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## Notes

### DRIVING A HARD BARGAIN: ACCEPTING RESPONSIBILITY FOR A SIGNIFICANT CURTAILMENT OF FEDERAL PROSECUTORIAL DISCRETION IN *UNITED STATES v. DIVENS*

RORY A. EATON\*

#### I. LET'S MAKE A DEAL: AN INTRODUCTION AND EXPLANATION OF RECENT TRENDS IN PROSECUTORIAL DISCRETION

Don Corleone assures a panicked Johnny Fontane that he will deliver the actor a starring role in an upcoming film, explaining that he will make the studio head “an offer he can’t refuse.”<sup>1</sup> Fans familiar with the classic *The Godfather* know that the Don drives a hard bargain and that the offer extended to the studio head is not really an offer; rather, it is a command, or something to the effect of: “do as I say or I will kill you.”<sup>2</sup> A career as a U.S. Attorney would not suit a character like Don Corleone.<sup>3</sup> For one thing, plea bargaining in the American criminal justice system gives something to defendants that Don Corleone would rarely provide someone in his business dealings—a *choice*.<sup>4</sup>

Plea bargaining is extremely prevalent in the criminal justice system, and it has advantages to both prosecutors and defendants.<sup>5</sup> Unlike every-

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1. *THE GODFATHER* (Paramount Pictures 1972); *see also AFI’s 100 Years . . . 100 Movie Quotes*, AM. FILM INST. (2005), <http://www.afi.com/100years/quotes.aspx> (ranking greatest movie quotes of all time).

2. *See THE GODFATHER*, *supra* note 1. Later, in another memorable scene, the studio head Jack Woltz decides to accommodate the Don’s request after waking up in his bed with the severed head of his beloved racehorse. *See id.*

3. *See generally id.* (depicting downfall of gangster and patriarch Don Corleone).

4. *See Brady v. United States*, 397 U.S. 742, 748 (1970) (emphasizing guilty pleas must be “the voluntary expression of [the defendant’s] own choice”).

5. *See id.* at 752 (acknowledging prevalence of plea bargaining and explaining “mutuality of advantage” between government and defendants engaging in plea bargains); Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 *DUKE L.J.* 209, 223 (2005) (providing practitioners’ comments and empirical data of defendants’ successes in negotiating with government for signifi-

day bargains, however, the participants in these dealings barter for the commodity of time—prosecutors seek plea agreements to conserve their resources and defendants plead guilty to have their sentences lessened.<sup>6</sup> Inherent in our current system is the opportunity that a defendant has to *choose* to cooperate and, by doing so, to receive significant concessions from the government.<sup>7</sup> Thus, the success of a system in which the practice of plea bargaining is so necessary is largely contingent on defendants' ability to choose amongst opportunities that prosecutors have the discretion to offer them in the first place.<sup>8</sup>

One scholar observes that “[d]iscretion is a hallmark of the criminal justice system, and officials at almost every stage of the process exercise discretion in the performance of their duties and responsibilities.”<sup>9</sup> The criminal justice system entrusts prosecutors in particular with significant discretion, primarily to properly charge defendants and negotiate guilty pleas.<sup>10</sup> Although prosecutorial discretion is nothing new, it did not always permeate every phase of criminal proceedings.<sup>11</sup> Historically, prose-

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cant concessions); *see also* 29A AM JUR. 2D *Evidence* § 778 (“Plea bargaining implies an offer to plead guilty upon condition, that is, in return for concessions by the State.” (footnote omitted)).

6. *See Brady*, 397 U.S. at 751-52 (describing defendants' motivations including hope of receiving lesser penalties); Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 905 (2011) (“Criminal defendants and their attorneys routinely offer information and assistance in the prosecution of other criminals in exchange for leniency at sentencing.”).

7. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2011) (providing government may move for reduction in offense level of defendant who “clearly demonstrates acceptance of responsibility”); *id.* § 5K1.1 (providing government may move for reduction in offense level of defendant who “has provided substantial assistance in the investigation or prosecution of another person”).

8. *See Brady*, 397 U.S. at 750 (acknowledging government actively encourages guilty pleas and listing reasons why defendants plead guilty).

9. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 6 (2007) (providing brief history of American prosecutor, and contending that unlike judges, police, and other officials, prosecutors are rarely criticized for abuse of discretion).

10. *See* Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 177, 186 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (describing extent of prosecutorial discretion). Prosecutors may adopt different policies that govern decisions regarding the acceptance and disposal of cases, but such policies are applied primarily to weed out cases not considered strong enough to proceed to trial on legal sufficiency, evidentiary, or constitutional grounds. *See id.* (explaining prosecutorial policies). Moreover, almost all criminal cases are resolved with guilty pleas. *See* DAVIS, *supra* note 9, at 47 (providing statistics and discussing benefits of plea bargaining for defendants and prosecutors alike); *see also* Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 374 (2000) (“The prosecutor’s decision as to whether or not to charge a suspect is virtually unchecked by formal constraints on regulatory mechanisms . . .”).

11. *See* Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 304-05 (2009) (explaining how prosecutors

cutors were not required to take a position on the justice of a sentence, and had virtually no power to contest a sentence on appeal.<sup>12</sup> After 1987, however, with the introduction of the Federal Sentencing Guidelines (the Guidelines), prosecutors began to play a more active role in the sentencing process, proving facts and arguing the new law under the Guidelines.<sup>13</sup>

One such example of the extensive discretion recently afforded prosecutors is the “acceptance of responsibility” provision of the Guidelines.<sup>14</sup>

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traditionally exercised little discretion at sentencing). Nevertheless, over the course of time, the role played by prosecutors in the American justice system has grown substantially. See DAVIS, *supra* note 9, at 13 (indicating prosecutorial discretion is necessary because of “the limitation on resources and the need for individualized justice”); see also Coles, *supra* note 10, at 177 (“Uniquely positioned because of their authority, strategic position between police and courts, and linkages to those in the executive and legislative branches, American prosecutors exercise considerable power and discretion.”); Dickerson Moore, *supra* note 10, at 377 (“Among the principal reasons advanced for allowing the prosecutor such discretion is that it serves to mitigate the ill effects of the trend toward legislative overcriminalization.”); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 263 (2001) (noting analysts have argued that “prosecutors are more suited than the legislature to adapt the criminal law to new circumstances”); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 159 (1994) (hypothesizing judicial review of every charging decision would needlessly delay criminal proceedings and increase backlogs of courts). Moreover, empirical evidence suggests that prosecutors still exercise extensive discretion in charging decisions involving mandatory minimums, and “in deciding the severity of charges under presumptive sentencing guidelines.” Rodney L. Engen, *Have Sentencing Reforms Displaced Discretion over Sentencing from Judges to Prosecutors?*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, *supra* note 10, at 73, 84-86 (describing prosecutorial discretion after Guidelines).

12. See Simons, *supra* note 11, at 308 (describing extent of discretion prior to Guidelines). Although traditionally judges had virtually complete discretion over sentencing, prosecutors still exercised substantial authority in making charging decisions that were ordinarily not subject to judicial review. See *id.* at 308-11 (comparing judicial and prosecutorial discretion prior to Guidelines). Thus, prosecutors could only influence sentencing proceedings through their charging decisions, which determined what the maximum sentence could be. See *id.* at 311 (qualifying prosecutorial influence by recognizing that actual sentences were “solely within judges’ discretion” and “appellate review was practically nonexistent”).

13. See *id.* (noting prosecutors now argue law under Guidelines at sentencing proceedings).

14. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011) (providing sentence reductions for “acceptance of responsibility”). Section 3E1.1 provides:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense by 2 levels.

(b) 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.

Subsection (a) of section 3E1.1 of the U.S. Sentencing Guidelines Manual rewards a defendant who “clearly demonstrates acceptance of responsibility.”<sup>15</sup> Subsection (b), the focus of this Note, provides an additional one-level reduction to a defendant who meets the criteria for subsection (a), and who has further “assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty.”<sup>16</sup> Currently, as a result of a 2003 amendment to the Guidelines, the government must make a motion for defendants to benefit from the one-level sentence reduction provided for in subsection (b).<sup>17</sup> The vast majority of circuits have construed this prosecutorial power expansively, holding that the government may refuse to move for a

*Id.*

15. *Id.* § 3E1.1(a). The commentary to § 3E1.1 provides factors for determining whether a particular defendant is eligible for the reduction:

In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

- (A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;
- (B) voluntary termination or withdrawal from criminal contact or associations;
- (C) voluntary payment of restitution prior to adjudication of guilt;
- (D) voluntary surrender to authorities promptly after commission of the offense;
- (E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
- (F) voluntary resignation from the office or position held during the commission of the offense;
- (G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
- (H) the timeliness of the defendant’s conduct in manifesting the acceptance of responsibility.

*Id.* § 3E1.1 cmt. n.1.

16. *Id.* § 3E1.1(b) (providing acceptance of responsibility reduction); *see also* Ellen M. Bryant, Comment, *Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 CATH. U. L. REV. 1269, 1273 (1995) (explaining acceptance of responsibility provision).

17. *See* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act, Pub. L. No. 108-21, § 401(g) (2003) (amending § 3E1.1(b)). Before the amendment, a defendant was automatically entitled to the extra one-level reduction for merely meeting the criteria set forth by § 3E1.1(b), regardless of whether the government moved for it. *See* United States v. Deberry, 576 F.3d 708, 710 (7th Cir. 2009) (“The amendment turned subsection (b) into a license for prosecutorial discretion.”); *see also* United States v. Moreno-Trevino, 432 F.3d 1181, 1185 (10th Cir. 2005) (analyzing text of § 3E1.1(b) after PROTECT Act,

section 3E1.1(b) reduction for any reason as long as it serves a legitimate government purpose, and as long as the prosecutor did not make the refusal with an unconstitutional motive.<sup>18</sup>

Recently, in *United States v. Divens*,<sup>19</sup> the Fourth Circuit Court of Appeals broke from this trend, significantly curtailing federal prosecutorial discretion by declining to hold the Government's refusal to file for a section 3E1.1(b) motion to the legitimate government purpose standard.<sup>20</sup> Instead of affording prosecutors latitude, the court held that federal prosecutors *must* move for a section 3E1.1(b) reduction when any defendant notifies the court of his or her intent to plead guilty in a timely manner.<sup>21</sup> Defendant Lashawn Dwayne Divens pled guilty to possession with intent to distribute cocaine, signing an acceptance of responsibility statement but declining to sign a plea agreement waiving rights to appellate review and collateral attack.<sup>22</sup> Consequently, the district court refused to award Divens the additional one-level sentence reduction.<sup>23</sup>

The issue on appeal in *Divens* was whether the "legitimate government end" standard, governing prosecutorial discretion concerning section 5K1.1 "substantial assistance" reductions, applied similarly to section 3E1.1(b) reductions.<sup>24</sup> The Fourth Circuit held that it did not.<sup>25</sup> Thus, the court ruled that the Government could not refuse to move for a section 3E1.1(b) modification because the defendant did not sign an appellate waiver when that defendant otherwise met the criteria set forth by the acceptance of responsibility provision.<sup>26</sup>

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and holding defendants can obtain additional adjustment only upon motion of government).

18. See *Deberry*, 576 F.3d at 710 (explaining government may not base refusal to file motion "on an invidious ground"); *United States v. Beatty*, 538 F.3d 8, 14-15 (1st Cir. 2008) (comparing substantial assistance and acceptance of responsibility provisions and noting that both condition sentence adjustment on government's decision to file motion); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008) (holding defendant's refusal to waive right to appeal was proper basis for Government to decline to make motion); *Moreno-Trevino*, 432 F.3d at 1186 (qualifying broad discretion by noting government's "broad discretion . . . is not unfettered" (internal quotation marks omitted)).

19. 650 F.3d 343 (4th Cir. 2011)

20. See *id.* at 347 (recognizing holding "does not accord with that of other circuits").

21. See *id.* at 346 ("Accordingly, once the Government has determined that a defendant 'has tak[en] the steps specified in subsection (b),' he becomes entitled to the reduction." (alteration in original) (quoting § 3E1.1 cmt. background)).

22. See *id.* at 344 (discussing facts of case). For a further discussion of the facts, see *infra* notes 68-73 and accompanying text.

23. See *Divens*, 650 F.3d at 344-45 (providing procedural background).

24. See *id.* at 345 (admitting that if legitimate government end standard did control instant case, Government would have acted appropriately in electing not to move for additional reduction).

25. See *id.* at 348, 350 (summarizing plain-language arguments supporting holding).

26. See *id.* at 348 (interpreting § 3E1.1(b) as instructive for government in determining whether notice of guilty plea was timely, and holding provision "does

This Note argues that, although the Fourth Circuit correctly interpreted section 3E1.1(b) and the accompanying comments to limit prosecutorial discretion, its holding could have potentially disastrous fundamental and pragmatic implications.<sup>27</sup> As it stands, federal prosecutors in the Fourth Circuit will no longer be able to refuse to move for a section 3E1.1(b) sentence reduction when a defendant refuses to waive the right to an appeal.<sup>28</sup> Appeal waivers are important tools used to ensure the efficient allocation of appellate resources, and until the *Divens* decision, prosecutors could use the acceptance of responsibility sentence modification to incentivize defendants to sign them when appropriate.<sup>29</sup>

A majority of circuits have upheld the validity of appellate waivers, and Congress should ensure their continued success in conserving resources by giving the government the ability to execute them properly.<sup>30</sup> Therefore, Congress should re-draft section 3E1.1(b) to allow federal prosecutors discretion tantamount to that afforded them in deciding to move for section 5K1.1 substantial assistance motions.<sup>31</sup> Alternatively,

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not permit the Government to withhold a motion for a one-level reduction because the defendant has declined to perform some other act to assist the Government”).

27. See Simons, *supra* note 11, at 355 (recommending prosecutors embrace their role in seeking sentencing justice, and encouraging them to “develop charging policies that are fair, rational, and consistently based on the principles of punishment”). Because of limitations on resources and a call for individualized justice, it is difficult to envision a system that does not afford prosecutors the authority to make charging decisions or, when appropriate, to execute plea agreements. See DAVIS, *supra* note 9, at 13 (explaining need for prosecutorial discretion). The *Divens* holding curtails prosecutorial discretion significantly by removing an instrument prosecutors could use to facilitate plea negotiations. See *id.* (acknowledging “[i]t is difficult to imagine a fair and workable system that does not include some level of measured discretion in the prosecutorial process”).

28. See *Divens*, 650 F.3d at 348 (explaining criteria for § 3E1.1(b)). The court explicitly instructed that the Government must base its decision to make a § 3E1.1(b) motion on whether the defendant had entered his guilty plea in a timely manner. See *id.* (proclaiming Government cannot withhold from moving for § 3E1.1(b) reduction because defendant “refused to assist the prosecution in other ways”) Thus, federal prosecutors in the Fourth Circuit will no longer be able to use a defendant’s refusal to sign an appellate waiver as a justification for refusing to file a § 3E1.1(b) motion. See *id.* (explaining definitive criteria for § 3E1.1(b) motion).

29. See *United States v. Bushert*, 997 F.2d 1343, 1345 (11th Cir. 1993) (holding that waivers, like guilty pleas, must be made knowingly and voluntarily to be effective).

30. See *id.* at 1350 (recognizing waiver of right to appeal as valid); *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992) (same); *United States v. Rivera*, 971 F.2d 876, 896 (2d Cir. 1992) (same); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992) (same), *overruled on other grounds* by *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (same); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) (same).

31. See *Wade v. United States*, 504 U.S. 181, 182 (1992) (explaining defendant would only be entitled to relief if “prosecutor’s refusal to move was not rationally related to any legitimate Government end”). In *Wade*, the Supreme Court further

Congress could re-draft the subsection changing the criteria from timeliness of notification to requiring the signing of an appeal waiver.<sup>32</sup> Otherwise, inaction may risk inviting continued conflicting interpretations of the poorly drafted provision, resulting in an unnecessary burden on prosecutorial resources and federal courts.<sup>33</sup>

Part II provides an overview of the Federal Sentencing Guidelines, specifically, the promulgation and subsequent interpretation of the section 3E1.1(b) acceptance of responsibility provision.<sup>34</sup> Part III details the factual background, procedure, and rationale of the Fourth Circuit's decision in *United States v. Divens*.<sup>35</sup> Part IV discusses the pragmatic and fundamental ramifications of this decision and provides a recommendation that section 3E1.1(b) be re-drafted to allow federal prosecutors the discretion to refuse to move for the reduction unless the defendant signs an appellate waiver.<sup>36</sup>

## II. LEVERAGING JUSTICE: PROSECUTORIAL DISCRETION INCREASED BY FEDERAL SENTENCING GUIDELINES AND SUBSEQUENT AMENDMENTS

Recognizing the need for broad reform of federal sentencing, the statutorily created U.S. Federal Sentencing Commission (the Commission) introduced the Guidelines in 1987.<sup>37</sup> Amongst the provisions of the U.S. Sentencing Guidelines Manual is section 3E1.1, which provides a sentence reduction for defendants who demonstrate that they have accepted responsibility for their actions.<sup>38</sup> Section 3E1.1 further advances the goals of the broader sentencing reform by rewarding defendants who plead

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explained that, under the substantial assistance provision, while "a showing of assistance is a necessary condition for relief, it is not a sufficient one." *Id.* at 187.

32. *See* *United States v. Deberry*, 576 F.3d 708, 710 (7th Cir. 2009) (holding Government's refusal valid when based on defendant's failure to sign waiver); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008) (allowing Government to refuse based on defendant's failure to sign waiver because justification is "rationally related to the purpose of the rule and is not based on an unconstitutional motive").

33. *See* *Brady v. United States*, 397 U.S. 742, 748 (1970) (describing prevalence of, and need for, plea bargaining in criminal justice system).

34. For a further discussion of the Federal Sentencing Guidelines and § 3E1.1(b)'s acceptance of responsibility provision, see *infra* notes 37-64 and accompanying text.

35. For a further discussion of the facts, holding, and rationale of *Divens*, see *infra* notes 65-89 and accompanying text.

36. For a further discussion of the implications of the Fourth Circuit's decision, see *infra* notes 90-137 and accompanying text.

37. *See generally* Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291 (1993) (explaining history of Guidelines and critiquing Commission's efforts).

38. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2011) (providing acceptance of responsibility reduction).

guilty when appropriate, thereby lessening the burden on the criminal justice system.<sup>39</sup>

A. *The Federal Sentencing Guidelines: A New Deal*

Before the promulgation of the Federal Sentencing Guidelines in 1987, federal judges enjoyed substantial discretion to impose any statutorily permissible sentence for a crime.<sup>40</sup> Although the Supreme Court generally regarded this as a “salutary and progressive evolution in the law,” there was a growing legislative movement for a wholesale reform of the system.<sup>41</sup> The primary motivation behind these efforts was to address sentencing disparities that had become endemic to the system, but proponents of sentencing reform were also concerned about ensuring the certainty of punishments, the need to curtail time off for good behavior, and the importance of appellate review of sentencing.<sup>42</sup> While the genesis of this movement toward reform can be traced as far back as the early 1970s, Congress did not pass the Sentencing Reform Act until 1984.<sup>43</sup> The enabling legislation delegated the task of promulgating the new sentencing guidelines to the statutorily created Commission, and so began the long and perilous road to implementing a new federal sentencing policy that would mark a shift away from the rehabilitative paradigm of the pre-Guidelines era.<sup>44</sup>

39. For a further discussion of the justifications underlying § 3E1.1, see *infra* notes 52-56 and accompanying text.

40. See Ricardo Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 5 (2010) (noting federal sentencing system prior to Guidelines “posited that judges should tailor a sentence to each individual defendant’s prospects for rehabilitation”).

41. See *id.* at 5-6 (describing early proponents of federal sentencing reform who “clamored for a reversion to a system of like punishments for like crimes”); Feinberg, *supra* note 37, at 294-95 (depicting events leading to enactment of Sentencing Reform Act of 1984 including drafting of Model Penal Code, establishment of Brown Commission, and other early congressional initiatives).

42. See Feinberg, *supra* note 37, at 295 (“Evidence that similar offenders convicted of similar offenses received, at times, grossly dissimilar criminal punishment struck a critical nerve among key legislators.”).

43. See *id.* (recounting history of reforms leading to Guidelines). Congress was only able to pass the Sentencing Reform Act by divorcing the sentencing reform prerogatives from the proposed substantive criminal law reforms. See *id.* (explaining Congress’s prior attempts to implement sentencing reforms were hindered by heated debate surrounding broader reforms of federal criminal code).

44. See *id.* (considering challenges Commission faced in creating Guidelines). Congress decided to delegate this important task to the Commission because it did not have the time or expertise to manufacture the complex guidelines matrix that the reform called for. See *id.* at 297 (detailing Commission’s origins). As one scholar argues, this difficult undertaking was made more problematic by ambiguities and limitations present in the enabling legislation. See *id.* at 299-302 (listing problems, which included Congress’s failure to prioritize one philosophical approach, explain role of offender characteristics, evaluate impact of past sentencing procedure, and provide guidance on purposes of sentencing). Interestingly, the decision to reform was accompanied by the realization that “the well-intentioned

The stated mission of the Federal Sentencing Guidelines, ultimately completed in 1987, was to “further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.”<sup>45</sup> The Commission also articulated three major objectives in the introductory commentary to the manual: to increase honesty by eliminating the indeterminate nature of sentencing, to achieve reasonable uniformity in sentencing by reducing the disparity of sentences, and to strive to ensure proportionality in sentencing crimes of varying degrees of severity.<sup>46</sup> The product of the Commission’s work was a complex matrix of recommended minimum and maximum sentencing ranges—a system which takes into consideration characteristics of both the charged offense and the offender.<sup>47</sup> More specifically, defendants’ sentencing ranges are now determined by assessing and ultimately combining two mathematical scores—one for the seriousness of the offense and the other for the defendant’s criminal history.<sup>48</sup>

Not surprisingly, this complex grid system, which boasts increased sentencing severity, a diminished interest in rehabilitation, and fewer opportunities for sentencing mitigation, has been the source of heated scholarly debate.<sup>49</sup> Despite this, the promulgation of the Guidelines ultimately

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but misguided notion of compelled rehabilitation as a goal of imprisonment could no longer be justified.” *Id.* at 298.

45. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt., at 2 (2011) (explaining Sentencing Reform Act’s basic objective “to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system”).

46. *See id.* (recognizing major objectives of Guidelines). The commentary calls attention to the pragmatic limitations of the Commission’s undertaking, recognizing that “[a] sentencing system tailored to fit every conceivable wrinkle of each case would quickly become unworkable and seriously compromise the certainty of punishment and its deterrent effect.” *Id.* at 3. The Commission also called attention to an underlying tension between a retributive philosophy and the utilitarian aims of deterrence that further frustrated the process. *See id.* at 4 (describing ideological conflicts undermining Commission’s efforts). Notwithstanding the ideological problems, the commentary emphasizes that the Guidelines are the product of “an approach that begins with, and builds upon, empirical data.” *See id.* at 4-5 (acknowledging Guidelines do not accord perfectly with any individual philosophical theory of punishment). An important example of one of the major reforms implemented by the Guidelines is the change to a “charge offense” system with significant “real offense” elements; that is, focusing on the particular aspects of a defendant’s conduct beyond the elements of the crime charged. *See id.* at 6 (“[T]he Guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, . . . specific offense characteristics, cross references, and adjustments.”).

47. *See Bryant, supra* note 16, at 1271 (“Theoretically, the system increases uniformity in sentencing by narrowing the range of possible sentences . . . for various criminal conduct.” (footnote omitted)).

48. *See Simons, supra* note 11, at 316 (explaining changes in federal sentencing after Guidelines).

49. *See Bascuas, supra* note 40, at 3-4 (condemning Federal Sentencing Guidelines as reflecting “calculated and deliberate inquisitorial agenda”); Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal*

resulted in broader systemic changes to sentencing law, as “appellate review of sentencing emerged as the primary enforcement mechanism for sentencing reform in federal courts as well as in the courts of more than a dozen states.”<sup>50</sup> Although the Supreme Court has held the Guidelines to be advisory in nature, they continue to remain influential, particularly by conferring upon federal prosecutors substantial influence over the sentencing process.<sup>51</sup>

#### B. Section 3E1.1: Rewarding Responsibility

Section 3E1.1, the acceptance of responsibility provision, is consistent with the broader goals of the Guidelines.<sup>52</sup> Cognizant of the abundance of—and necessity for—plea bargaining in the American criminal justice system, the Commission designed this section and the broader Guidelines to facilitate the continued negotiation of guilty pleas by creating (i) clearer expectations with respect to sentences and (ii) norms to which courts could refer when deciding whether to accept or reject plea agreements.<sup>53</sup> Even more than other provisions, however, section 3E1.1’s justi-

*Mandatory Minimums*), 56 STAN. L. REV. 1017, 1020 (2004) (arguing that Federal Sentencing Guidelines are not overly harsh, rather they “impose the kind of punishment that society expects for serious federal offenses”); Feinberg, *supra* note 37, at 294 (“[W]hile problems with the Commission’s guidelines do exist, as a whole, the Commission has accomplished its principal goals.”); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (criticizing effect of substantial assistance provision because often defendants of higher culpability receive less severe punishment because they have more to offer as informants).

50. See King & O’Neill, *supra* note 5, at 215 (describing Sentencing Reform Act’s effect on systemic growth and reform of sentencing law). Prior to the Sentencing Reform Act, there were not many grounds upon which a defendant could appeal a given sentence resulting from a guilty plea. See *id.* at 219 (“Because defendants waived most pretrial and trial rights when pleading guilty, and because sentencing appeals were futile, criminal appeals were primarily reserved for those few defendants who were convicted after trial.”). The introduction of the Guidelines, however, provided hundreds of issues for defendants to raise on appeal subsequent to a guilty plea. See *id.* at 219-20 (“The hope of avoiding these sorts of challenges motivated prosecutors to include appeal waivers in plea agreements.”).

51. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (declaring “Guidelines effectively advisory”); Bascuas, *supra* note 40, at 32 (“Significantly, this ruling rendered the Guidelines themselves neither unconstitutional nor unworkable.”); Simons, *supra* note 11, at 306 (describing *Booker*’s influence on Guidelines and contending holding had effect of increasing federal prosecutorial discretion).

52. See Bryant, *supra* note 16, at 1273 (describing how acceptance of responsibility provision engenders many of Commission’s broader goals by “encouraging a defendant to accept responsibility for his conduct, ensuring efficient and certain punishment, and avoiding potentially lengthy, costly, and emotionally challenging trials” (footnotes omitted)).

53. See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A., introductory cmt., at 7 (2011) (noting approximately ninety percent of all federal cases involve guilty pleas). Furthermore, excerpts from the Introductory Comment reveal the Commission’s concern for the continuation of plea negotiations: “Some commentators on early Commission guideline drafts urged the Commission not to attempt any major reforms of the plea agreement process on the grounds that any set of guide-

fications are comparable to the policy reasons for plea agreements: that defendants who accept responsibility for their actions are less likely to engage in recidivist behaviors, and that courts, by historically rewarding defendants who do plead guilty, lessen the burden on the criminal justice system.<sup>54</sup> Again, section 3E1.1 mitigates the severity of a defendant's sentence in two ways: subsection (a) provides for a two-level reduction for defendants who demonstrate acceptance of responsibility, and subsection (b) provides for a *further* one-point reduction for defendants who notify the government of their intent to plead in a timely manner.<sup>55</sup> The courts, long recognizing the legitimacy of rewarding cooperation with lessened sentences, have upheld the constitutionality of section 3E1.1 as a general matter.<sup>56</sup>

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lines that threatened to change pre-guidelines practice radically also threatened to make the federal system unmanageable." *Id.* Perhaps most importantly, the commentary stresses that, as a result of the Guidelines, prosecutors and defense attorneys would no longer have to "work in the dark" while negotiating pleas. *See id.* at 8 ("This fact alone should help to reduce irrationality in respect to actual sentencing outcomes.").

54. *See Brady v. United States*, 397 U.S. 742, 752 (1970) (recognizing preservation of prosecutorial and judicial resources as sound justifications for plea bargaining); Bryant, *supra* note 16, at 1273-74 ("Section 3E1.1 provides reductions that recognize pleas as an acceptable and important element in the sentencing process.").

55. *See* § 3E1.1 (providing acceptance of responsibility reduction).

56. *See, e.g., United States v. Rogers*, 921 F.2d 975, 983 (10th Cir. 1990) (upholding validity of § 3E1.1). In *Rogers*, the defendant, charged with various offenses arising from a heroin smuggling conspiracy, argued that his Fifth Amendment right against self-incrimination was violated "by a perceived requirement under § 3E1.1 that he further incriminate himself, or be 'punished' by not receiving the two-point reduction." *See id.* at 975-77 (providing facts and procedural background). The Tenth Circuit Court of Appeals first identified the faulty premise upon which Rogers' argument was founded, explaining that Rogers was not necessarily required to plead guilty to receive the reduction. *See id.* at 982 (indicating § 3E1.1's commentary points to variety of ways acceptance of responsibility can be demonstrated). Rather than characterizing the provision as administering additional punishment to a silent defendant, this court described the provision as "extend[ing] leniency to a defendant who is willing to cooperate with the government." *See id.* at 982-83 (citations omitted) (internal quotation marks omitted) ("There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level."); *see also Corbitt v. New Jersey*, 439 U.S. 212, 219 (1978) ("We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea."). Before the promulgation of the Guidelines, the Supreme Court held that it is acceptable for a statute to incentivize guilty pleas by offering leniency in exchange for cooperation. *See Corbitt*, 439 U.S. at 219-21 ("It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."); *see also* § 3E1.1 cmt. n.2 (providing criteria for acceptance of responsibility reduction). Interestingly, the comment to the provision itself notes that the "adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial," but goes on to explain how, in certain situations, a defendant who takes his or her case to court may be deter-

The general policy rationale supported by section 3E1.1 came under scrutiny with the expansion of prosecutorial discretion via a 2003 amendment of subsection 3E1.1(b).<sup>57</sup> The amendment provided that defendants could now only enjoy an additional one-level sentence reduction under subsection (b) for timely cooperation “upon motion of the government.”<sup>58</sup> All of the circuits, until recently, have construed this to be a broad expansion of prosecutorial discretion, holding that federal prosecutors may refuse to move for a section 3E1.1(b) modification for any reason as long as it serves a legitimate government purpose and the refusal was not made with an unconstitutional motive.<sup>59</sup> The circuit courts that conferred this substantial discretion relied primarily on the similarity of language between the modified section 3E1.1(b) and section 5K1.1, the latter providing 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.”<sup>60</sup> Based on these similarities, a majority of circuits have seen fit to graft the “legitimate government purpose” standard upon the amended section 3E1.1(b) motion.<sup>61</sup> These courts have also looked

mined to have demonstrated an acceptance of responsibility. § 3E1.1 cmt. n.2. The comment in its entirety reads:

This 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. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, 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). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

*Id.*

57. See PROTECT Act, Pub. L. No. 108-21, § 401(g) (2003) (amending § 3E1.1(b)).

58. *Id.*

59. See, e.g., *United States v. Johnson*, 581 F.3d 994, 1001 (9th Cir. 2009) (indicating prosecution’s refusal to file motion must not be “animated by an unconstitutional motive” or “not racially related to a legitimate government interest”); *United States v. Deberry*, 576 F.3d 708, 710-11 (7th Cir. 2009) (same); *United States v. Beatty*, 538 F.3d 8, 14 (1st Cir. 2008) (same); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008) (same); *United States v. Moreno-Trevino*, 432 F.3d 1181, 1186 (10th Cir. 2005) (same); *United States v. Smith*, 422 F.3d 715, 726 (8th Cir. 2005) (same).

60. § 5K1.1; see, e.g., *Moreno-Trevino*, 432 F.3d at 1185-86 (observing “the language in the amended Section 3E1.1 resembles the language found in Section 5K1.1”).

61. See § 5K1.1 (providing grounds for substantial assistance reduction). The provision reads:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another per-

beyond the similarities of the provisions to the circumstances of the amendment of section 3E1.1(b), emphasizing that the addition of the government motion requirement signifies a legislative intent to grant prosecutors significant discretion.<sup>62</sup> Such an interpretation has had the positive pragmatic effect of allowing prosecutors to use the section 3E1.1(b) one-level reduction to further incentivize the execution of appeal waivers.<sup>63</sup> Given the extensive criticism of the Guidelines and the controversial nature of appeal waivers, however, one might be surprised to note how the circuit courts lined up to entrust this significant discretion to federal prosecutors—that is, until the Government made Lashawn Divens an offer he thought he couldn't refuse.<sup>64</sup>

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son who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

*Id.* In *United States v. Moreno-Trevino*, the Tenth Circuit, having found this language to be decisively similar to § 3E1.1, grafted the Supreme Court's interpretation of § 5K1.1 onto the provision at issue. See *Moreno-Trevino*, 432 F.3d at 1186 (describing § 3E1.1(b) as conferring upon the government "a power, not a duty"); see also *Wade v. United States*, 504 U.S. 181, 187 (1992) (holding that when determining whether to file § 5K1.1 substantial assistance motion, prosecutor's decision to refuse must be based on legitimate government interest, which may simply be "rational assessment of the cost and benefit that would flow from moving"). For a thorough discussion of § 5K1.1 substantial assistance motions and cooperation, see Baer, *supra* note 6.

62. See *Beatty*, 538 F.3d at 15 (recognizing "[i]f the government were required to move for the third-level reduction when the defendant enters a timely plea . . . the amended language requiring that the government file a motion would be a nullity"). In *Beatty*, the court explained "the touchstone of § 3E1.1 is no longer trial preparation, but rather the presence of a government motion for the third-level reduction." *Id.* at 16. The *Beatty* court further noted that the decision to move no longer hinges solely on the timeliness of the plea, but on whether the government is satisfied that the defendant genuinely accepts responsibility. See *id.* (explaining new criteria).

63. See *Deberry*, 576 F.3d at 710-11 (holding Government may refuse § 3E1.1(b) reduction because of defendant's failure to sign waiver); *Newson*, 515 F.3d at 378 (allowing Government to decline moving for § 3E1.1(b) reduction for any legitimate government purpose).

64. See *Deberry*, 576 F.3d at 710-11 (upholding refusal of § 3E1.1 reduction); *Beatty*, 538 F.3d at 14 (same); *Newson*, 515 F.3d at 378 (same); *Moreno-Trevino*, 432 F.3d at 1186 (same); *United States v. Smith*, 422 F.3d 715, 726 (8th Cir. 2005) (same). But see *United States v. Divens*, 650 F.3d 343, 350 (4th Cir. 2011) (limiting prosecutorial discretion regarding § 3E1.1(b) motions).

III. *UNITED STATES V. DIVENS*: THE FOURTH CIRCUIT TELLS THE GOVERNMENT TO “ACCEPT RESPONSIBILITY” AND MOVE FOR ONE-POINT REDUCTION WHEN APPROPRIATE

In *Divens*, the Fourth Circuit confronted the issue after the trial judge denied the defendant, Lashawn Divens, a section 3E1.1(b) one-level reduction for refusing to sign an appeal waiver.<sup>65</sup> The Fourth Circuit dealt a blow to federal prosecutorial discretion by declining to allow the Government to refuse to move for section 3E1.1(b) reduction for “any legitimate Government end.”<sup>66</sup> Although this holding will have the undesirable outcome of straining prosecutorial and court resources, it was reached through a convincing argument relying on an analysis of the plain language and comments accompanying section 3E1.1(b).<sup>67</sup>

A. *Facts and Procedure of Divens*

In May 2009, a federal grand jury charged Lashawn Divens with one count of possession with intent to distribute crack cocaine.<sup>68</sup> Subsequently, Divens refused an offer for a plea agreement from the Government, declining to waive certain rights to appellate review and collateral attack.<sup>69</sup> Despite this initial refusal, Divens filed a motion the next day notifying the federal district court of his intent to plead guilty.<sup>70</sup> After pleading guilty without the benefit of the plea agreement, the probation officer prepared a pre-sentence report recommending that Divens receive the acceptance of responsibility two-level reduction pursuant to section 3E1.1(a) but not the additional one-level reduction under section 3E1.1(b).<sup>71</sup> Although Divens notified the court of his intent to plead guilty in a timely manner, the probation officer only recommended the two-level reduction under subsection (a) because Divens’ failure to sign the appellate waiver made it unlikely that the Government would move for

65. *Cf. Divens*, 650 F.3d at 344 (“At the sentencing hearing, the Government contended that its refusal to move for the additional reduction was ‘rationally related to the purposes of the guidelines’ because it allowed the Government to avoid defense of ‘a complete appeal’ and ‘allocate its resources to other matters.’”).

66. *See id.* at 347 (holding 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, as with § 5K1.1, on the basis of any conceivable legitimate interest”).

67. *See id.* (reaching different conclusion than majority of other circuit courts, reasoning that these sister courts overlooked important commentary to § 3E1.1 that “forecloses courts from relying on § 5K1.1 cases in interpreting § 3E1.1(b)”).

68. *See id.* at 344 (providing facts).

69. *See id.* (noting that waiver would “bar[ ] him from appealing any sentence that did not exceed the Guidelines range and from mounting any collateral attack not based on ineffective assistance of counsel”).

70. *See id.* (noting Divens signed acceptance of responsibility statement, admitting his guilt and remorse for committing crime charged).

71. *See id.* (providing probation officer’s recommendations from presentence report).

the additional one-level reduction provided for in subsection (b).<sup>72</sup> At the sentencing hearing, the district court overruled an objection posed by Divens, holding that the Government's refusal to move for the additional reduction was permissible because avoiding a complete appeal and properly allocating prosecutorial resources were goals "rationally related to the purposes of the Guidelines."<sup>73</sup>

B. *The Fourth Circuit's Ruling in Divens: Analyzing Section 3E1.1(b) and Curtailing Federal Prosecutorial Discretion*

The Fourth Circuit Court of Appeals considered the district court's ruling a raw deal for the defendant.<sup>74</sup> The court began its analysis by comparing sections 3E1.1(b) and 5K1.1, as well as their respective commentaries, in order to distinguish the standard of discretion in the instant case from that which the Supreme Court had previously decided governed section 5K1.1.<sup>75</sup> Looking to the commentary, the court identified language accompanying section 3E1.1(b) that had no equivalent in the comments describing section 5K1.1 motions.<sup>76</sup> Perhaps most importantly, the court

72. *See id.* (describing Divens's objection to calculation was premised on notion that his unwillingness to execute appellate waiver was not sufficient justification for Government's refusal to file motion).

73. *See id.* (internal quotation marks omitted) (explaining how court ultimately adopted probation officers' suggested downward departure from standard Guideline range to thirty-six-months imprisonment).

74. *See id.* at 350 (vacating Divens's sentence).

75. *See id.* at 345-46 (acknowledging issue of whether or not standard developed in *Wade v. United States* governs § 3E1.1(b) was yet undecided); *see also* *Wade v. United States*, 504 U.S. 181, 185 (1992) (holding that prosecutors may decline to move for § 5K1.1 substantial assistance motion for any legitimate government purpose). In *Wade*, the defendant, indicted for possession and distribution of cocaine, assisted law enforcement officials by giving them evidence that led to the arrest of another drug dealer. *See id.* at 183 (recounting facts). The Government ultimately refused to file a motion for the substantial assistance reduction, and the defendant appealed. *See id.* (explaining procedural background). The Court afforded prosecutors extensive discretion when deciding whether to move for the reduction, explaining that a "prosecutor's discretion when exercising that power is [only] subject to constitutional limitations that district courts can enforce." *Id.* at 185 (holding defendant failed to demonstrate refusal was based on unconstitutional motive).

76. *See Divens*, 650 F.3d at 345-46 (considering precise wording of two excerpts from commentary). Looking to the applicable commentary, the court excerpted the following: "[s]ubsection (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)." *Id.* at 346 (alterations in original) (quoting U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) cmt. n.6 (2011)). The court extracted the following from the background commentary: "[s]uch 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." *Id.* at 346 (alterations in original) (quoting § 3E1.1(b) cmt. background). Importantly, the court notes that the explanation present in this commentary is absent from that accompanying the substantial assistance provision. *See id.* (comparing comments accompanying acceptance of responsibility and substantial assistance provisions).

called attention to the mandatory terms included in the comment to the acceptance of responsibility provision that were notably absent from the substantial assistance adjustment.<sup>77</sup> Ultimately, the court suggested that, because the explanation describing the provision for a section 3E1.1(b) motion is more definite and the criteria more apparent, the government should be afforded less latitude in deciding whether to execute the motion.<sup>78</sup> Consequently, this close comparison of the two commentaries led the court to clarify that “although the Government’s motion is necessary, the decision to file such a motion under section 3E1.1(b) involves far less expansive governmental discretion than under § 5K1.1.”<sup>79</sup>

1. *Departing from the Trend: The Fourth Circuit Acknowledges and Defends Its Deviation from the Majority*

The court acknowledged the holding as a departure from the current trend and went on to criticize the rationale of its sister courts.<sup>80</sup> It began by contending that the other circuits relied “almost exclusively” on the fact that Congress amended the provision in 2003 without truly delving into the commentary that accompanied the changes.<sup>81</sup> Moreover, the court posited that if Congress intended to afford the government authority tantamount to that of the substantial assistance enhancement it could have done so expressly, by writing corresponding commentaries in both provisions.<sup>82</sup> Following this “deal-breaker” of an argument, the court addressed the arguments set forth by the Government, which were notably different

77. *See id.* at 346-47 (comparing comments accompanying provisions).

78. *See id.* (comparing § 3E1.1(b) commentary to § 5K1.1). The court looks to the language of § 3E1.1(b)’s commentary to emphasize that its interpretation does not obliterate discretion entirely. *See id.* at 346 (“[T]he Government retains discretion to determine *whether* the defendant’s assistance has relieved it of preparing for trial.”). However, the court clarifies that “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.” *Id.* Thus, the court looks to deliberate choices in language, such as “provides,” “thereby,” and “meriting,” to suggest that all a defendant must do is meet the listed criteria in order to benefit from the sentence modification. *See id.* (justifying interpretation). Because the language describing the criteria for § 3E1.1(b) is more definite than the comment for § 5K1.1, the government has less latitude in deciding whether or not to move for the modification. *See id.* (comparing language).

79. *Id.* at 345-46. The court continued: “Both of these comments indicate that the Government does not possess the wide discretion afforded by § 5K1.1 in deciding whether to move for the additional one-level reduction provided in § 3E1.1(b).” *Id.* at 346.

80. *See id.* at 347 (critiquing rationale of other circuits).

81. *See id.* (“But nothing in the 2003 reforms evinces such an intent.”).

82. *See id.* (explaining how Congress “instead left unchanged § 3E1.1(b)’s mandatory commentary and inserted language suggesting that the Government’s newfound discretion applies only to the question of ‘whether the defendant has assisted authorities in a manner that avoids preparing for trial’” (quoting § 3E1.1(b) cmt. n.6)).

than those supported by the rationale of the majority of the circuits.<sup>83</sup> At this juncture, the court landed on what was really at the heart of the bargain—that which the Government feared losing the most—the ability to use section 3E1.1(b) motions to incentivize the execution of appellate waivers.<sup>84</sup>

2. *Addressing the Government's Arguments: Reprimanding Federal Prosecutors for Deviating from Specific Criteria*

The Government contended, as a matter of policy, that appellate waivers are important to the conservation of appellate resources, an interest that is closely related to those engendered by section 3E1.1(b).<sup>85</sup> While the court tentatively acknowledged the importance of appellate waivers, it dismissed the Government's argument with a simple, but accurate, plain-language contention: the provision explicitly specifies the required form of assistance to be "timely notifying authorities of his intention to enter a plea of guilty."<sup>86</sup> Thus, the court contended, by its very language, the only discretion the provision affords prosecutors is to determine whether the plea was entered in a timely manner; "[i]t does not permit the Government to withhold a motion for a one-level reduction because the defendant has declined to perform some other act to assist the Government."<sup>87</sup> Moreover, the court looked to several phrases in the provision's language that suggested the Commission was concerned with the allocation of trial resources rather than appellate resources.<sup>88</sup> Finally, the court refuted the Government's argument that the conservation of ap-

83. *See id.* ("Tellingly, the Government never explicitly defends this approach or contends that it enjoys the same expansive discretion under § 3E1.1(b) as it does under § 5K1.1.").

84. *See id.* at 348 (noting that Divens refused to sign appellate waiver). For a further discussion of the importance of appeal waivers, see *infra* notes 93-122 and accompanying text.

85. *See Divens*, 650 F.3d at 348 ("First, the Government maintains that an appellate waiver, like the one that Divens refused to sign, serves its interest in 'avoid[ing] the expense and uncertainty of having to defend defendant's conviction and sentence on appeal and collateral attack.'" (alteration in original) (citation omitted)).

86. *Id.* (quoting § 3E1.1(b)) (internal quotation marks omitted). The court looks to the precise language of the provision, explaining that the assistance required for the one-level reduction is an explicitly designated form of assistance that does not include the signing of an appeal waiver. *See id.* (bolstering plain-language argument).

87. *Id.* (emphasizing specificity of criteria).

88. *See id.* (analyzing language of provision). The court emphasizes the use of the term "court" rather than "courts," suggesting that while contemplating the purpose of the provision, the Commission considered the conservation of resources at the trial "court," rather than the trial and appellate "courts." *See id.* (demonstrating Commission's concern for conservation of trial resources only). The court also emphasized the context in which the term was used and how the language of § 3E1.1(b) focuses on the use of term "trial." *See id.* (analyzing context surrounding term "courts").

pellate resources is “closely related” to the interests recognized by section 3E1.1(b), noting that the provision “requires the Government to consider the specific factors articulated in the guideline itself, not some other criterion that it believes to be ‘closely related’ to the textual requirement.”<sup>89</sup>

#### IV. THE RAMIFICATIONS OF *DIVENS*: A RAW DEAL FOR FEDERAL PROSECUTORS?

As a result of *Divens*, federal prosecutors in the Fourth Circuit will no longer be able to require defendants to sign appeal waivers in order to benefit from the section 3E1.1(b) reduction.<sup>90</sup> Undeniably, this decision will exact a toll on federal prosecutorial resources, a result that courts upholding the validity of appeal waivers would probably reject.<sup>91</sup> More fundamentally, the Fourth Circuit’s decision constitutes a meaningful curtailment of federal prosecutorial discretion that is contrary to the holdings of the other circuits and the Supreme Court.<sup>92</sup>

89. *Id.* at 349.

90. *See id.* (limiting federal prosecutorial discretion by refusing to “stretch the Guidelines’ plain language to facilitate the Government’s pursuit of such waivers”).

91. *See* United States v. Andis, 333 F.3d 886, 894 (8th Cir. 2003) (recognizing validity of appeal waiver signed knowingly and voluntarily); United States v. Howle, 166 F.3d 1166, 1168 (11th Cir. 1999) (likening plea agreements to contracts and explaining “[a]mong the considerations that a defendant may offer as part of such a contract is waiver of his right to appeal, provided that the waiver is made knowingly and voluntarily”); United States v. Agee, 83 F.3d 882, 886 (7th Cir. 1996) (holding “specific dialogue with the judge is not a necessary prerequisite to a valid waiver of appeal”); United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993) (holding waivers, like guilty pleas, must be made knowingly and voluntarily to be effective); United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992) (“We hold that a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence.”); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992) (providing example of plea agreement containing appeal waiver); United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990) (holding appeal waiver is not violation of due process but qualifying that “a waiver of the right to appeal would not prevent an appeal where the sentence imposed is not in accordance with the negotiated agreement”); United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990) (reasoning that if defendants can waive other fundamental constitutional rights, “surely they are not precluded from waiving procedural rights granted by statute” (quoting United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989))).

92. *Compare Divens*, 650 F.3d at 347 (curtailing prosecutorial discretion under § 3E1.1), *with* United States v. Johnson, 581 F.3d 994, 1001 (9th Cir. 2009) (describing government’s power to exercise discretion), *and* United States v. Deberry, 576 F.3d 708, 710 (7th Cir. 2009) (explaining § 3E1.1(b) as conferring entitlement upon government), *and* United States v. Beatty, 538 F.3d 8, 14-15 (1st Cir. 2008) (construing prosecutorial discretion broadly), *and* United States v. Newson, 515 F.3d 374, 378 (5th Cir. 2008) (analogizing § 3E1.1(b) to § 5K1.1), *and* United States v. Moreno-Trevino, 432 F.3d 1181, 1186 (10th Cir. 2005) (describing limits of government’s broad discretion), *and* United States v. Smith, 422 F.3d 715, 726 (8th Cir. 2005) (explaining government refusal need only relate to “legitimate government end”).

A. *The Practical Effect: Inhibiting Federal Prosecutors' Use of Appeal Waivers*

Circuits encountering the issue have held that an appeal waiver is enforceable so long as it was made knowingly, intelligently, and voluntarily.<sup>93</sup> Ironically, the Fourth Circuit is amongst these courts, having recognized the constitutional validity of appeal waivers in *United States v. Wiggins*.<sup>94</sup> In *Wiggins*, the Fourth Circuit encountered the issue when the defendant, indicted on perjury charges, sought to appeal the court's refusal to grant an acceptance of responsibility reduction.<sup>95</sup> Ultimately, the court held

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93. See *Bushert*, 997 F.2d at 1350 (finding appeal waivers enforceable as long as they are made knowingly and voluntarily); *Melancon*, 972 F.2d at 568 (upholding plea agreement); *Rivera*, 971 F.2d at 896 (discussing appeal waiver); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992) ("We believe that such waivers should be given their proper effect."), *overruled by Andis*, 333 F.3d 886; *Navarro-Botello*, 912 F.2d at 321 (upholding appeal waiver); *Wiggins*, 905 F.2d at 53 (same). In *Bushert*, for instance, the defendant and his co-defendants were indicted on charges of conspiracy to possess with intent to distribute cocaine and crack cocaine. See *Bushert*, 997 F.2d at 1345 (providing facts). Unlike his co-defendants, the defendant's "negotiations with the Government became protracted . . . because the government believed that Bushert was not being completely truthful." *Id.* The defendant signed an appeal waiver as part of his guilty plea, which the other defendants did not do. See *id.* at 1346 (providing details of agreement). Ultimately, the defendant sought to withdraw his guilty plea and was denied. See *id.* (describing procedure subsequent to guilty plea). On appeal, the court considered the Government's claim that the defendant's "purported waiver of his right to appeal his sentence . . . , as stated in his plea agreement, prevents him from contesting his sentence." *Id.* at 1347. Confronting this issue of first impression, the court ultimately agreed with the reasoning of its sister circuits "that sentence appeal waivers may be enforced." *Id.* at 1350. When considering the justifications for appellate waivers, the court emphasized the importance of plea bargaining, noting that such waivers save the government time and money. See *id.* at 1347 (listing justifications for appeal waivers). Importantly, the court noted that bargained guilty pleas are "important components of this country's criminal justice system." *Id.* (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977)). For an example of an appeal waiver, see *NORMA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 789 (2d ed. 2007).

94. 905 F.2d 51, 53 (4th Cir. 1990). In *Wiggins*, the court confronted the issue of whether the defendant could appeal, "pursuant to 18 U.S.C. § 3742, the sentence imposed by the district court in connection with a plea agreement in which [the defendant] expressly waived his right to appeal his sentence." *Id.* at 51.

95. See *id.* (detailing events prior to defendant's indictment). The defendant, a witness to events surrounding the murder of a fellow prisoner, told federal investigators that he had seen another inmate in possession of a shank that was later used in the killing. See *id.* (recounting facts). When called before the grand jury, however, the defendant said that he had never physically seen the shank, and he was consequently indicted for perjury. See *id.* at 52 (describing circumstances of defendant's perjury charges). As a result of a bargain, the defendant "agreed to plead guilty to the obstruction charge in return for the government's dismissal of the perjury charge." *Id.* The court reviewed the sentence, suggested the possibility of a departure from the Federal Sentencing Guidelines, and reminded the defendant that by entering the guilty plea he would be waiving his right to appeal the sentence. See *id.* ("In each instance, [the defendant] indicated that he understood the consequences of his plea."). Ultimately, the district court rejected the defendant's request for the two-level acceptance of responsibility adjustment, and the defendant appealed. See *id.* (explaining basis of defendant's appeal). The Fourth

that the defendant could not challenge his sentence because he had expressly waived his right to appeal it.<sup>96</sup> The Fourth Circuit emphasized the well-established principle that a defendant may waive his or her constitutional rights, and that—as a result—plea agreements have become an “important component” of the modern criminal justice system.<sup>97</sup> The court further explained that if defendants could waive fundamental constitutional rights, they could also waive statutorily granted protections, such as the right to appeal a sentence as conferred by 18 U.S.C. § 3742.<sup>98</sup> Because

Circuit held that the defendant could not bring the appeal “because he expressly waived in his plea bargain any right he may have had to challenge his sentence.” *Id.* at 52; *see also id.* at 54 (“Wiggins waived his right for the purpose of obtaining certain concessions from the government and he may not now ignore his part of the bargain.”).

96. *See id.* at 52 (upholding appeal waiver).

97. *See id.* at 53 (“Indeed, plea bargaining is now accepted as an ‘important component [ ] of this country’s criminal justice system.’” (alteration in original) (quoting *Blackledge*, 431 U.S. at 71)).

98. *See id.* (“[I]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.” (quoting *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989))); *see also Navarro-Botello*, 912 F.2d at 321 (analogizing appellate waiver to waiver of other constitutional rights). In *Navarro-Botello*, the court agreed with the Fourth Circuit’s reasoning, finding that “it is not a due process violation for a defendant to waive, in an otherwise valid plea agreement, the statutory right of appeal.” *Navarro-Botello*, 912 F.2d at 321; *see also Melancon*, 972 F.2d at 576 (declaring right to appeal is statutory). In *Melancon*, the defendant was indicted for conspiring to distribute ecstasy, pled guilty, and, as a part of his plea agreement, waived his right to appeal the sentence. *See Melancon*, 972 F.2d at 567 (providing facts and terms of plea agreement). The defendant argued that his waiver was not made knowingly because the judge misstated the law by advising the defendant that he had the right to appeal when he had in fact already waived it. *See id.* at 568 (providing defendant’s argument). The Fifth Circuit rejected this argument, noting that the misstatement was made four months after the execution of the agreement and that, therefore, it could not have compromised the knowingness of the waiver. *See id.* (deciding defendant’s waiver was made knowingly and voluntarily). The Fifth Circuit reasoned that because the Supreme Court has repeatedly held that a defendant may waive constitutional rights in a plea agreement, “it follows that a defendant may also waive statutory rights, including the right to appeal.” *Id.* at 567; *see also* 18 U.S.C. § 3742 (2006) (granting statutory right to appeal of sentence). Section 3742 provides:

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

- (1) was imposed in violation of law;
- (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
- (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or
- (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

the circumstances surrounding the plea agreement established that the defendant's waiver was made voluntarily and intelligently, the court held that he "waived his right for the purpose of obtaining certain concessions from the government and he may not now ignore his part of the bargain."<sup>99</sup>

Courts and scholars have also explained that these waivers are beneficial for several public policy reasons.<sup>100</sup> First, appellate waivers—and plea bargains entered as a result of them—save the government time and money.<sup>101</sup> Second, and perhaps more important, "is the finality that results."<sup>102</sup> Moreover, appellate waivers enable public defenders to allocate their limited resources meaningfully, diminishing the amount of frivolous appeals.<sup>103</sup> Courts have even justified appellate waivers using a contracts analysis.<sup>104</sup> Notwithstanding these arguments, one district court and a minority of state courts have held that plea bargains cannot be conditioned upon defendants' willingness to sign appellate waivers because such waivers can never truly be made knowingly and voluntarily.<sup>105</sup>

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§ 3742(a).

99. *Wiggins*, 905 F.2d at 54.

100. See *Navarro-Botello*, 912 F.2d at 321-22 (illustrating "public policy strongly supports plea agreements"); Gregory P. LaVoy, Note, *Neither a "Moose" Nor a "Puppet": Defining a Lawyer's Role When Directed to Pursue an Appeal Notwithstanding a Valid Waiver of Appellate Rights*, 7 AVE MARIA L. REV. 265, 269 (2008) (explaining benefits of appellate waivers to judicial system); Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 879 (2010) ("Courts that hold these waivers enforceable under a due process analysis also explain that these waivers serve the public interest in finality, efficiency, and the preservation of resources in the criminal justice system.").

101. See *Navarro-Botello*, 912 F.2d at 322 ("[W]hen the State enters a plea bargain with a criminal defendant, it receives immediate and tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources." (alteration in original) (quoting *Town of Newton v. Rumery*, 480 U.S. 386, 393 n.3 (1987))); see also Reimelt, *supra* note 100, at 881 (explaining waivers "save the time and money spent on appellate review").

102. See *Navarro-Botello*, 912 F.2d at 322 ("[A] plea of guilty and resulting judgment of conviction 'comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.'" (quoting *United States v. Broce*, 488 U.S. 563, 569 (1989))); Lavoy, *supra* note 100, at 306 ("[W]here defendants find it in their interest to make a bargain one day, they cannot repudiate it without cause the next."); Reimelt, *supra* note 100, at 881 ("The court has explained that a chief virtue of plea bargains is finality, and that appeal waivers serve this interest by preserving the finality of convictions reached through guilty pleas.").

103. See LaVoy, *supra* note 100, at 271 (focusing on responsibilities of defendant's attorney to client when no right to appeal exists).

104. See, e.g., *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999) (using contract principles to justify execution of appellate waivers in plea bargaining). In *Howle*, the Eleventh Circuit reasoned that a plea agreement is, "in essence, a contract between the Government and a criminal defendant." *Id.*

105. See *United States v. Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997) (describing plea agreements with appeal waivers as contracts of adhesion). The court explained:

These outliers may be the result of a substantial disfavor of appellate waivers amongst commentators and scholars who advance several arguments for their invalidity.<sup>106</sup> First, opponents emphasize that defendants ordinarily sign appeal waivers before sentencing proceedings have occurred and, therefore, cannot possibly know exactly what they are waiving.<sup>107</sup> Second, appeal waivers come under fire because commentators contend their use results in drastically unequal bargaining positions, and that the resulting plea agreements constitute contracts of adhesion.<sup>108</sup> Furthermore, empirical research suggests that “the proportion of agreements with waiver clauses varie[s] widely among the circuits,” indicating that the courts are not using appellate waivers entirely consistently in practice.<sup>109</sup> One scholar explains the damaging effect appeal waivers can have

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The condition sought to be imposed by the government is inherently unfair; it is a one-sided contract of adhesion . . . . A defendant cannot knowingly, intelligently and voluntarily give up the right to appeal a sentence that has not yet been imposed and about which the defendant has no knowledge as to what will occur at the time of sentencing.

*Id.*; accord *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) (“If such bartering were to be permitted, the prosecution would indeed be able to insulate, in many cases, guilty pleas accepted in contravention of standards which have been developed with painstaking care to afford defendants their basic rights.”).

106. See Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 182-83 (2005) (calling for banning of sentence appeal waivers); King & O’Neill, *supra* note 5, at 213 (noting inconsistent trading of sentencing concessions for appellate waivers “are undercutting efforts to advance consistency in federal sentencing”); David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1052 (1999) (“The waiver does not achieve the public policy goals of economy, closure, and uniformity of enforcement because the waiver merely creates a two-tiered appeal in which defendants attack the validity of the waiver—as a threshold question—before addressing their underlying substantive appellate arguments.”); see also DEMLEITNER ET AL., *supra* note 93, at 493 (describing federal policy regarding waivers of right to appeal); Reimelt *supra* note 100, at 904 (calling for prohibition on suppression motion appellate waivers). Because of the increasing prevalence of appeal waivers in the federal system, “judges have expressed concerns that such waivers, especially in their broadest forms, can be unlawful, inappropriate, and dangerous.” DEMLEITNER ET AL., *supra* note 93, at 493.

107. See King & O’Neill, *supra* note 5, at 222-23 (summarizing opponents’ arguments). Opponents argue that there cannot be a “knowing waiver of potential future errors that might occur at a proceeding that had yet to take place. . . . [D]efendants could not possibly know and the judge at the plea proceeding could not describe what claims defendants were waiving.” *Id.*

108. See *id.* at 223 (explaining how commentators argue that plea agreements reached using appellate waivers are contracts of adhesion). Commentators contend that appellate waivers are not conditions upon which defendants can fairly bargain. See *id.* (explaining argument that “to promote appeal waivers [is] to promote contracts of adhesion”).

109. See *id.* at 231 (displaying percentage of plea agreements with waivers by circuit). The evidence gathered by these scholars was undertaken “to present a snapshot of the use and impact of appeal waivers in cases sentenced under the Guidelines in the hope that the findings will prompt further research and better inform evolving sentencing policy.” *Id.* at 211; see also *id.* at 225 (basing research on sample of 971 cases “coded by the Commission staff as including a written plea

on a systemic level, decreasing opportunities for meaningful appellate review, thus impairing the evolution and growth of sentencing law under the Guidelines.<sup>110</sup>

The same research underlying many of these arguments, however, also supports the determination that many defendants have secured meaningful concessions from the prosecutors in exchange for signing waivers.<sup>111</sup> Specifically, research indicates that particular, significant government concessions more frequently accompanied bargains involving waivers than those without.<sup>112</sup> Moreover, defendants signing appellate waivers were more likely to receive downward departures.<sup>113</sup> Practitioners themselves have confirmed that “those waivers are often exchanged for concessions of one sort or another from the prosecutor.”<sup>114</sup> Accordingly, it would be inappropriate to hastily condemn appellate waivers as apparatuses used to force the hand of defendants, when defendants have in fact been given another tool with which to barter for meaningful concessions from the government that they could otherwise not obtain on the merits

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agreement or other written agreement in the file”). As a result of this research, these scholars concluded that the “frequency of waivers varies substantially among the circuits, and among districts within circuits.” *Id.* at 212.

110. See Chanenson, *supra* note 106, at 183 (acknowledging importance of appellate review for evolution and development of Sentencing Guidelines law). Professor Chanenson emphasizes the role appellate courts should play in the ongoing evolution of sentencing law and practices, positing that “[a]ppellate review ought to be the fulcrum around which guided sentencing systems revolve. With their dual focus on establishing broad principles of sentencing law and evaluating individual cases, appellate courts can bring a distinctive voice to the sentencing discussion.” *Id.* at 177. Recognizing the importance of appellate review, he asks, “How can appellate review provide a meaningful check on district courts and valuable feedback to other sentencers if many cases have escaped review before the sentence is even imposed?” *Id.* at 183; accord King & O’Neill, *supra* note 5, at 252-53 (describing distorting effect appellate waivers can have on sentencing law). Waivers have the potential to distort the law by preventing appellate review of certain errors more frequently than other ones. See King & O’Neill, *supra* note 5, at 253 (“All bargaining skews appellate lawmaking because rules that survive the bargaining process receive attention and development that rules waived as part of bargains do not.”).

111. See King & O’Neill, *supra* note 5, at 233 (providing practitioners’ comments and empirical data of defendants’ success in negotiating with government for concessions).

112. See *id.* at 236 tbl.1 (depicting statistical findings regarding correlation between execution of appellate waivers and government concessions in form of substantial assistance reductions and safety valves). The data suggested that “those who waived appeal were more likely than nonwaiving defendants to receive a promise by the government to seek a safety-valve reduction (applicable in drug cases only), as well as to actually receive downward departures.” *Id.* at 235; see *id.* at 236 tbl.1 (providing statistics demonstrating defendants’ ability to use waivers to obtain concessions).

113. See *id.* at 236 tbl.2 (depicting statistical findings regarding “Other Departures, by Presence of Waiver”).

114. See *id.* at 233.

of their cases.<sup>115</sup> Statistics and interviews show that defense attorneys still retain a significant amount of agency—and discretion—in negotiating, as “they have had the ability, particularly when supported by the trial bench, to avoid these waivers, to limit them, or alternatively, to obtain significant concessions in return for signing them.”<sup>116</sup>

Moreover, the Department of Justice circulated a memo in 1995 to all U.S. Attorneys providing guidance on the use of such waivers in plea agreements.<sup>117</sup> Thus, the Justice Department is aware of the implications of broad appellate waivers and has taken steps to mitigate any inconsistencies amongst federal prosecutors.<sup>118</sup> Further research could provide an explanation of the discrepancies amongst the circuit courts’ practices and

115. See generally LaVoy, *supra* note 100 (explaining modern defense attorneys’ responsibilities in light of contemporary case law regarding appellate waivers); Derek Teter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 739 (2005) (“Waiver of the right to appeal is an additional bargaining chip that a defendant may use in his negotiations.”).

116. King & O’Neill, *supra* note 5, at 230-31 (footnote omitted). Based on their research, Professors King and O’Neill decided that bargains stricken involving appellate waivers do not constitute contracts of adhesion, noting that “the prediction that defendants have neither power to avoid signing agreements with unlimited waivers, nor leverage to negotiate benefits in return for signing them, has proved demonstrably untrue.” *Id.* at 231.

117. See generally Memorandum from John C. Keeney, Acting Asst. Att’y Gen., U.S. Dep’t of Justice, to All United States Attorneys (Oct. 4, 1995) [hereinafter Keeney Memo], reprinted in 10 FED. SENT’G REP. 209 (1998). In the Keeney Memo, the Justice Department warned U.S. Attorneys:

The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines. It is imperative to guard against the use of waivers of appeal to promote circumvention of the sentencing guidelines.

*Id.* at 210. Additionally, the memo provides the following instructions:

Use of waiver of appeal rights in a manner resulting in sentences in violation of the sentencing guidelines could prompt a court of appeals to reconsider its decision to uphold the validity of a sentencing appeal waiver. Alternatively, the reviewing court could construe a sentencing appeal waiver narrowly in order to correct an obvious miscarriage of justice. To avoid these concerns, we recommend that, in a case involving an egregiously incorrect sentence, the prosecutor consider electing to disregard the waiver and to argue the merits of the appeal. That would avoid confronting the court of appeals with the difficult decision of enforcing a sentencing appeal waiver that might result in a miscarriage of justice.

*Id.* The Keeney Memo suggests that U.S. Attorneys are aware of the implications of broad appellate waivers. See *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) (“The very concerns expressed by this Court have also been expressed by the Justice Department, which has provided guidance to prosecutors . . .”).

118. See DEMLEITNER ET AL., *supra* note 93, at 492-93 (explaining Department of Justice’s measures in providing guidance on execution of appeal waivers). Importantly, written policies regarding plea bargaining apply to U.S. Attorneys throughout the United States. See *id.* at 492-93 (recognizing Department of Justice’s goals, including “provid[ing] guidance on the drafting and use of sentencing appeal waivers in plea agreements”).

may be instructive in the continued shaping of federal prosecutorial policy.<sup>119</sup> Ultimately, however, these concerns do not outweigh the decisive benefits that appeal waivers confer in the form of conservation of resources and assurances of finality.<sup>120</sup> Scholars have admitted it.<sup>121</sup> The courts have commanded it.<sup>122</sup>

B. *The Fundamental Implications: Frustrating Prosecutorial Discretion in Plea Bargaining*

Fundamentally, the court's ruling in *Divens* constitutes a meaningful limitation of federal prosecutorial discretion in plea bargaining.<sup>123</sup> Specifically, the Fourth Circuit's decision threatens to frustrate prosecutorial discretion in the plea bargaining process—a consequence that is contrary to the spirit of the Supreme Court's holding in *Brady v. United States*.<sup>124</sup> In *Brady*, the defendant, charged with kidnapping and potentially facing the death penalty, changed his plea to guilty upon learning that his co-defendant had confessed to authorities.<sup>125</sup> Subsequently, the defendant sought relief claiming that his guilty plea was not voluntary, arguing that the relevant kidnapping statute operated to coerce his guilty plea, that his counsel exerted impermissible pressure on him, and that he was “induced by rep-

119. See King & O'Neill, *supra* note 5, at 211 (calling for further research to “better inform evolving sentencing policy”).

120. See *id.* at 258 (explaining difficulties accompanying abolishment of appeal waivers). It is unlikely that Congress would decide to mandate appellate review in addition to or instead of prohibiting appeal waivers because “it would be difficult for legislators to deny prosecutors and courts the finality and fiscal relief that appeal waivers afford.” *Id.* As Professors King and O'Neill succinctly surmise, “There is no easy solution to reconciling the efficient administration of justice with the need to ensure uniform sentencing . . . .” *Id.*

121. See *id.* at 256-61 (providing conclusions based on statistics); LaVoy, *supra* note 100, at 270 (“As with bargained-for contracts generally, appellate waivers further distinct goals and help each side achieve a more satisfactory end.”); Teter, *supra* note 115, at 742 (contending that appeal waivers fit “in a society that holds individual liberty and autonomy in the highest regard”). But see Reimelt, *supra* note 100, at 895 (acknowledging appellate waivers as generally enforceable but arguing for invalidity of suppression motion appellate waivers alone).

122. See *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999) (likening plea agreements to contracts and explaining that valid appellate waiver was heart of bargain); *United States v. Agee*, 83 F.3d 882, 894 (7th Cir. 1996) (upholding waiver); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993) (agreeing with rationale of sister circuits in upholding validity of appeal waivers); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992) (“[A] defendant may also waive statutory rights, including the right to appeal.”); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (“We . . . find that it is not a due process violation for a defendant to waive, in an otherwise valid plea agreement, the statutory right of appeal.”); *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) (“It is clear that a defendant may waive in a valid plea agreement the right of appeal under 18 U.S.C. § 3742.”).

123. See generally *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011) (limiting prosecutorial discretion).

124. 397 U.S. 742 (1970).

125. See *id.* at 743 (providing facts).

resentations with respect to reduction of sentence and clemency.”<sup>126</sup> The Court dismissed these arguments and held that the defendant’s plea was made knowingly and voluntarily and was therefore valid.<sup>127</sup> The Court ultimately declined to hold “that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities.”<sup>128</sup>

More relevant than the holding is the Court’s discourse on plea bargaining.<sup>129</sup> The Court estimated that between ninety and ninety-five percent of all criminal convictions at the time were resolved by guilty pleas, implying that the eradication of plea bargaining would therefore have a disastrous effect on prosecutorial and court resources.<sup>130</sup> Importantly, the Court attributed these percentages to the “mutuality of advantage” inherent in bargains stricken between defendants and the government.<sup>131</sup> Among the benefits listed, the Court noted how the avoidance of trial means that “scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.”<sup>132</sup> With this and other considerations in mind, the Court emphatically declined to find it “unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime.”<sup>133</sup> Thus, in addition to acknowledging the severe strain on prosecutorial resources that would exist in a world without plea bargain-

126. *See id.* at 744 (noting defendant sought relief under 28 U.S.C. § 2255).

127. *See id.* at 747-52 (addressing defendant’s arguments). The Court explained that the statute at issue was not intrinsically coercive enough to call for an invalidation of the plea bargain. *See id.* at 746-47 (distinguishing issue from authority relied upon by defendant). After examining the totality of the circumstances, the Court determined that the plea was made voluntarily and knowingly. *See id.* at 749-51 (upholding plea agreement). The Court reasoned: “That the statute caused the plea . . . does not necessarily prove that the plea was coerced and invalid as an involuntary act.” *Id.* at 751.

128. *Id.*

129. *See id.* at 752-58 (discussing plea bargaining).

130. *See id.* at 752 n.10 (providing statistics).

131. *See id.* at 751-52 (“It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty . . . .” (footnote omitted)).

132. *Id.* at 752. For a defendant, these advantages include avoiding the reduction of exposure, more immediate initiation of the correctional process, and the elimination of the practical burdens of trials. *See id.* (listing advantages for defendant). For the government, one advantage is prompt punishment that in turn “may more effectively attain the objectives of punishment.” *Id.* The Court continued: “[W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant’s guilt or in which there is substantial doubt that the State can sustain its burden of proof.” *Id.*

133. *Id.* at 753.

ing, the Court placed value on a defendant's willingness to accept responsibility—an interest that Congress recognized through the promulgation of the Federal Sentencing Guidelines and section 3E1.1.<sup>134</sup>

Accordingly, while *Divens* threatens to overburden both courts and prosecutorial resources by decreasing the use of appeal waivers, it also narrows federal prosecutors' discretionary latitude to determine whether and to what extent a defendant has demonstrated an acceptance of responsibility for his or her actions and whether the defendant did so in a timely manner.<sup>135</sup> What *Divens* refrains from emphasizing is that a defendant's willingness to execute an appeal waiver further demonstrates an acceptance of responsibility and a willingness to do so in a timely manner.<sup>136</sup> However, given the language of section 3E1.1(b) and accompanying commentary, as well as the exhaustive plain-language analysis undertaken, the Fourth Circuit's conclusion in *Divens* was correct and the rationale sound.<sup>137</sup>

### C. Recommendation: Taking Responsibility for *Divens*

Therefore, Congress should address the issue and clarify exactly what standard of discretion it intended to afford prosecutors who are considering whether to move for the additional one-level reduction under section 3E1.1(b).<sup>138</sup> While it is clear that the discretion to move for a 3E1.1(a) two-level reduction is extensive, the emerging circuit split regarding subsection (b) reveals that it is uncertain whether Congress or the Commission intended to afford prosecutors the same latitude in determining eligibility for the specific reduction for timely notification of an intent to plead guilty.<sup>139</sup> Recognizing the importance of appeal waivers and their utility in incentivizing guilty pleas where appropriate, Congress should re-

134. See *id.* (noting how plea bargaining results in rewards for defendants who admit guilt). For a further discussion of the history and purpose of the Guidelines, see *supra* notes 37-64 and accompanying text.

135. See generally *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011) (holding discretion is limited to criteria specifically enumerated by § 3E1.1(b)).

136. See *id.* at 345-47 (focusing instead on plain-language interpretation of § 3E1.1(b) and accompanying comments).

137. For a further discussion of the rationale of the Fourth Circuit in *Divens*, see *supra* notes 74-89 and accompanying text.

138. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2011) (providing criteria for additional one-level reduction for timely notification of intention to plead guilty under acceptance of responsibility provision).

139. Compare *United States v. Beatty*, 538 F.3d 8, 14-15 (1st Cir. 2008) (comparing substantial assistance with acceptance of responsibility provisions and noting that both condition sentence adjustment on government's decision to file motion), and *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008) (holding refusal to sign appeal waiver constitutes ground for declining to move for § 3E1.1(b) reduction), and *United States v. Moreno-Trevino*, 432 F.3d 1181, 1186 (5th Cir. 2005) (holding government may refuse to file for adjustment after timely notification of guilty plea, but noting that government's "broad discretion . . . is not unfettered"), with *Divens*, 650 F.3d at 347 (limiting prosecutorial discretion regarding decision to move for § 3E1.1(b) reductions).

draft section 3E1.1(b) or the accompanying commentary to confer upon federal prosecutors discretion tantamount to the legitimate government interest standard entrusted to them in approving section 5K1.1 substantial assistance reductions.<sup>140</sup> If, as the majority of courts have contended, Congress meant to afford prosecutors extensive discretion in the 2003 amendment, it should expressly clarify that intent through legislation.<sup>141</sup>

Alternatively—and perhaps more appropriately—Congress should change the criteria for section 3E1.1(b) from requiring timeliness of the notification to requiring the signing of an appeal waiver. In practice, federal prosecutors have frequently declined to move for section 3E1.1(b) reductions because defendants have refused to sign such waivers.<sup>142</sup> By making the recommended change, Congress would make the law better reflect the reality of the constitutionally valid plea bargaining processes.<sup>143</sup> Moreover, the law would formally acknowledge that federal prosecutors require appeal waivers to preserve prosecutorial resources, and that defendants require waivers to obtain meaningful concessions in the plea bargaining process.<sup>144</sup> Through deliberate legislation, Congress can achieve greater consistency in the execution of appeal waivers in federal courts and ensure that defendants obtain the reductions they deserve by *choosing* to admit their guilt and accepting responsibility for their actions with dignity and finality.<sup>145</sup>

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140. See § 5K1.1 (setting forth standard for substantial assistance reduction). For a discussion elaborating on the standard that governs § 5K1.1 reductions, see *supra* note 75.

141. See *United States v. Deberry*, 576 F.3d 708, 710 (7th Cir. 2009) (“The amendment turned subsection (b) into a license for prosecutorial discretion.”); *Beatty*, 538 F.3d at 14-15 (reasoning that revised provision grants substantial discretion to government); *Newson*, 515 F.3d at 378 (same); *Moreno-Trevino*, 432 F.3d at 1186 (same).

142. See, e.g., *Deberry*, 576 F.3d at 710 (noting government refusal to move for further reduction because defendant refused to waive right to appeal); *Beatty*, 538 F.3d at 14 (same); *Newson*, 515 F.3d at 377 (same); see also *Moreno-Trevino*, 432 F.3d at 1186 (encountering discretion issue when prosecutors refused to move for § 3E1.1(b) motion because of defendant’s failure to abide by plea agreement).

143. For a discussion of the validity and widespread use of appeal waivers, see *supra* notes 74-89.

144. See generally *Brady v. United States*, 397 U.S. 742 (1970) (explaining advantages of plea bargaining to both government and defendants).

145. See *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990) (emphasizing finality accompanying execution of appeal waiver).