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Ricky Murray
University of Dayton

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Cover Page Footnote

The author would like to thank his parents, Rick and Terri Murray, for their support and encouragement as he pursues a new direction in his life; the Honorable Judge Walter H. Rice and his wife, Bonnie, for encouraging him to pursue a career in law; and Professor Thaddeus Hoffmeister for his guidance and expertise in the field of criminal law while writing this Comment.

PURSUING "LAW AND ORDER": THE NEED FOR CONSISTENCY IN THE PLEA-BARGAINING PROVISION OF THE FEDERAL SENTENCING GUIDELINES

Ricky Murray, J.D.[*]

[*] Ricky Murray, J.D., is a recent graduate of the University of Dayton School of Law. He received his B.S. in Religion, his M.A. in Pastoral Counseling, and his M.Div from Liberty University in Lynchburg, Virginia. He would like to thank his parents, Rick and Terri Murray, for their support and encouragement as he pursues a new direction in his life; the Honorable Judge Walter H. Rice and his wife, Bonnie, for encouraging him to pursue a career in law; and Professor Thaddeus Hoffmeister for his guidance and expertise in the field of criminal law while writing this Comment.

> The effect of a one-level reduction can be substantial. For the most serious offenses, the reduction can shift the Guidelines range by years, and even make the difference between a fixed-term and a life sentence. The present disagreement among the Courts of Appeals means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced.[1]

I. INTRODUCTION

People who dream of a career in criminal litigation often grew up watching procedural dramas on television. For me, that memorable procedural drama was Law and Order: Special Victims Unit ("SVU"). In SVU, many of the episodes would reach their conclusion in a similar fashion: the tension would mount in the courtroom as the district attorney and the defense counsel would examine the witnesses, fending off the objections of opposing counsel. Near the end of the episode, the case would be resolved and, more often than not, the criminals would be sent to Rikers Island, leaving Olivia Benson and her squad to celebrate their work in the never-ending fight for justice in New York City. Though I perceived the criminal justice system to operate in this fanciful way before I attended law school, that façade quickly faded once I became a law student and saw how cases truly transpire in the realm of criminal justice.

In today's federal criminal system, many cases are adjudicated by way of a plea bargain rather than a guilty verdict at trial.[2] This process, which involves calculating an advisory sentence under the United States Sentencing Guidelines, takes place between the United States Attorney's Office and

[1] Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., concurring).

[2] *See* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 5 (2018) (stating that "97% of federal defendants convicted of a felony or Class A misdemeanor offense" were adjudicated based upon a plea of guilty rather than a trial.).

defense counsel.[3] With such a high volume of cases reaching their conclusion through the plea-bargaining system, it is imperative that the statutory language surrounding these agreements, as well as the sentences that are produced by them, is clear and unequivocal for practitioners and defendants alike.

Unfortunately, a rift in the circuit court opinions, resulting in differing sentences for criminal defendants, highlights the disparity in the plea-bargaining system under the United States Sentencing Guidelines. In *United States v. Longoria*, a defendant was denied a one-level reduction under their advisory Sentencing Guidelines range because the prosecutor refused to make the motion for a one-level reduction in the applicable base offense level, citing their preparation for a suppression hearing prior to trial.[4] Currently, the Second and Fifth Circuits hold that preparation for a suppression hearing can be grounds for the United States Attorney's Office or the court to withhold the one-level reduction under U.S.S.G. § 3E1.1(b).[5] At the same time, the Ninth, Tenth, and D.C. Circuits hold that preparation for pre-trial motions, like motions to suppress, cannot be the sole ground for withholding the one-level reduction.[6]

This Comment seeks to navigate and rectify the current schism in the process for plea-bargaining in the federal system by proposing an amendment to the United States Sentencing Guidelines, which specifically addresses the effect that a motion to suppress should have in determining whether an additional one-level reduction is warranted during the plea-bargaining process. Section II of this Comment will give the background of the

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[3] *See generally id.*

[4] *See* United States v. Longoria, 958 F.3d 372, 374 (5th Cir. 2020); *see also infra* Background Section II.F.2.

[5] *See Longoria*, 958 F.3d at 376 ("for a quarter century we have repeatedly and 'routinely affirmed the denial of a one-level reduction under [section] 3E1.1(b) when the government had to prepare for a suppression hearing.'"); *see also* United States v. Rogers, 129 F.3d 76, 80–81 (2d Cir. 1997) (per curiam) ("In this case, the only defensive measure available to Rogers was to argue that the evidence seized from her pocket was inadmissible. Thus, in terms of preparation by the government and the investment of judicial time, the suppression hearing was the main proceeding in this case. . . . Rogers' offer to enter a conditional guilty plea and her bench trial on stipulated facts, coming *after* the suppression hearing, did not come sufficiently early in the proceedings to allow the court or the government to avoid the burdens of litigating the case.").

[6] *See* United States v. Price, 409 F.3d 436, 443–44 (D.C. Cir. 2005) ("The District Court's conclusion [that the motion to suppress warranted withholding the reduction] cannot be reconciled with the plain language of § 3E1.1(b)(2), which states that a defendant is eligible for a third-level reduction if he timely notifies 'authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing *for trial*.'"); *see also* Untied States v. Marquez, 337 F.3d 1203, 1211 (10th Cir. 2003) (citing United States v. Marroquin, 136 F.3d 220, 225 (1st Cir. 1998) ("A defendant, of course, is entitled to bring a motion to suppress to protect his or her constitutional rights, and we agree that '[t]he Guidelines do not force a defendant to forgo the filing of routine pre-trial motions at the price of receiving a one-step decrease [under § 3E1.1(b)(2)].'") (alteration in original)); United States v. Kimple, 27 F.3d 1409, 1414–15 (9th Cir. 1994) (stating that "the district court may properly deny the reduction because [the defendant] failed to notify authorities of his intent to plead guilty before the Government was able to avoid trial preparations, or before the court had set the calendar for trial, it cannot deny the reduction on the basis that [the defendant] exercised his constitutional rights at the pretrial stage of the proceedings" and that "[m]erely opposing a suppression motion is not sufficient to constitute trial preparation.").

plea-bargaining system in federal courts, the inception of the United States Sentencing Guidelines, as well as an examination of the current language in U.S.S.G. § 3E1.1. Section III of this Comment will analyze the statutory language of U.S.S.G. § 3E1.1 by providing insight as to how the various federal circuits have interpreted that language. Next, Section IV looks to resolve this schism by proposing an amendment to U.S.S.G. § 3E1.1(b), which would establish a clear policy regarding when the one-level reduction would be appropriate in these situations. Lastly, Section V will summarize this Comment by reiterating the need for this amendment and suggesting when this amendment should be considered by the United States Sentencing Commission.

II. BACKGROUND

A. The Inception of the United States Sentencing Guidelines

Before the inception of the United States Sentencing Guidelines, federal judges had the ability to impose sentences in criminal cases with "virtually unlimited discretion . . . ."[7] This unlimited discretion led to an "unjustifiably wide range of sentences" for offenders convicted under similar circumstances.[8] In response to the disparities in sentencing, Congress enacted the Sentencing Reform Act of 1984 ("SRA").[9] Within the SRA, Congress established the United States Sentencing Commission, a bipartisan agency, whose goal was to promulgate a set of Guidelines that would streamline the sentencing process in the federal court system.[10] Furthermore, these Guidelines would also address the disparities in federal sentencing.[11] The first version of the Federal Sentencing Guidelines went into effect on November 1, 1987.[12] This version of the Guidelines contained a sentencing table to calculate the mandatory sentencing range for judges to apply when sentencing crimes in the federal court.[13]

B. The Effect of U.S. v. Booker *on the Sentencing Guidelines*

A major shift occurred after the decision of *United States v. Booker*, which examined whether the mandatory application of the Sentencing Guidelines violated the Sixth Amendment to the U.S. Constitution.[14] Answering in the affirmative, the Supreme Court stated that the then-existing Guidelines system allowed judges to find facts by a preponderance of the

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[7] U.S. SENT'G COMM'N, *supra* note 2, at 1.
[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.* at 4.
[14] *See* United States v. Booker, 543 U.S. 220, 226 (2005).

evidence rather than by the jury making findings of fact beyond a reasonable doubt.[15] Because of the varying burdens of proof, the Supreme Court remedied this defect in the Guidelines by striking the mandatory provision of the SRA.[16] As such, the SRA, as amended, "[made] the Guidelines effectively advisory."[17] The Guidelines would then "[require] a sentencing court to consider Guidelines ranges . . . but [would permit] the court to tailor the sentence in light of other statutory concerns as well."[18]

C. How Federal Courts Use the Guidelines to Calculate the Defendant's Sentence

After the *Booker* decision, courts were directed to employ a three-step process in calculating the proper Guidelines range for criminal sentences.[19] First, the court must calculate the initial range under the Sentencing Guidelines.[20] This is largely based on the crime that has been alleged in the case.[21] For instance, if a defendant were charged with "Criminal Sexual Abuse of a Minor Under the Age of Sixteen Years (Statutory Rape) or Attempt to Commit Such Acts," their base offense level would be eighteen.[22] The base offense level could then be increased based upon other conduct occurring in conjunction with the alleged offense.[23]

After taking all adjustments into account, the court must then calculate the criminal history of the defendant.[24] This calculation involves looking at the past convictions of the defendant to determine the "Criminal History Category" that should be used to calculate the sentence in the current case.[25] Moreover, the Sentencing Commission has identified four purposes for including the defendant's prior convictions in the advisory Sentencing Guidelines range:

> [1] A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. [2] General deterrence of criminal conduct dictates that a clear message be sent to society that repeated criminal behavior will aggravate the need for punishment with each recurrence. [3] To protect the public from further crimes of the particular defendant, the likelihood

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[15] *See id.* at 245; *see also* U.S. SENT'G COMM'N, *supra* note 2, at 4.
[16] *See Booker*, 543 U.S. at 245.
[17] *Id.*
[18] *Id.*
[19] U.S. SENT'G COMM'N, *supra* note 2, at 11.
[20] *See id.*
[21] *See generally* U.S. SENT'G GUIDELINES MANUAL § 2 (U.S. SENT'G COMM'N 2018).
[22] *See id.* § 2A3.2.
[23] *See, e.g.*, *id.* ("If the minor was in the custody, care, or supervisory control of the defendant, increase by four levels."); *see also generally id.* § 3.
[24] *See generally id.* § 4A1.2.
[25] *See id.* § 4A.

> of recidivism and future criminal behavior must be considered. [4] Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.[26]

After establishing the criminal history of the defendant, the base offense level and the criminal history category are used to tabulate the advisory sentencing range on the Sentencing Guidelines Sentencing Table.[27] So, continuing to use the statutory rape charge as an example, if a defendant had a base offense level of eighteen and a criminal history category of four, his advisory sentence would be forty-one to fifty-one months.[28]

Second, the court must consider any policy statements or commentary in the Sentencing Guidelines Manual regarding departures and variances from the sentence.[29] For instance, the advisory notes under the statutory rape section of the Guidelines state that "an upward departure may be warranted if the defendant committed the criminal sexual act in furtherance of a commercial scheme such as pandering, transporting of persons for the purpose of prostitution, or the production of pornography."[30] Departures and variances vary based upon the crime alleged in each case.[31]

Lastly, the courts were directed to consider all seven factors outlined in 18 U.S.C. § 3553(a) to determine whether the sentence would be sufficient, but not greater than necessary, in light of the conviction.[32] This provision allows the court to have discretion in sentencing a defendant by allowing the judge to consider the totality of the circumstances in the case, thereby tailoring the sentence to each individual defendant.[33] The seven factors in 18 U.S.C. § 3553(a) are:

> (1) [T]he nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) [T]he need for the sentence imposed to reflect the four primary purposes of sentencing, *i.e.*, retribution,

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[26] *Id.*

[27] *See generally id.* § 5A.

[28] *See id.*

[29] *See* U.S. SENT'G COMM'N, *supra* note 2, at 11.

[30] U.S. SENT'G GUIDELINES MANUAL § 2A3.3 n.6 (U.S. SENT'G COMM'N 2018).

[31] *Compare* U.S. SENT'G GUIDELINES MANUAL § 2A3.2 cmt. n.6 (U.S. SENT'G COMM'N 2018) (allowing an upward variance for sentences stemming from charges statutory rape if the defendant intended to pander the children or transport them for purposes of producing child pornography), *with id.* § 2A1.2 cmt. n.1 (U.S. SENT'G COMM'N 2018) (allowing an upward variance for sentences stemming from charges of second degree murder if the "defendant's conduct was exceptionally heinous, cruel, brutal, or degrading to the victim . . . .").

[32] U.S. SENT'G COMM'N, *supra* note 2, at 11; *see also* 18 U.S.C. § 3553(a) (stating that sentences should be "sufficient, but not greater than necessary" in relation to the charge of conviction); Gall v. United States, 552 U.S. 38, 50 n.6 (2007) ("The fact that § 3553(a) explicitly directs sentencing courts to consider the Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.").

[33] *See generally* 18 U.S.C. § 3553(a).

deterrence, incapacitation, and rehabilitation;

(3) [T]he kinds of sentences available (*e.g.*, whether probation is prohibited or a mandatory minimum term of imprisonment is required by statute);

(4) [T]he sentencing range established through application of the sentencing Guidelines and the types of sentences available under the Guidelines;

(5) [A]ny relevant 'policy statements' promulgated by the Commission;

(6) [T]he need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) [T]he need to provide restitution to any victims of the offense.[34]

These factors, outlined in 18 U.S.C. § 3553(a), were considered by the Commission during their construction of the Guidelines and, as such, have substantial overlap with the codified Sentencing Guidelines.[35]

D. Guidelines Calculations Can Occur During the Plea-Bargaining Phase

Although many of these factors are discussed at a sentencing hearing, the calculation of the sentencing range can occur during the plea-bargaining phase.[36] For instance, a plea agreement made under Federal Rule of Criminal Procedure 11(c)(1)(B) states that the Government will either recommend or, in the alternative, not oppose a recommendation by the defendant regarding a sentencing range that would be sufficient in that case.[37] If a plea agreement is made under Federal Rule of Criminal Procedure 11(c)(1)(C), the Government will concur with the defendant on an applicable sentencing range and that range will be binding on the court during the imposition of the sentence.[38] Similarly, these calculations are also discussed by the probation office in their presentence report, which gives

[34] U.S. SENT'G COMM'N, *supra* note 2, at 3 (footnotes omitted); *see also* 18 U.S.C. § 3553(a).

[35] *See* U.S. SENT'G COMM'N, *supra* note 2, at 3 ("[T]wo of the seven factors in section 3553(a) are the guidelines and the policy statements promulgated by the Commission, and the remaining five reflect factors that the Commission itself considers in promulgating the guidelines and policy statements.") (footnote omitted).

[36] *See id.* at 5–6.

[37] FED. R. CRIM. P. 11(c)(1)(B) ("[A]n attorney for the government will: . . . recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate . . . .").

[38] FED. R. CRIM. P. 11(c)(1)(C) ("[A]n attorney for the government will: . . . agree that a specific sentence or sentencing range is the appropriate disposition of the case . . . [and] (such a recommendation or request binds the court once the court accepts the plea agreement).").

a vast background into the defendant, the offense, and factors that should be considered with the sentence that they have recommended to the court.[39]

E. The Downward Departure Provision of United States Sentencing Guidelines § 3E1.1

The ability to construct a plea-bargain within federal courts is found in U.S.S.G. § 3E1.1.[40] That provision allows for a "downward departure" on the initial base level for the offense that has been calculated under the Guidelines.[41] This departure, which is awarded for "acceptance of responsibility" by the defendant, has evolved since the inception of the Guidelines in 1987.[42] Although the statutory language has evolved, the reasoning behind the departure has not. This departure is designed to incentivize defendants for accepting plea bargains and foregoing the criminal trial that would ensue.[43]

1. The History of the Downward Departure Provision of § 3E1.1

Prior to 1992, the United States Sentencing Guidelines only provided the opportunity for a two-level reduction for "acceptance of responsibility."[44] Several factors were attributed to the reduction under § 3E1.1.[45] For instance, judges are more likely to look favorably on a defendant who pleads guilty.[46] This belief is largely correlated to the idea that a plea of guilty is indicative of a lower rate of recidivism once the sentence has been fulfilled.[47] Lastly, the reduction in sentence may also be attributed to "the prosecutor's willingness to accept a lower sentence in order to save prosecutorial and judicial resources. . . ."[48] Moreover, this reduction could also be applied in cases

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[39] U.S. SENT'G COMM'N, *supra* note 2, at 6.

[40] U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 2018).

[41] *See id.*

[42] *Compare* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b)(1) (U.S. SENT'G COMM'N 1992), *with id.* § 3E1.1(b) (citing the differences between differing adaptations of the "downward departure" language in the Guidelines); *see supra* note 12 and accompanying text.

[43] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) cmt. n.2 (U.S. SENT'G COMM'N 2018) ("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."); *see also id.* § 3E1.1(b) cmt. n.3 ("Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable . . . will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a).").

[44] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 (U.S. SENT'G COMM'N 1991); *see also* United States v. Vargas, 961 F.3d 566, 573 (2d Cir. 2020).

[45] U.S. SENT'G COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 50 (1987).

[46] *Id.*

[47] *Id.*

[48] *Id.* at 50–51.

where a guilty plea had not been entered, but the reduction was warranted under the facts.[49]

In 1992, the United States Sentencing Guidelines were amended to add subsection (b) to the statutory language of § 3E1.1.[50] This additional one-level reduction was provided when "the defendant . . . made a stronger showing of contrition, and provided greater benefit to the government, than was demonstrated simply by pleading guilty."[51] Another apparent purpose of this new provision was to

> provide an incentive to defendants to offer to plead guilty at an early enough stage of the process to save the government the expense and burden not only of a *trial*, but also of the intensive *preparation* required for a scheduled trial, and to permit the court to efficiently reallocate the time that had been set aside for the trial.[52]

Under this new provision, several requirements had to be met to warrant the additional reduction under U.S.S.G. § 3E1.1(b).[53] First, the defendant must qualify for the initial two-level reduction under subsection (a) of the statute.[54] Second, the base offense level must have been calculated at or above level sixteen under the Guidelines.[55] Lastly, the defendant must "[have] assisted authorities in the investigation or prosecution of his own misconduct . . . ."[56]

There were two ways for a defendant to assist authorities in their investigation: either by "timely providing complete information to the government concerning his own involvement in the offense" or 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 court to allocate its resources efficiently . . . ."[57] Under this version of the Guidelines provision, the power to grant the reduction under U.S.S.G. § 3E1.1(b) "was vested solely in the judiciary."[58] Moreover, a motion by the United States Attorney at trial was not required for the one-level reduction to be awarded to the defendant.[59]

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[49] *Id.* at 50 n.83; *see also* ROGER W. HAINES, JR. ET AL., FEDERAL SENTENCING GUIDELINES HANDBOOK app. C amend. 459 (1993).
[50] HAINES, *supra* note 49, at app. C amend. 459.
[51] United States v. Vargas, 961 F.3d 566, 573 (2d Cir. 2020).
[52] *Id.*
[53] U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 1992).
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] United States v. Sloley, 464 F.3d 355, 359–60 (2d Cir. 2006).
[59] United States v. Vargas, 961 F.3d 566, 574 (2d Cir. 2020).

2. The Current Language of United States Sentencing Guidelines § 3E1.1

The next major shift to the plea-bargaining provision of United States Sentencing Guidelines § 3E1.1 occurred upon the passage of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("PROTECT Act").[60] Under this amendment, the award of the one-level reduction under subsection (b) was contingent, in part, on a motion from the United States Attorney who was pursuing the case.[61] The motion of the United States Attorney indicates to the court 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 . . . ."[62] This shift in authoritative discretion for the one-level reduction back to the United States Attorney was made "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial . . . ."[63] Although this discretion is given to the United States Attorney, they cannot withhold their motion on "interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal."[64]

Furthermore, the assistance of the defendant should "[permit] the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently…."[65] As such, the timeliness of the defendant's plea must be considered under this subsection.[66] Moreover, the consideration of this plea is context-specific and thus, requires analysis on a case-by-case basis.[67] As part of their commentary on this section, the United States Sentencing Commission states that:

> [T]he conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. [T]he defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.[68]

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[60] *See generally* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, Title IV, § 401(g)(1), 117 Stat. 650, 671.

[61] *Id.* § 401(g)(2)(B).

[62] U.S. SENT'G MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018).

[63] *See* U.S. SENT'G MANUAL § 3E1.1 cmt. n.6 (U.S. SENT'G COMM'N 2018), *amended by* § 401(g)(2)(B), 117 Stat. at 672; s*ee also* United States v. Vargas, 961 F.3d 566, 583 (2d Cir. 2020) ("Although the district court is not bound by the government's motion, it must grant substantial deference to the government's claim that the timing of the plea allowed it to avoid trial preparation . . . .").

[64] U.S. SENT'G MANUAL § 3E1.1 cmt. n.6 (U.S. SENT'G COMM'N 2018); s*ee also infra* notes 143–63 and accompanying text.

[65] U.S. SENT'G MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018).

[66] *Id.* § 3E1.1 cmt. n.6.

[67] *Id.*

[68] *Id.*

Although the government is given some deference to determine whether the defendant is entitled to the one-level departure under subsection (b), the court is also awarded some deference under subsection (b) to override the motion by the United States Attorney.[69]

Although this statutory language seems straightforward, the issues raised under U.S.S.G. § 3E1.1(b) become convoluted when applied in real cases. This creates a myriad of questions, such as whether a plea is considered "timely" when the defendant pleads guilty after filing a motion to suppress evidence.[70] This specific issue strikes to the heart of the incongruity between the circuit courts regarding the interpretation of U.S.S.G. § 3E1.1(b), the goal of the Guidelines, and the need for clearer construction regarding the statutory language of the plea-bargaining provision.

F. The Need for Clarity and Consistency in the Plea-Bargaining Provision of the United States Sentencing Guidelines

Although many people will never be directly impacted by the plea-bargaining procedures found in the United States Sentencing Guidelines, they play a large part in the criminal adjudication process in the federal court system. In 2020, the Sentencing Guidelines Commission released their annual report of sentences handed down in federal criminal cases.[71] This report encapsulated the data on 76,538 reported federal sentencings for crimes that were considered felonies or Class A misdemeanors.[72] These statistics shine a light on the expansive impact of the plea-bargaining system and the need for reform in this area.

1. The Statistical Impact of Sentencing in Federal Courts

The Commission's 2019 report establishes that the majority of sentences across the federal court system often involve defendants from minority backgrounds.[73] In 2019, approximately 56.3% of all offenders in federal court were Hispanic, while 20.2% of all offenders were Black.[74] Furthermore, non-U.S. citizens accounted for approximately 44% of all offenders that were sentenced in federal courts in 2019.[75]

Immigration cases made up the majority of criminal cases in federal court during the 2019 fiscal year, encompassing approximately 38% of all

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[69] *See id.*at n.5 ("The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.").

[70] *See e.g.*, United States v. Longoria, 958 F.3d 372 (5th Cir. 2020).

[71] *See generally* CHARLES R. BREYER ET AL, U.S. SENT'G COMM'N, 2019 ANNUAL. REPORT. AND SOURCEBOOK OF FEDERAL. SENTENCING STATISTICS, at 8 (2020).

[72] *See id.*

[73] *See id.*

[74] *See id.*

[75] *See id.*

cases.[76] Three other major groups of cases within the federal courts in 2019 included offenses involving narcotics, firearms, and fraud.[77] Together, these four offense categories accounted for approximately 85% of all federal criminal cases in America during the 2019 fiscal year.[78]

In 2019, approximately 75% of all reported sentences meted from the bench were within the applicable Guidelines range or were subject to a lower sentence based on an applicable reason for departure.[79] Moreover, the majority of federal sentences were adjusted based upon the plea-bargaining procedures in § 3E1.1 of the Sentencing Guidelines; approximately 40,000 defendants were awarded a three-level reduction to their sentences, while another 28,000 were awarded a two-level reduction under the same section of the Guidelines.[80] Based on these statistics, only 3.7% of all federal sentences reported in 2019 were not affected by some kind of departure under U.S.S.G. § 3E1.1.[81]

The statistics found in the Commission's 2019 report become even more staggering when examined by specific crime. In 2019, approximately 96% of all drug-trafficking charges adjudicated included a departure based on U.S.S.G. § 3E1.1[82] Moreover, 96% of all child pornography cases adjudicated included a departure based upon the Guidelines.[83] These percentages are similar for sentences involving firearms, drug possession, extortion and racketeering, and crimes regarding national defense.[84] The statistics reach a staggering height of 99.2% when analyzing the sentences of cases involving issues of immigration.[85]

2. The Importance of Consistency in the Plea-Bargaining Procedures in Federal Courts

Although these statistics shed light on the impact that the United States Sentencing Guidelines have across the entire federal justice system, the need for consistency is best highlighted when examining how the process can affect individual defendants. A standout case would be the Fifth Circuit case of *United States v. Longoria*.[86] During Longoria's initial trial, the Probation Office prepared a presentence report ("PSR"), which was

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[76] *See id.*
[77] *See id.*
[78] *See id.*
[79] *See id.*
[80] *Id.* at 73.
[81] *Id.*
[82] *See id.* at 74 (stating that, of the 19,449 drug trafficking sentences reported to the Commission, 18,696 involved an adjustment under U.S.S.G. § 3E1.1).
[83] *See id.* (stating that, of the 1,353 child pornography cases, 1,299 of those cases involved an adjustment under U.S.S.G. § 3E1.1).
[84] *See id.*
[85] *See id.* (stating that, off the 26,472 immigrations cases reported to the Commission, 26,255 of those cases involved a departure under U.S.S.G. § 3E1.1).
[86] *See generally* 958 F.3d 372 (5th Cir. 2020).

used by the court to determine the proper sentence length for the defendant.[87] The initial PSR tabulated Longoria's base offense level at thirty and his initial criminal history score to be four points, which placed him in "Criminal History Category III" for sentencing purposes.[88] The PSR, after calculating Longoria's Sentencing Guidelines range and examining whether the statute included a limit on the maximum sentence that could be imposed, determined that Longoria's advisory range was 120 months, *i.e.*, ten years in federal prison.[89] Longoria filed several objections to the PSR, including the withholding of a three-level reduction for timely acceptance under U.S.S.G. § 3E1.1.[90]

During his sentencing by the United States District Court for the Southern District of Texas, Longoria's base offense level was reduced by four points after the judge sustained an objection for a proposed enhancement for using a firearm in connection with a separate felony offense.[91] Moreover, Longoria's sentence was reduced by another two points in conjunction with his notice of an intent to plead guilty under U.S.S.G. § 3E1.1(a).[92] He was not awarded the additional one-point reduction under U.S.S.G. § 3E1.1(b) since the prosecutor in that case refused to make the necessary motion, stating that "she did not file [the] motion because Longoria forced the government to prepare for 'a full-blown suppression hearing.'"[93] After these adjustments were made, the district court calculated Longoria's advisory Sentencing Guidelines range at sixty-three to seventy-eight months.[94] Ultimately, Longoria was sentenced to the maximum sentence of seventy-eight months in prison for his initial crime.[95]

On appeal to the Fifth Circuit, Longoria contested the government's withholding of the one-point reduction under U.S.S.G. § 3E1.1(b), stating that the government could not use their preparation for the suppression hearing as "trial preparation" under U.S.S.G. § 3E1.1(b).[96] Under the purview of *stare decisis*, the Fifth Circuit sided with the prosecution, holding that preparation for a suppression hearing can constitute a withholding of the one-level reduction under U.S.S.G. § 3E1.1(b).[97]

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[87] *See* Brief for Defendant-Appellant at 8, United States v. Longoria, 958 F.3d 372 (5th Cir. 2020) (No. 19-20201), 2019 WL 3222195.

[88] *See id.* at 8–10.

[89] *See id.* at 10.

[90] *See id.*

[91] *See Longoria*, 958 F.3d at 374 (citing U.S. SENT'G GUIDELINES MANUAL § 2K2.1(b)(6)(B) (U.S. SENT'G COMM'N 2018)).

[92] *See id.*

[93] *Id.*

[94] *See id.* at 375.

[95] *See id.*

[96] *See id.* at 376.

[97] *See id.* ("Even if a minority view, our precedent of course poses a problem for Longoria. One published decision is all it takes for *stare decisis*.").

Conversely, if Longoria had been in another federal circuit that has previously held that suppression hearings cannot be used to withhold a one-level reduction, his sentence may have been much lower. As stated previously, Longoria's base offense level, after all adjustments, was determined to be twenty-four.[98] When calculated with a criminal history category of three, we come to the original Guidelines range discussed in *Longoria* of sixty-three to seventy-eight months.[99] However, if the additional one-level reduction had been awarded to Longoria, his advisory Guidelines range would have been fifty-seven to seventy-one months.[100] Therefore, if Longoria had been sentenced in a different federal circuit, there is a possibility that his sentence could have been reduced by up to twenty-one months.[101]

III. ANALYSIS

Currently, there are two distinct schools of thought on this issue. One group of courts, spearheaded by the Fifth Circuit, currently holds that the government may withhold the one-level reduction under § 3E1.1(b) if the defendant seeks a motion to suppress and requires the prosecution to prepare for trial regarding the motion.[102] In contrast, the Ninth, Tenth, and D.C. Circuits all hold that motions to suppress, and the preparation thereof by the prosecution, are not enough by themselves to warrant withholding the one-level reduction under U.S.S.G. § 3E1.1(b).[103] Although the variance in the courts' interpretation of U.S.S.G. § 3E1.1(b) may seem insignificant, this split manifests itself in lengthier advisory sentencing ranges for similarly situated defendants in the Second and Fifth Circuits than their counterparts in the Ninth, Tenth, and D.C. Circuits.[104] Before this split can be resolved through an amendment to the Sentencing Guidelines Manual, it is imperative to examine how the courts have interpreted the phrases in the statutory language of § 3E1.1.

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[98] *See generally* Brief for Defendant-Appellant, at 17–18, United States v. Longoria, 958 F.3d 372 (5th Cir. 2020) (No. 19-20201), 2019 WL 3222195; s*ee also* United States v. Longoria, 958 F.3d 372 (5th Cir. 2020) (showing the original base offense level of 30 was reduced by six points: four for the sustained objection on the enhancement for use in a prior felony and another two points for notice of an intent to plead guilty under U.S.S.G. § 3E1.1(a)).

[99] *See supra* notes 87–89 and accompanying text.

[100] *See* U.S. SENT'G GUIDELINES MANUAL § 5(A) (U.S. SENT'G COMM'N 2018).

[101] *See id.* This potential is calculated by evaluating the difference between the sentence that Longoria received in his trial (seventy-eight months) and the lowest potential sentence that could have been received in another Circuit (fifty-seven months). *See id.* By subtracting these figures, a twenty-one month reduction in potential sentence would have been possible. *See id.; see also* Longoria v. United States, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., concurring) ("The effect of a one-level reduction can be substantial. For the most serious offenses, the reduction can shift the Guidelines range by years, and even make the difference between a fixed-term and a life sentence. The present disagreement among the Courts of Appeals means that similarly situated defendants may receive substantially different sentences depending on the jurisdiction in which they are sentenced.").

[102] *See* cases cited *supra* note 5.

[103] *See* cases cited *supra* note 6.

[104] *See supra* notes 70–81 and accompanying text.

A. The Necessity of the Government's Motion for a Downward Departure Under U.S.S.G. § 3E1.1(b)

Under the plain language of the Sentencing Guidelines, § 3E1.1(b) states, in part, that "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own . . . plea of guilty . . . ."[105] This language was added to § 3E1.1 of the Sentencing Guidelines Manual as part of the PROTECT Act of 2003.[106] This provision shifted some of the deference from the judiciary to the government "[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial. . . . "[107]

This language has recently been challenged as to whether the motion of the government is not only necessary for the downward departure but should also be sufficient to fulfill the final condition of subsection (b).[108] Most recently, this clause was analyzed by the Second Circuit in *United States v. Vargas*.[109] In that case, Marilyn Vargas pled guilty after her motion to suppress evidence was denied by the district court.[110] The prosecutor in that case made a motion for the additional one-level reduction under § 3E1.1(b).[111] Even though the prosecutor made the requisite motion, the court chose to deny Vargas the additional reduction due to the suppression hearing.[112] Marilyn Vargas appealed the denial of a one-level reduction under U.S.S.G. § 3E1.1(b).[113] In her appeal, Vargas argued that "once the district court [had] granted a two-level reduction[,]… under § 3E1.1(b), the court [had] no power to deny the motion; it [was] *required* to reduce the defendant's offense level by one."[114]

The plain language of the statute does not give clear direction to the sufficiency of the government's motion for a downward departure in federal criminal cases.[115] Under the previous statutory language, the statute "listed [the criteria] sequentially within a conditional clause introduced by the word 'if,' and ultimately joined by the conjunction 'and.'"[116] This construction made it apparent to those involved that all three conditions must be present

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[105] U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018).

[106] *See generally* Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108–21, Title IV, § 401(g)(1), 117 Stat. 650, 671.

[107] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.6, *amended by* § 401(g)(2)(B), 117 Stat. at 672.

[108] *See generally* United States v. Vargas, 961 F.3d 566 (2d. Cir. 2020).

[109] *See generally id.*

[110] *See id.* at 570.

[111] *See id.*

[112] *See id.* ("The court denied the government's motion for the additional onelevel (sic) reduction under § 3E1.1(b) because Vargas pled guilty only 'after a lengthy suppression hearing had been held that required a substantial amount of work on the government's part'. . . .").

[113] *See id.* at 571.

[114] *Id.*

[115] *See id.* at 574.

[116] *Id.* at 574–75.

before the court could award the one-level reduction under that section of the Sentencing Guidelines.[117] The amended language does not conform to the same grammatical build.[118] Under the amended language, the third item in the list is a prepositional phrase. This "inelegant construction" of the statutory language was considered "the root of the ambiguity in the text."[119]

The court reasoned that, based upon this construction, it was undisputed that Congress, from a procedural standpoint, made the motion from the government a requirement for eligibility for the one-level downward departure of U.S.S.G. § 3E1.1(b).[120] This construction, however, also established that the government's motion "was plainly inserted to *limit* or *condition* the availability of the reduction."[121] The United States Sentencing Guidelines commentary reinforces this concept, stressing that the reduction "may only be granted upon a formal motion by the Government . . . ."[122]

Moreover, this provision should also be analyzed in comparison to other sections of statutory language regarding similar provisions. For instance, 18 U.S.C. § 3553 codified several factors that should be considered by a federal judge before imposing a sentence at the conclusion of the criminal litigation process.[123] Specifically, 18 U.S.C. § 3553(e) states that "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense."[124] This statutory language has been interpreted by several courts to establish that a motion by the government is a prerequisite for imposition of a sentence below the statutory minimum, but this motion does not force any obligation on the court to award a sentence below the statutory minimum.[125]

The court in *Vargas* also examined the provision of U.S.S.G. § 3E1.1(b) against another provision of the Sentencing Guidelines—that of U.S.S.G. § 5K1.1.[126] United States Sentencing Guidelines § 5K1.1 explains when the court may depart from the Sentencing Guidelines after a defendant has provided substantial assistance to

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[117] *See id.* at 575; s*ee also* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 1992).

[118] *Vargas*, 961 F.3d at 575.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 576.

[122] U.S. SENT'G GUIDELINES MANUAL § 3E1.1 cmt. n.6, *amended by* § 401(g)(2)(B), 117 Stat. at 672.

[123] *See* 18 U.S.C. § 3553(a).

[124] *Id.* § 3553(e).

[125] *See e.g.*, Melendez v. United States, 518 U.S. 120, 125–26 (1996) ("We believe that § 3553(e) requires a Government motion requesting or authorizing the district court to 'impose a sentence below a level established by statute as minimum sentence' before the court may impose such a sentence."); *see also* United States v. Huerta, 878 F.2d 89, 94 n.2 (2nd Cir. 1989) ("As in the case of plea bargains, a court is free to grant or deny a Section 3553(e) motion by the government.").

[126] *See Vargas*, 961 F.3d at 576.

authorities.[127] The language of U.S.S.G. § 5K1.1 states 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."[128] Like the motion in 18 U.S.C. 3553(e), "the motion [in U.S.S.G. § 5K1.1] is a prerequisite to the authorized departure, but the court is *permitted,* not required, to grant a reduced sentence."[129]

Lastly, it appears that the legislative drafters wanted to allow the court some discretion as to whether to award the one-level reduction. The final phrase says that the notification to enter a plea should "permit[] the government *and the court* to allocate their resources efficiently. . . ."[130] In their conclusion, the Second Circuit Court of Appeals held that, "[w]hile the government is in the best position to assess whether the plea came sufficiently early to allow [reallocation of] resources, the court, and not the government, is in the best position to determine how the plea affected the court's ability to make efficient use of [their] resources."[131] Although this decision would be binding in the Second Circuit, this decision would not prevent any other challenges to the sufficiency of the government motion in other federal circuits.

B. Timely Notification, Trial Preparation, and the Effective Allocation of Prosecutorial and Judicial Resources

The United States Sentencing Guidelines state that the motion by the government signifies that the defendant has provided "timely" notification of an intent to plead guilty to the charged crime or crimes.[132] According to the commentary of the Sentencing Guidelines, the concept of "timeliness" is context-specific and will vary on a case-by-case basis.[133] The Sentencing Commission provides very little guidance in the interpretation of "timeliness," stating that the plea should come "particularly early in the case" as to allow the government to avoid preparing for trial and to allow the court to efficiently schedule pending cases.[134]

1. Establishing "Timely Notification" Takes More than a Quick Perusal of the Calendar

Since the inception of the United States Sentencing Guidelines in 1984, the federal courts have weighed a variety of factors to determine

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[127] *See generally* U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2018).
[128] *Id.*
[129] *Vargas*, 961 F.3d at 576.
[130] U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018) (emphasis added).
[131] *Vargas*, 961 F.3d at 577–78.
[132] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1.(b) (U.S. SENT'G COMM'N 2018).
[133] *See id.* § 3E1.1. cmt. n.6.
[134] *See id.*

whether a defendant's notification should be considered "timely" to qualify for the one-level reduction under U.S.S.G. § 3E1.1(b).[135] One of the factors courts have considered is the examination of the calendar to determine the length of time between the date of the notification in relation to the start of the criminal trial.[136] Typically, pleas that are made within forty-eight hours of the onset of trial are not considered timely to warrant the reduction under § 3E1.1(b).[137] Although a larger length of time may favor the defendant in regard to "timely notification," it will not guarantee the additional one-level reduction in every situation.[138]

Another factor that has previously been analyzed by the courts is whether the information provided by the defendant assisted the police in their investigation of the crime in question.[139] Under previous versions of the plea-bargaining process outlined in U.S.S.G. § 3E1.1, defendants were able to obtain a one-level reduction to their offense level by "timely providing complete information to the government concerning his own involvement in the offense . . . ."[140] To qualify for that provision of the Sentencing Guidelines, the knowledge proffered by the defendant must have been information that authorities have not discovered at that point in their investigation.[141] The court did not consider whether the information would have been easily obtainable by the authorities, nor whether the disclosure spared the government the burden of undertaking *any* investigatory efforts.[142] With such a low threshold, the timeliness element of U.S.S.G. § 3E1.1(b) was often easily met.[143]

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[135] *See generally* Ellen M. Bryant, *Section E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty*, 44 Cath. U.L. Rev. 1269, 1270, 1273 (1995).

[136] *See, e.g.*, United States v. Robinson 14 F.3d 1200, 1203 (7th Cir. 1994) (stating that a plea that was received four days before the beginning of trial was not considered timely for a reduction under U.S.S.G. § 3E1.1(b)). *But see* United States v. Dethlefs, 123 F.3d 39, 43 (1st Cir. 1997) ("[T]he timeliness requirement of [U.S.S.G. §] 3E1.1(b)(2) cannot always be measured simply by counting calendar pages.").

[137] *See e.g.*, United States v. Nomeland, 7 F.3d 744, 749 (8th Cir. 1993) (stating that a plea that was proffered on the eve of trial did not warrant the one-level reduction under subsection (b) because the plea was not timely in nature); United States v. McQuay, 7 F.3d 800, 802 (8th Cir. 1993) (stating that a plea received one day before the start of a second trial was not considered timely under U.S.S.G. § 3E1.1).

[138] *See, e.g.*, United States v. Marquez, 337 F.3d 1203, 1212–13 (10th Cir. 2003) (stating that a plea that was received eight days before the beginning of a trial was considered "timely" under U.S.S.G. § 3E1.1); Dethlefs, 123 F.3d at 41, 43 (stating that a plea received two weeks before the start of a trial is considered timely for a one-level reduction under U.S.S.G. § 3E1.1). *But see* United States v. Babar, 512 Fed. Appx. 78, 81 (2d. Cir. 2013) ("[T]he government was well within its discretion in determining that an additional reduction was not warranted because, given the complexity of the case, a plea only six weeks before trial [was not timely].").

[139] *See e.g.*, United States v. Schau, 1 F.3d 729, 731 (8th Cir. 1993) (stating that authorities had already recovered the stolen money and the government had already prepared for trial before defendant confessed and pleaded guilty, therefore prohibiting the one-level reduction under 3E1.1(b)(2)).

[140] U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 1992).

[141] *See* United States v. Hopper, 27 F.3d 378, 384–85 (9th Cir. 1994).

[142] *See id.* at 385.

[143] *See id.* at 384–85 ("If the disclosure is timely enough to spare the Government investigation, then the defendant has complied with the primary purpose of subsection (b) of promoting prosecutorial economy.").

2. What Exactly Constitutes Trial Preparation in the Federal Court System?

Under the current language of the United States Sentencing Guidelines, timeliness is tied to several areas of the litigation process, such as the prosecutor's preparation for the upcoming trial as well as the calendar of the federal court.[144] By a plain reading of the statutory language, the Sentencing Guidelines state that a defendant's timely notification of an intent to plead guilty "thereby [permits] the government to avoid preparing for trial . . . ."[145] Although the term "trial preparation," on its' face, appears to be unambiguous, several circuits have examined what should be considered "trial preparation" under the Sentencing Guidelines.

a. A Refusal to Sign a Waiver of Appeal Does Not Implicate the Trial Preparation Clause under § 3E1.1(b)

One of the earliest challenges to the "trial preparation" provision of U.S.S.G. § 3E1.1(b) centered upon whether a defendant's refusal to waive their rights to an appeal in a given case was sufficient to withhold the one-level reduction on the grounds of "trial preparation."[146] Of these cases, *United States v. Divens* is often cited as the case which establishes the foundation for examining whether a refusal to sign a waiver of appeal is enough to withhold the one-level reduction under 3E1.1(b).[147] In *Divens*, the defendant was charged with one count of possession with intent to distribute.[148] As part of the plea agreement offered by the government, Divens was required to waive any appeal that was not based upon either an excessively high sentence under the Guidelines or ineffective assistance of counsel.[149] Divens refused to sign the agreement but still filed a motion with the district court, signifying his intent to plead guilty to the aforementioned charge.[150] Furthermore, Divens signed an "acceptance of responsibility statement," admitting his guilt for the possession charge.[151]

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[144] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018).

[145] *Id.*

[146] *Compare* United States v. Johnson, 581 F.3d 994, 1002 (9th Cir. 2009) (holding that "allocation and expenditure of prosecutorial resources for the purposes of defending an appeal is a rational basis" for the government to withhold a § 3E1.1(b) motion), *and* United States v. Deberry, 576 F.3d 708, 711 (7th Cir. 2009) (holding that a requirement that the defendant would waive their right to appeal would avoid "expense and uncertainty"), *and* United States v. Newson, 515 F.3d 374, 377 (5th Cir. 2008) (holding that the prosecutor's interests under 3E1.1 include the government's time and effort during both prejudgment and postjudgment proceedings), *with* United States v. Divens, 650 F.3d 343, 348 (4th Cir. 2011) (stating that "the text of § 3E1.1(b) reveals a concern for the efficient allocation of *trial* resources, not *appellate* resources.") (emphasis in original), *and* United States v. Davis, 714 F.3d 474, 476 (7th Cir. 2013) ("[I]nsisting that he waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests identified in section 3E1.1.").

[147] *See* 18 U.S.C. app § 775.

[148] *Divens*, 650 F.3d at 344.

[149] *Id.*

[150] *Id.*

[151] *Id.*

At sentencing, the government refused to make the motion for the one-level reduction under U.S.S.G. § 3E1.1(b), citing Divens's refusal to waive his right to collateral attack.[152] Although Divens objected to the government's refusal to make the motion for a downward departure, the district court agreed with the government, stating that "the decision as to whether to move for an additional one-level reduction lay 'completely in the discretion of the Government.'"[153] After receiving his sentence, Divens made a timely appeal to the Fourth Circuit Court of Appeals regarding the government's refusal to make the motion under U.S.S.G. § 3E1.1(b).[154]

On appeal to the Fourth Circuit, the central contention was whether "Divens's failure to sign the appellate waiver justifies the Government's refusal to move for the additional one-level reduction under § 3E1.1(b)."[155] As part of their analysis, the court first examined another provision of the Sentencing Guidelines, § 5K1.1, which outlines whether a downward departure should be given to a criminal defendant for offering "substantial assistance" to the government.[156] Under that provision, the government is able to withhold a motion for a downward departure so long as "[the government] provides any legitimate reason, even one unrelated to the defendant's 'substantial assistance.'"[157]

Although the Government is allowed substantial deference to withhold the downward departure motion under § 5K1.1, the Fourth Circuit held that the government did not possess the same level of deference under § 3E1.1(b).[158] As such, under § 3E1.1(b), "the Government retains discretion to refuse to move for an additional one-level reduction, but only on the basis of an interest recognized by the guideline itself—not, as with § 5K1.1, on the basis of any conceivable legitimate interest."[159]

Moreover, the Fourth Circuit stated that the defendant's refusal to sign an appellate waiver did not support the government's withholding of the motion for a one-level reduction under § 3E1.1(b).[160] Instead, the court focused upon the plain language of the Guidelines, stating that:

> [A]lthough § 3E1.1(b) subsequently identifies general interests—resource allocation and trial avoidance—the

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[152] *Id.*

[153] *Id.*

[154] *See id.*

[155] *Id.* at 345.

[156] *See id.*; *see also* U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2018) ("Upon 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.").

[157] *Divens*, 650 F.3d at 345 (citing United States v. Butler, 272 F.3d 683, 687 (4th Cir. 2001)).

[158] *See id.* at 345–47, 346 n.1.

[159] *Id.* at 347.

[160] *See id.* at 348 ("[Section] 3E1.1(b) simply does not require that a defendant provide the prosecution with the type of assistance that might reduce the 'expense and uncertainty' attendant to an appeal.").

> syntax of the guideline dictates that the furtherance of these interests must again derive from [a] single source: the defendant's "timely notif[ication of] authorities of his intention to enter a plea of guilty.[161]

As such, § 3E1.1(b) "instructs the Government to determine simply whether the defendant has 'timely' entered a 'plea of guilty,'" therefore furthering the underlying purpose of the Guidelines itself.[162]

Additionally, the Fourth Circuit noted that the Guidelines focus upon the efficient allocation of trial resources, not appellate resources.[163] The commentary on the Guidelines reflects this concept, stating that "[t]his 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" and that "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility."[164] As such, the Fourth Circuit held that a defendant's refusal to waive their right to appeal could not support the government's withholding of a one-level reduction under § 3E1.1(b).[165] After the decision in *Divens*, the United States Sentencing Commission made an amendment to the commentary of § 3E1.1, explicitly stating that the government cannot use the refusal to sign an appellate waiver to withhold the one-level reduction under the Guidelines.[166]

b. Preparation for a Fatico Hearing Does Not Support Withholding a Reduction under § 3E1.1(b)

In 2011, the Second Circuit examined whether the government could withhold a one-level reduction under U.S.S.G. § 3E1.1(b) if the government prosecutor would have to prepare for a *Fatico* hearing.[167] In *United States v. Lee*, the defendant pled guilty to four counts, all stemming from narcotics violations.[168] As part of the sentencing phase of the litigation,

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[161] *Id.*

[162] *See id.* (["Section 3E1.1(b)] 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.") (citing United States v. Richins, 429 F.Supp. 2d 1259, 1263–64 (D. Utah 2006)).

[163] *See id.*

[164] U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) nn.2, 5 (U.S. SENT'G COMM'N 2018).

[165] *See Divens*, 650 F.3d at 350 ("If the Government cannot provide a valid reason for refusing to move for an additional one-level reduction under [3E1.1(b)] and continues to refuse to move for such a reduction, the district court should order the Government to file the motion.").

[166] 18 U.S.C. app. § 775.

[167] *See generally* United States v. Lee, 653 F.3d 170 (2d. Cir. 2011); *see also* Alexa Chu Clinton, Comment, *Taming the Hydra: Prosecutorial Discretion under the Acceptance of Responsibility Provision of the U.S. Sentencing Guidelines*, 79 U. CHI. L. REV. 1467, 1481–82, 1481 n.105 (2012) ("A *Fatico* hearing is a presentencing hearing at which parties may offer evidence as to appropriate sentencing.") (emphasis added).

[168] *See Lee*, 653 F.3d at 172.

the PSR was drafted by the Probation Department.[169] The defendant in *Lee* disputed several facts included in the PSR, which prompted the *Fatico* hearing before sentencing.[170] At the conclusion of the *Fatico* hearing, the court began the sentencing phase of the trial.[171] At sentencing, the prosecutor refused to move for the one-level reduction under § 3E1.1(b), citing their preparation for the *Fatico* hearing.[172]

On appeal, the Second Circuit Court of Appeals held that the government's refusal to make the motion based upon preparation for a *Fatico* hearing was unlawful.[173] As part of their reasoning, the Second Circuit stated that the plain language of U.S.S.G. § 3E1.1(b) "refers only to the prosecution resources saved when the defendant's timely guilty plea 'permit[s] the government to avoid preparing *for trial*.'"[174] When analyzed under this language, the court stated that preparation for a *Fatico* hearing was not analogous to that of trial preparation since "Lee's post-plea objections to the PSR did not require the government to prepare 'for trial.'"[175] Moreover, the court also reasoned that a defendant "has a due process right to reasonably contest errors in the PSR that affect his sentence" and that withholding the one-level reduction under U.S.S.G. § 3E1.1(b) would be tantamount to punishing the defendant in that situation.[176]

c. Motions to Suppress Evidence May Implicate the Trial Preparation Clause of § 3E1.1(b)

The federal circuits are presently split as to whether preparation for a motion to suppress and the subsequent suppression hearing that typically follows, should suffice to withhold the one-level reduction under § 3E1.1(b).[177] A suppression hearing, also referred to as an exclusionary hearing, is "a pre-trial hearing in a criminal action to determine whether evidence is inadmissible because it was discovered or seized in violation of the Fourth, Fifth, or Sixth Amendments."[178] Since the decision on a motion to suppress can have a substantial effect on criminal proceedings, it is crucial to analyze how the various circuits have explored the tenuous relationship

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[169] *See id.*; *see also* U.S. SENT'G COMM'N, *supra* note 2, at 6. ("The PSR contains not only information about the offense and the offender but also the statutory range of punishment and a calculation of the relevant sentencing guidelines (with a corresponding guideline sentencing range), [and] any bases that may exist for imposing a sentence outside of the applicable range.").

[170] *See Lee*, 653 F.3d at 172.

[171] *See id.*

[172] *See id.*

[173] *See id.* at 173.

[174] *Id.* at 174 (citing U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018)).

[175] *Id.*

[176] *Id.*

[177] *See generally* United States v. Longoria, 958 F.3d 372 (5th Cir. 2020); United States v. Rogers, 129 F.3d 76 (2d. Cir. 1997).

[178] *Suppression Hearing*, BOUVIER LAW DICTIONARY (2012).

between a motion to suppress and the effect it can have on a potential downward departure under the Sentencing Guidelines.

1) Preparation for a Motion to Suppress Evidence is Sufficient to Withhold the Reduction under § 3E1.1(b)

One of the predominant arguments that circuit courts have used to support withholding the one-level reduction, in conjunction with a motion to suppress, is centered upon whether the evidence that would be presented at a suppression hearing would have substantial overlap with the criminal trial itself.[179] For instance, in *United States v. Rogers*, the defendant-appellant challenged whether they were entitled to the one-level reduction under § 3E1.1(b).[180] The Second Circuit affirmed the district court decision, specifically focusing on the motion to suppress and subsequent hearing to determine whether the evidence was admissible at trial.[181]

In their decision, the Second Circuit noted that the motion to suppress was the only viable option for the defendant before pleading guilty.[182] As such, the court determined that "in terms of preparation by the government and the investment of judicial time, the suppression hearing was the main proceeding in [the] case."[183] Although the defendant offered to enter a conditional plea after losing at the suppression hearing, the Second Circuit determined that this offer "did not come sufficiently early [enough] in the proceedings to allow the court or the government to avoid the burdens of litigating the case."[184]

Moreover, the doctrine of *stare decisis* has played a factor in similar situations.[185] For instance, in the Fifth Circuit, case precedent establishes that a motion to suppress "preclud[es] the government and the sentencing court from 'allocat[ing] their resources efficiently,' a concern central to § 3E1.1."[186] This precedent was recently enforced in the Fifth Circuit, through the doctrine of *stare decisis*, in *United States v. Longoria*.[187]

In *Longoria*, the defendant-appellant challenged the withholding of the government's motion under § 3E1.1(b) on the basis that the defendant made a motion to suppress the evidence.[188] At the onset of their decision, the Fifth Circuit noted that Longoria had a "compelling" argument for the

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[179] *See, e.g.*, *Rogers*, 129 F.3d at 80–81.
[180] *See id.* at 80.
[181] *See id.* at 80–81.
[182] *See id.* at 80 ("In this case, the only defensive measure available to [the defendant] was to argue that the evidence seized from her pocket was inadmissible.").
[183] *Id.*
[184] *See id.* at 80–81.
[185] *See, e.g.*, United States v. Longoria, 958 F.3d 372, 376 (5th Cir. 2020) ("One published decision is all it takes for *stare decisis*.").
[186] *See, e.g.*, United States v. Silva, 865 F.3d 238, 245 (5th Cir. 2017).
[187] *See generally* 958 F.3d 372 (5th Cir. 2020).
[188] *See id.* at 376.

one-level reduction based upon the plain language of the Guidelines.[189] Even though the Fifth Circuit considered Longoria's argument compelling, the case precedent in the Fifth Circuit mandated that the court affirm the government's decision to withhold the reduction since they had to prepare for the suppression hearing.[190]

2) Preparation for a Motion to Suppress Evidence is Not Sufficient to Withhold the Reduction under § 3E1.1(b)

Although some circuit courts believe that a motion to suppress is enough to warrant withholding the reduction under the Guidelines, other circuit courts believe that a motion to suppress, on its own, is not enough to warrant withholding the one-level reduction under § 3E1.1(b).[191] One of the arguments used by these courts centers on a plain reading of the Sentencing Guidelines, which states that the government's motion should signify that "the defendant has assisted authorities . . . by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing *for trial* . . . ."[192] Since motions to suppress are generally settled before the onset of trial, the preparation for those hearings does not warrant withholding the reduction under § 3E1.1(b).[193]

Moreover, circuit courts have also determined that withholding the reduction under § 3E1.1(b) because a defendant filed a motion to suppress would be tantamount to punishing them for exercising their constitutional rights.[194] In *United States v. Kimple*, the Ninth Circuit sought to determine whether the district court erred in withholding the one-level reduction under the Guidelines.[195] During the trial in the district court, "Kimple vigorously defended himself by filing a motion to suppress evidence that involved extensive briefing by the parties and hearing and consideration by the

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[189] *See id.* ("Section 3E1.1(b) speaks of 'trial,' not pretrial hearings, and preparing for a suppression hearing usually requires less time and resources than trial preparation.").

[190] *See id.* ("[F]or a quarter century we have repeatedly and 'routinely affirmed the denial of a one-level reduction under section 3E1.1(b) when the government had to prepare for a suppression hearing.'") (quoting United States v. Silva, 865 F.3d 238, 244 (5th Cir. 2017)).

[191] *See* cases cited *supra* note 6.

[192] U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) (U.S. SENT'G COMM'N 2018) (emphasis added).

[193] *See, e.g.*, United States v. Price, 409 F.3d 436, 443–44 (D.C. Cir. 2005) ("The District Court's conclusion on this point cannot be reconciled with the plain language of § 3E1.1(b)(2) . . . [w]hile the Government did have to prepare for a suppression hearing, the Government does not dispute that it never had to prepare for trial. Therefore, under the plain language of U.S.S.G. § 3E1.1(b)(2), [the defendant] was entitled to a third-level reduction in his offense level."); *accord, e.g.*, United States v. Marquez, 337 F.3d 1203, 1212 (10th Cir. 2003) ("[W]e hold that where a defendant has filed a non-frivolous motion to suppress, and there is no evidence that the government engaged in preparation beyond that which was required for the motion, a district court may not rely on the fact that the defendant filed a motion to suppress . . . to justify a denial of the third level reduction under § 3E1.1(b)(2).").

[194] *See, e.g.*, United States v. Kimple, 27 F.3d 1409, 1414 (9th Cir. 1994); *accord* United States v. Marroquin, 136 F.3d 220, 225 (1st Cir. 1998) ("The Guidelines do not force a defendant to forgo the filing of routine pre-trial motions as the price of receiving a one-step decrease.").

[195] *See Kimple*, 27 F.3d at 1411.

Court."[196] Before the district court could make an official ruling on the suppression motion, Kimple pled guilty to one count of the superseding indictment.[197] At sentencing, the district court denied the one-level reduction to Kimple's sentencing, citing the motion to suppress as part of their reasoning.[198]

On appeal in the Ninth Circuit, the court concluded that the district court erred in denying the one-level reduction for timely acceptance due to the motion to suppress.[199] In their analysis, the Ninth Circuit noted that "in determining a defendant's acceptance of responsibility, a sentencing court cannot consider against a defendant any constitutionally protected conduct, whether it occurs *before* or after the entry of a plea."[200] Additionally, the court stated that "constitutionally protected conduct," such as filing a motion to suppress, should not be held against a criminal defendant when examining whether that defendant is entitled to a reduction under § 3E1.1(b)(2).[201] Therefore, the Ninth Circuit concluded that "a defendant is entitled to receive the timely acceptance reduction only if he has pled guilty before the prosecution has begun meaningful trial preparations and before the district court has unnecessarily expended its resources, thereby preserving his constitutional rights and fulfilling the goals of subsection (b)(2)."[202] Since the government could not establish that they had completed any trial preparation beyond the suppression hearing, the Ninth Circuit determined that Kimple was entitled to the one-level reduction, thus vacating and remanding the decision to the lower court.[203]

IV. RECTIFYING THE SPLIT: PROPOSING AN AMENDMENT TO THE SENTENCING GUIDELINES

In an effort to rectify this schism between the Circuits, an amendment must be made to the United States Sentencing Guidelines that gives direct guidance as to how courts balance motions to suppress against the language of the plea-bargaining provision in U.S.S.G. § 3E1.1(b). Rather than making an amendment to the direct language of the Guidelines, this proposal seeks to add commentary into the advisory notes that follow the statutory language. This method is similar to what was done after *United States v. Divens*, which

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196 *Id.* at 1414.

197 *See id.*

198 *See id.* ("I would have to say that here there was some delay in making the decision to plead guilty. There were two motions. They were voluminous. They required considerable effort on the part of the Government and on the part of the Court. I think in this context, the additional point off is not justifiable, so I don't accept the objection [challenging the withholding of the one-level reduction under 3E1.1(b)(2)].").

199 *See id.* at 1413 ("The denial of a reduction under subsection (b)(2) is impermissible if it penalizes a defendant who has exercised his constitutional rights.").

200 *Id.* (citing United States v. Watt, 910 F.2d 587, 592 (9th Cir. 1990)).

201 *See id.*

202 *Id.*

203 *See id.* at 1415.

addressed the refusal to sign an appellate waiver.[204] This method would allow for the United States Sentencing Commission to address the dispute over the motion to suppress but would not affect the federal court's analysis on any other pre-trial motions. The following commentary, which would be added within the advisory notes of the Sentencing Guidelines, would state:

> Motions to suppress are presumptively considered pre-trial motions and, for the purposes of § 3E1.1(b), will not automatically preclude a reduction under the Guidelines. Should the Government elect to withhold the reduction due to the defendant's motion to suppress, the burden is on the Government to establish, by clear and convincing evidence, that their preparation for the motion to suppress would have "substantial overlap" with the impending criminal trial. The court must then determine whether the Government has met their burden to withhold the one-level reduction under § 3E1.1(b). If the court determines that the Government has not met their burden, the court must compel the Government to file the motion for the one-level reduction under subsection (b).
>
> This commentary does not preclude the court from denying the one-level motion under subsection (b) if the defendant's plea was not timely and, therefore, did not allow for efficient allocation of the court's resources.

A. The Procedural Impact

At the onset, this amendment seeks to protect the defendant's constitutional right to challenge evidence before going to trial.[205] The motion to suppress evidence is standard practice in criminal litigation and, if they are sustained, can be a huge boon to the defendant's ability to avoid jailtime. By presumptively withholding the one-level reduction under subsection (b) of the Guidelines, defendants are essentially challenged to "roll the dice" when filing their motion to suppress. If their motion to suppress is sustained, then the evidence is excluded. If, however, their motion to suppress is overruled, then the defendant is penalized with a higher base offense level. This amendment to the advisory notes eliminates that risk-allocation by initially protecting the defendant's interest in filing their motion to suppress before pleading guilty to any criminal charges. Furthermore, this also encapsulates the underlying principles of the "rule of lenity," a rule of

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[204] *See* U.S. SENT'G GUIDELINES MANUAL § 3E1.1(b) cmt. n.6 (U.S. SENT'G COMM'N, amended 2013);
see generally 650 F.3d 343 (4th Cir. 2011).

[205] *See generally* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

statutory interpretation, which states that ambiguous criminal statutes should be interpreted in favor of the defendant.[206]

At the same time, this amendment also allows the government the opportunity to withhold the one-level reduction, so long as the circumstances do not warrant the reduction. The Sentencing Commission has acknowledged that the federal prosecutor has the best vantage point to determine how much overlap would exist between the hearing for the motion to suppress and the actual trial. This is evidenced by the statement in the Guidelines that "the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial."[207] As such, the federal prosecutor must be given the opportunity to support their withholding of the one-level departure due to "substantial overlap" between the motion to suppress and the actual trial. Similarly, the higher standard of "[c]lear and convincing evidence" should streamline the number of challenges to this provision each year, thus promoting the efficient allocation of resources by the government and the court.[208] By allowing the federal prosecutor to retain some discretion to withhold the one-level reduction under U.S.S.G. § 3E1.1(b), this amendment maintains an efficient balance of power between the prosecutor and the court, as designed by the 2003 amendment in the PROTECT Act.[209]

Additionally, this amendment would not preclude the court from withholding the reduction due to the defendant's untimely notification, which would affect the allocation of court resources. In contrast with the government's resources in preparation for trial, the court's resources largely center on the use of the courtroom and the judicial staff being available for hearings. This amendment would not strip the court's ability to evaluate how the defendant's notice of an intent to plead guilty would affect the allocation of judicial resources moving forward. Should the defendant not give any intent to plead guilty until after the conclusion of the hearing on the motion to suppress, the court would be within its authority to refuse to accept the government's motion for a reduction under the Guidelines if the court was not able to effectively allocate its staff and its courtroom facilities.

Ultimately, this amendment accomplishes the goal of the plea-bargaining provision of the Guidelines, which is the efficient allocation of

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[206] *See, e.g.*, WILLIAM N. ESKRIDGE ET AL., CASES AND MATERIALS ON STATUTORY INTERPRETATION 863 (2012); s*ee also* Rowe v. Lockhart, 736 F.2d 457, 461 (8th Cir. 1984) ("The rule of lenity is a rule of statutory construction that provides that ambiguities in criminal statues must be resolved in favor of lenity."); State v. Guarnero, 867 N.W.2d 400, 408 (Wis. 2015) ("The rule of lenity provides that when doubt exists as to the meaning of a criminal statute, 'a court should apply the rule of lenity and interpret the statute in favor of the accused.'").

[207] *See supra* note 63 and accompanying text.

[208] *See, e.g.*, Roche Diagnostics Corp. v. Priority Healthcare Corp., No. 2:18-CV-01479-KOB, 2020 U.S. Dist. LEXIS 81449, at *11–12 (N.D. Ala. May 8, 2020) ("Clear and convincing evidence is a demanding but not insatiable standard, [but] requiring proof that a claim is highly probable.").

[209] *See supra* notes 60–64 and accompanying text.

resources. By balancing the constitutional rights of the defendant, the duties of the federal prosecutor, and the time of the federal courts, this amendment creates a standard that is workable for all parties. This clear standard will lead to less time litigating disputes regarding the downward departure provision and, therefore, will permit both the federal prosecutor and the court to "efficiently allocate" their resources as stated in the Guidelines.

B. Policy Considerations

As stated previously, this amendment would streamline the process for examining the effect of a motion to suppress on the plea-bargaining provision, which, in turn, would allow for the efficient allocation of resources by the federal court. By giving clarity to the procedural process, courts will hear fewer cases regarding motions to suppress and their effect on advisory Sentencing Guidelines ranges. At the same time, this amendment still empowers judges to deny the motion in the event that judicial resources are not being allocated efficiently. Moreover, for practitioners within the legal field, this amendment would reduce the inconsistencies in sentencing between the circuits, which was the original aim of the Sentencing Guidelines.[210] The advisory note would give guidance to practitioners on how the motion to suppress should affect the plea-bargaining procedures at the federal level. With this information in hand, defense attorneys can ascertain a firm snapshot of their client's base offense level after factoring in all reductions.

Lastly, this amendment creates a fair process, which strengthens public opinion of the criminal justice system in America. Although people may not always agree about the outcome of a case, society must believe that the criminal justice system is fair. By establishing a clear, workable standard that protects the constitutional rights of the accused, while also allowing the government to pursue justice, this amendment can hopefully instill societal confidence in the criminal justice system.

V. CONCLUSION

As the schism currently stands, some defendants are left with a grave decision during the pre-trial phase of their criminal trial: they must either take the deal that they are given or "roll the dice" and exercise their constitutional right by filing a motion to suppress evidence. If this challenge fails, defendants are likely left with longer advisory sentencing periods and, possibly, longer sentences in federal prisons. This choice seemingly punishes defendants for exercising their rights by requiring the federal prosecutor to 'do their jobs' and substantiate the evidentiary chain required by the United States Constitution.

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[210] *See supra* notes 10–11 and accompanying text.

This delicate balance between the defendant's constitutional right to challenge evidence and the plea-bargaining system in the Sentencing Guidelines must be addressed by the United States Sentencing Commission. Although the United States Sentencing Commission has amended the plea-bargaining provision of the Guidelines in the past, they have typically elected to do so after the United States Supreme Court has weighed in on the contested provision. The Supreme Court may hear this issue in the future, but currently, they have no plans to do so.[211]

Rather than wait for the Supreme Court to elect to hear oral arguments on this issue, the Sentencing Commission should address this issue directly and amend the Guidelines to avoid any further confusion amongst the federal circuits.[212] By acting immediately, the Sentencing Commission can protect the rights of defendants while also promoting the efficiency of the prosecutor and the courts. Although this proposed amendment may not be adopted immediately, my hope is that consistency in the plea-bargaining provision of the United States Sentencing Guidelines is within reach . . . and when that day finally comes, I have to believe that Olivia Benson and I would both have something to celebrate.

[211] *See* United States v. Longoria, 958 F.3d 372 (5th Cir. 2020), *cert. denied* 141 S. Ct. 978 (Mar. 22, 2021).

[212] *See* Longoria v. United States, 141 S. Ct. 978, 979 (Mar. 22, 2021) (Sotomayor, J., concurring) ("The Sentencing Commission should have the opportunity to address this issue in the first instance . . . .").