1(b).

As described below, under this Comment's solution, the Government must consider the timeliness of the defendant's plea.²¹³ the Government can also consider factors related to reducing trial preparation and conserving trial resources, such as a defendant's refusal to admit aspects of the crime that the Government would otherwise be required to prove at trial.²¹⁴ The Government cannot consider a defendant's refusal to sign an appellate waiver or to waive other nontrial rights,²¹⁵ preservation of his right to challenge his PSR,²¹⁶ refusal to enter a formal plea agreement with the Government,²¹⁷ or good faith.²¹⁸ In addition, the Government cannot consider its desire to promote general deterrence.²¹⁹

A. Factors Permissibly Considered in Withholding a § 3E1.1(b) Motion

Factors relevant to withholding a § 3E1.1(b) motion include, most obviously, a defendant's nontimely entrance of a guilty plea. *United States v Smith*²²⁰ exemplifies the consideration of timeliness

²¹³ See, for example, *United States v Smith* 422 F3d 715, 726–27 (8th Cir 2005).

²¹⁴ See *United States v Espinoza-Cano*, 456 F3d 1126, 1133–34 (9th Cir 2006); *Beatty*, 538 F3d at 16–17.

²¹⁵ See *Divens*, 650 F3d at 348; *Lee*, 653 F3d at 173–74; *United States v Deberry*, 576 F3d 708, 710 (7th Cir 2009); *Johnson*, 581 F3d at 1001; *United States v Newson*, 515 F3d 374, 377 (5th Cir 2008).

²¹⁶ See *Lee*, 653 F3d at 172.

²¹⁷ See *id.*

²¹⁸ See *id.* at 174; *Beatty*, 538 F3d at 13.

²¹⁹ See *Moreno-Trevino*, 432 F3d at 1187.

²²⁰ 422 F3d 715 (8th Cir 2005).

and the conservation of governmental resources: the defendant was required to provide notification of his intention to plead guilty by a certain date, but on that date he instead filed a motion to continue the deadline.²²¹ He also entered a guilty plea and then attempted to withdraw that plea.²²² The any rational interest court's conclusion that the Government's decision to withhold a § 3E1.1(b) motion was not improper would also be the conclusion under this Comment's solution, as the nontimeliness of the defendant's various actions resulted in the Government's inability to conserve trial resources.²²³

Other relevant factors include a defendant's refusal to admit to certain key aspects of the crime that the Government would otherwise be required to prove at trial. However, in certain circumstances, such action by the defendant would be insufficient in the event that trial resources are not conserved. For example, in *United States v Espinoza-Cano*,²²⁴ although the defendant was willing to stipulate to all the facts necessary for him to be found guilty,²²⁵ he "did not allow the government to avoid spending resources on preparing for trial"²²⁶ because he proceeded by way of stipulated bench trial. A stipulated bench trial falls under the solution's narrow definition of "trial," as it is a formal judicial proceeding before a judge at the district court level where guilt is assessed.²²⁷ In addition, it requires expending trial resources even when it can be equated to a guilty plea because the Government must still appear and present its case-in-chief to the court.²²⁸ As such, to the extent that the Government prepares for and allocates resources towards a stipulated bench trial, a § 3E1.1(b) motion can be withheld under this Comment's solution.²²⁹

A more complex example is *Beatty*, where the defendant refused to admit to the identity and weight of the drugs he pleaded guilty to

²²¹ Id at 727.

²²² Id.

²²³ Id at 726–28.

²²⁴ 456 F3d 1126 (9th Cir 2006).

²²⁵ Id at 1134 (declining to credit the defendant's argument that this allowed the Government to avoid trial preparation).

²²⁶ Id at 1138.

²²⁷ See notes 207–08 and accompanying text.

²²⁸ See, for example, *United States v Banks*, 624 F3d 261, 262 (5th Cir 2010); *United States v Dunn*, 345 F3d 1285, 1287 (11th Cir 2003); *United States v Howell*, 1993 WL 135737 *1 (ND Ill).

²²⁹ It is important to note that while the *Espinoza-Cano* court permissibly considered the Government's expenditure of *stipulated bench trial* resources, it impermissibly considered resources required to "anticipat[e], and ultimately defend[], a complete *appeal*." *Espinoza-Cano*, 456 F3d at 1138 (emphasis added). As discussed in Part III.C and IV.B, the consideration of appellate resources are not at issue under § 3E1.1(b).

distributing.²³⁰ Determining whether such a refusal is grounds for withholding a § 3E1.1(b) motion depends on whether the facts in question are elements of the offense or merely sentencing factors. At first blush, one might think that the Government acceptably withheld the § 3E1.1(b) motion because these issues relate to the real conduct of his crime, and, without a guilty plea, the Government would have to invest more resources in establishing evidence at trial. However, the lynchpin of this analysis is the fact that “[t]he court determined, provisionally, that the weight and identity of the substance as ‘crack’ were *relevant only to sentencing*.”²³¹ Because the First Circuit views drug quantity as a sentencing factor,²³² it need not be charged in the indictment, presented to the jury, or proved beyond a reasonable doubt at the trial phase as it would need to be if considered an element of the offense.²³³ As discussed in Part III.C, this Comment argues that the definition of “trial” under § 3E1.1(b) should exclude the sentencing phase, and therefore the defendant’s failure to stipulate to factors only relevant to sentencing would not be grounds for the Government’s refusal to move for the reduction.

It is important to note that the First Circuit’s consideration of drug quantity as a sentencing factor rather than an element of the offense is not shared among its sister circuits—there is currently a circuit split on the issue.²³⁴ Thus, in jurisdictions where drug quantity is an offense element, the identity and weight of drugs *are* at issue in the defendant’s trial, which requires the Government to invest resources

²³⁰ *Beatty*, 538 F3d at 10.

²³¹ *Id.* (emphasis added).

²³² *Id.* at 11 & n 4.

²³³ See *Apprendi v New Jersey*, 530 US 466, 490 (2000) (holding that any fact other than a prior conviction that increased the penalty for a crime beyond the statutory maximum had to be charged in the indictment, presented to the jury, and proved beyond a reasonable doubt). *Apprendi* was extended to state guidelines in *Blakely v Washington*, 542 US 296, 304–05 (2004), and to the federal Guidelines in *Booker*, 543 US at 244–45.

²³⁴ Seven circuits have concluded that drug quantity is an element of the offense. See *United States v Gonzalez*, 420 F3d 111, 123, 133–34 (2d Cir 2005); *United States v Vazquez*, 271 F3d 93, 98 (3d Cir 2001); *United States v Promise*, 255 F3d 150, 156–57 (4th Cir 2001); *United States v Doggett*, 230 F3d 160, 164–65 (5th Cir 2000); *United States v Velasco-Heredia*, 319 F3d 1080, 1085 (9th Cir 2003); *United States v Hishaw*, 235 F3d 565, 575 (10th Cir 2000); *United States v Fields*, 242 F3d 393, 395–96 (DC Cir 2001).

Four circuits have disagreed. See *United States v Goodine*, 326 F3d 26, 27–28, 35 (1st Cir 2003); *United States v Franco*, 484 F3d 347, 356–57 (6th Cir 2007); *United States v Leachman*, 309 F3d 377, 383 (6th Cir 2002); *United States v Clark*, 538 F3d 803, 812 (7th Cir 2008); *United States v Serrano-Lopez*, 366 F3d 628, 638 & n 9 (8th Cir 2004).

For a discussion of the current state of this circuit split and an argument that drug quantity ought to be considered an element of the offense, see Lindsay Calkins, Comment, *Is Drug Quantity an Element of 21 USC § 841(b)? Determining the Apprendi Statutory Maximum*, 78 U Chi L Rev 965 (2011).

in proving these aspects of the crime. In such instances, the Government could withhold a § 3E1.1(b) motion.

B. Factors Impermissibly Considered in Withholding a § 3E1.1(b) Motion

Factors that ought not to be considered under § 3E1.1(b) include a defendant's refusal to sign an appellate waiver or to waive other nontrial rights, as neither affects the Government's conservation of *trial* resources. *Divens*, *Johnson*, *United States v Deberry*,²³⁵ and *United States v Newson*²³⁶ all concerned appellate waivers²³⁷ and are easy to resolve under the framework of the solution. Under this Comment's solution, an appeal is not included in the definition of a "trial" under § 3E1.1(b), so a defendant's refusal to waive his right to appeal alone is insufficient grounds for denying a § 3E1.1(b) motion. By this same logic, *Lee* is also an easy case:²³⁸ a *Fatico* hearing is also not a "trial" under § 3E1.1(b).

Moreno–Trevino presents a more complex example of whether specific deterrence is relevant to the conservation of *trial* resources. In *Moreno–Trevino*, the defendant pleaded guilty to illegally reentering the United States, but when reminded that he could not reenter the country without the Government's permission, he replied: "How else am I going to see my kids?"²³⁹ From this response, the Government assumed that he intended to return to the United States in the future, which would violate his plea agreement, the anticipated conditions of supervised release, and federal law.²⁴⁰ Under this Comment's reading, the defendant's response has no relation to the timeliness of his guilty plea nor does it concern the Government's expending resources on the defendant's trial at hand.

Whether a defendant commits similar crimes in the future is distinct from his acceptance of responsibility for the crime at issue for two primary reasons: First, there is nothing in the Guideline itself suggesting a concern with anything other than a defendant's acceptance of responsibility for the crime for which he is *presently* charged. Subsection (a) states that a "defendant [must] clearly demonstrate[] acceptance of responsibility for *his offense*" in order

²³⁵ 576 F3d 708 (7th Cir 2009).

²³⁶ 515 F3d 374 (5th Cir 2008).

²³⁷ See *Divens*, 650 F3d at 348; *Johnson*, 581 F3d at 1003; *Deberry*, 576 F3d at 711; *Newson*, 515 F3d at 377.

²³⁸ *Lee*, 653 F3d at 172–73.

²³⁹ *Moreno–Trevino*, 432 F3d at 1183.

²⁴⁰ *Id* at 1183–84.

to qualify for the two-level reduction; no reference is made to future offenses.²⁴¹ In addition, the factors to consider listed in Application Note 1 make clear that the *current* offense is the one at issue.²⁴² Similarly, subsection (b)'s text and commentary indicate that the Government's avoidance of trial preparation and efficient allocation of resources are concerns relevant only to the particular trial at hand.²⁴³

Second, there are practical concerns associated with determining a defendant's future intentions. Because it is difficult to assess whether a defendant's ambiguous statements suggest the likelihood that he will commit a future crime, a loophole around the solution's limits on prosecutorial discretion would be created if future intentions were permissible considerations, such that the prosecutor would have unchecked discretion to make an assessment about a defendant's likelihood of recidivism and to punish the defendant accordingly. Creating a bright-line rule prohibiting the consideration of a defendant's potential commission of future crimes is necessary.

Another factor that cannot be considered is the Government's desire to provide general deterrence for potential future offenders by punishing a particular defendant more heavily or requesting particularly severe sentences for particular crimes. One of the Government's motives for withholding the § 3E1.1(b) motion in *Moreno-Trevino* was to deter future offenders,²⁴⁴ a motive that ought to be irrelevant in the acceptance of responsibility context.

Other factors that cannot be considered include a defendant's preservation of his right to challenge his PSR and a defendant's refusal to enter a formal plea agreement with the Government. With respect to the former, in *Lee*, the defendant made certain objections to the findings in a PSR.²⁴⁵ As described in Part III.B.1, defendants cannot be required to certify inaccurate PSRs in order to obtain the one-level reduction under § 3E1.1(b) because their ultimate sentences would not be reflective of their relevant real conduct, an affront to real offense sentencing.

Regarding a defendant's refusal to enter a formal plea agreement with the Government, the *Lee* court noted that the defendant

²⁴¹ USSG § 3E1.1(a) (emphasis added).

²⁴² USSG § 3E1.1, Application Note 1.

²⁴³ USSG § 3E1.1(b); USSG § 3E1.1, Application Note 6 ("For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.").

²⁴⁴ See *Moreno-Trevino*, 432 F3d at 1187.

²⁴⁵ *Lee*, 653 F3d at 172.

“pleaded guilty, without a plea agreement.”²⁴⁶ While the Government did not cite this as grounds for withholding the § 3E1.1(b) motion, there may be confusion on this point given that the text of § 3E1.1(b) ambiguously refers to “a plea of guilty,”²⁴⁷ which could be interpreted narrowly—to refer to only formal plea agreements—or more broadly, to encompass various other forms of guilty pleas, including plea declarations²⁴⁸ or plea colloquies.²⁴⁹ Under this Comment’s solution, a defendant’s admission of guilt in any of these forms is sufficient to warrant consideration of the § 3E1.1(b) reduction. Each clearly demonstrates the defendant’s acceptance of responsibility, and § 3E1.1 Background explicitly states that “[t]he reduction of offense level provided by this section recognizes legitimate societal interests,” namely rewarding those defendants who accept responsibility for their actions.²⁵⁰

Third, whether a defendant enters into a plea agreement in good faith or with sincerity is irrelevant. Both the *Lee* court²⁵¹ and the *Beatty* court²⁵² noted that these should be relevant considerations under § 3E1.1(b).²⁵³ However, the good faith requirement is neither inherent in the Guideline’s text, nor is it capable of being practically assessed. It also has no impact on timeliness, trial preparation, and trial resources and is thus irrelevant under § 3E1.1(b).

* * *

Under this Comment’s solution, only after the Government has evaluated permissible factors and concluded that the defendant’s timely notification did not allow it to avoid trial preparation or preserve trial resources can the Government withhold a § 3E1.1(b) motion. A

²⁴⁶ *Id.*

²⁴⁷ USSG § 3E1.1(b).

²⁴⁸ Plea declarations are signed by the defendant and defense counsel and are filed with the court. Plea declarations contain a detailed description of the facts that the defendant is admitting as well as the defense’s Guidelines calculations. See, for example, Plea Declaration, *United States v Wells*, No 07-CR-406 (ND Ill filed Sept 12, 2007) (available on Westlaw at 2007 WL 3311502).

²⁴⁹ Plea colloquies occur when a judge directs questions orally to a defendant. See Danielle M. Lang, Note, Padilla v. Kentucky: *The Effect of Plea Colloquy Warnings on Defendants’ Ability to Bring Successful Padilla Claims*, 121 Yale L J 944, 947 (2012). Note that while plea colloquies are required under FRCrP 11(b) even where a defendant has entered a plea agreement or plea declaration, a defendant may also appear and enter a plea before the court at the time of the colloquy. See Federal Judicial Center, *Benchbook for U.S. District Court Judges* § 2.01 at 71–81 (5th ed Sept 2007), online at [http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/\\$file/Benchbk5.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Benchbk5.pdf/$file/Benchbk5.pdf) (visited Nov 24, 2012).

²⁵⁰ USSG § 3E1.1, Background.

²⁵¹ *Lee*, 653 F3d at 174.

²⁵² *Beatty*, 538 F3d at 13.

²⁵³ See text accompanying notes 210–11.

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contrary finding imposes the obligation to move for the one-level reduction. By illuminating which factors the Government can and cannot consider in making its determination of whether a defendant's timely notification has conserved trial resources, this Comment fills a crucial gap left open by the *Divens* court and completes the analysis of prosecutorial discretion under § 3E1.1(b). This analysis ensures predictability and uniformity in sentencing and cabins one of the most worrisome consequences of broad prosecutorial discretion: the increased potential for prosecutorial abuse or overreaching.

CONCLUSION

The circuits are split as to which discretionary standard applies to § 3E1.1(b). The majority of circuits reason that the Government may withhold a § 3E1.1(b) motion based on any rational interest, concluding that Congress intended for the Government to possess the same broad discretion under § 3E1.1(b) as it enjoys under § 5K1.1. In rejecting this reliance on § 5K1.1, the minority of circuits reason that the Government's discretion under § 3E1.1(b) is limited to determining "whether the defendant has 'timely' entered a 'plea of guilty' and thus furthered the guideline's purposes in that manner."²⁵⁴

In rejecting both extreme approaches of the split, this Comment proposes a modified and extended *Divens* approach: The Government has the *power* to determine only whether a defendant's notification of his intention to plead guilty was sufficiently timely to alleviate trial preparation and conserve trial resources—with trial narrowly defined. Once a defendant's actions have satisfied this inquiry, however, the Government has the *duty* to request the § 3E1.1(b) reduction. This Comment then goes beyond *Divens* by delineating which factors can and cannot be considered under § 3E1.1(b).

This Comment's approach honors the purposes of the Guidelines, the Supreme Court precedent, the legislative intent surrounding the PROTECT Act, and the distinctions between § 3E1.1 and § 5K1.1. This approach also remains consistent with the text of § 3E1.1(b) and its commentary while avoiding the worrisome consequences of either extremely expansive or extremely limited grants of prosecutorial discretion.

²⁵⁴ *Divens*, 650 F3d at 348, citing USSG § 3E1.1(b); *Lee*, 653 F3d at 175, quoting *Divens*, 650 F3d at 348.