Refusing to Compare Apples and Oranges: Why the Fourth Circuit Got it Right in United States v. Divens

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INTRODUCTION

In *United States v. Divens*, the Fourth Circuit reviewed a defendant’s appeal challenging the U.S. District Court for the Southern District of West Virginia’s decision at sentencing that allowed the Government to withhold an extra acceptance of responsibility reduction under the United States Sentencing Guidelines (“Guidelines”) section 3E1.1(b). The Fourth Circuit reached a “very interesting and perhaps somewhat surprising” result: it vacated the defendant’s sentence and remanded the case for further
proceedings. The court ruled that the Government could not base its refusal to move for the extra acceptance of responsibility reduction on a defendant’s refusal to waive appellate rights. It refused to analogize section 3E1.1(b) to section 5K1.1. Section 5K1.1 provides for a downward departure upon a Government’s motion stating “that the defendant has provided substantial assistance” to the Government. In doing so, the Fourth Circuit split with the First, Fifth, Seventh, and Ninth Circuits, which all allow the Government broad discretion under section 3E1.1(b). The Fourth Circuit narrowed the Government’s discretion under section 3E1.1(b) to determine whether the defendant “timely” entered a “plea of guilty.”

This Recent Development argues that, despite creating a circuit split, the Fourth Circuit’s refusal to allow prosecutors to condition the extra sentence reduction on a defendant’s waiver of the right to appeal was correct. The court’s analysis is logical, clear, and furthers the Guidelines’ purpose of conserving scarce trial resources. Divens also reinforces other objectives that the criminal adjudication system values: predictability and certainty in federal sentencing.
acceptance of responsibility reduction is an adjustment that allows a defendant to “reduce his offense level and, ultimately, his advisory sentencing range”\(^{18}\) by assisting “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 [G]overnment to avoid preparing for trial and permitting the [G]overnment and the court to allocate their resources efficiently.”\(^{19}\) In *Divens*, the precise legal issue was whether the government has the power to condition a section 3E1.1 motion on the refusal by a defendant to waive appellate rights. The Fourth Circuit split with its sister circuits when it decided that section 3E1.1(b) should not be read to place near-unreviewable discretion, a la section 5K1.1, in the government over section 3E1.1 motions. The decision in *Divens* reflects a new analysis of section 3E1.1(b) that relies on the plain language of the Guidelines and their commentary instead of congressional intent. The Fourth Circuit’s approach has already guided the Second Circuit’s analysis in *United States v. Lee*,\(^{20}\) and the circuit split raises interesting questions about the acceptance of responsibility scheme that the Supreme Court of the United States should resolve.

Part I provides background on the Guidelines and case law regarding the Government’s discretion to refuse to move for extra reduction under section 3E1.1(b) when a defendant signs an acceptance of responsibility statement but refuses to sign a plea agreement waiving appellate review. Part II summarizes the facts and holding of the district court’s decision in *United States v. Divens*, outlines the contours of the Fourth Circuit’s recent opinion, and argues that *Divens* was correctly decided. Part III analyzes the legal effect of the Fourth Circuit’s decision in *Divens*, which created a circuit split, and argues that the Supreme Court should not only grant certiorari to resolve the circuit split surrounding the acceptance of responsibility scheme but should also adopt the Fourth Circuit’s position.

I. BACKGROUND OF ACCEPTANCE OF RESPONSIBILITY

Before the offense level adjustment based on acceptance of responsibility was incorporated into the Guidelines, the idea that accepting responsibility for one’s actions could mitigate punishment

\(^{18}\) Brief of Appellant, *supra* note 2, at 9.

\(^{19}\) U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2010).

\(^{20}\) 653 F.3d 170 (2d Cir. 2011).
had been present in the criminal adjudication system for decades.\textsuperscript{21} At sentencing, whether a defendant cooperated with the authorities when he was arrested,\textsuperscript{22} whether a defendant entered a guilty plea or insisted on having a trial, and whether a defendant's allocution at his sentencing hearing expressed remorse were all relevant inquiries.\textsuperscript{23} A defendant was usually rewarded with a lower sentence for cooperating with authorities upon arrest, entering a guilty plea, and giving a remorseful allocution.\textsuperscript{24} Thus, well before the introduction of the Guidelines, defendants who accepted responsibility for their crimes received lesser sentences than those who do not.\textsuperscript{25}

\textbf{A. United States Sentencing Guidelines}

When Congress originally enacted the Guidelines in 1984,\textsuperscript{26} it reduced the common law idea of acceptance of responsibility to a technical formula.\textsuperscript{27} Section 3E1.1 of the Guidelines provided for a two-level reduction in a defendant's offense level for acceptance of responsibility.\textsuperscript{28} While the reduction was not automatic, the primary purpose of section 3E1.1 was to encourage guilty pleas while at the same time avoiding an automatic reduction that might be subject to

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\item See United States v. Jones, 997 F.2d 1475, 1477-78 (D.C. Cir. 1993) ("Since long before the Guidelines, the law has allowed sentencing judges to show leniency to defendants who demonstrate contrition and acceptance of responsibility for their crimes." (citing Corbitt v. New Jersey, 439 U.S. 212, 224 (1978); Brady v. United States, 397 U.S. 742, 751 (1970))).
\item Brief of Appellant, supra note 2, at 11-12.
\item Jones, 997 F.2d at 1478.
\item See, e.g., Comment, The Influence of the Defendant's Plea on Judicial Determination of Sentence, 66 YALE L.J. 204, 206-07 (1956) (stating that in a survey of 140 judges, 66% believed that guilty pleas were relevant at sentencing and 87% of those indicated that guilty pleas lead to lower sentences).
\item The Guidelines have been described as \"a long set of instructions for one chart: the sentencing table . . . which has 43 offense levels, 6 criminal history categories, and 258 sentencing range boxes.\" Frank O. Bowman, The Failure of the Federal Sentencing Guidelines: A Structural Analysis, 105 COLUM. L. REV. 1315, 1324-25 (2005); see also supra note 2 (discussing a court's considerations in sentencing according to the Guidelines).
\item U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (1987). For example, the Guidelines recommended a sentence of 41 to 51 months for a defendant convicted of an offense with an offense level of 22 and a criminal history category of I; however, a two-level reduction in the same defendant's offense level would reduce the recommended Guidelines sentence to between 33 and 41 months. \textit{Id.} § 5A.
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constitutional challenges.\textsuperscript{29} Thus, the original version of section 3E1.1 established the link between a guilty plea and acceptance of responsibility.\textsuperscript{30}

On November 1, 1992, the Sentencing Commission added an extra acceptance of responsibility reduction level as part of the amendment to the Guidelines.\textsuperscript{31} The revised Guidelines provided that a defendant could receive an extra one-level reduction in cases where the offense level was 16 or greater.\textsuperscript{32} The revision conditioned the extra reduction's availability on whether "the defendant ha[d] assisted authorities in the investigation or prosecution of his own misconduct by" either "timely providing complete information to the [G]overnment concerning his own involvement in the offense" or by "timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the [G]overnment to avoid preparing for trial and permitting the court to allocate its resources efficiently."\textsuperscript{33} The Sentencing Commission provided the extra one-level reduction based on the beneficial effects of a guilty plea with regard to trial preparation and trial court resources.\textsuperscript{34} The Fourth Circuit found that

\textsuperscript{29} See Michael M. O'Hear, Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines, 91 NW. U. L. REV. 1507, 1512-21 (1997) (explaining that conviction at trial has never precluded a reduction and entertaining a guilty plea has never guaranteed one).

\textsuperscript{30} United States v. Jones, 997 F.2d 1475, 1478 (D.C. Cir. 1995) ("The law also has long recognized that a defendant's decision to plead guilty is good evidence of acceptance of responsibility and possibly even sincere remorse." (citing Brady v. United States, 397 U.S. 742, 753 (1970))).

\textsuperscript{31} U.S. SENTENCING GUIDELINES MANUAL app. C (2011).

\textsuperscript{32} The vertical axis of the Sentencing Table's grid represents the offense level, which is calculated under the appropriate Guideline section and can range from 1 to 43. U.S. SENTENCING GUIDELINES MANUAL § 5A (2010). The severity of punishment for an offense level of 16 ranges, depending on the defendant's criminal history category, from 21 to 57 months. Id. For example, the Guidelines recommend a 21 to 27 month sentence for a defendant convicted of an offense with an offense level of 16 (e.g., failure to register as a sex offender) and a criminal history category of I; however, if the same defendant's criminal history category is VI, then the recommended Guidelines sentence would increase to 46 to 57 months. Id.

\textsuperscript{33} Id. § 3E1.1(b).

\textsuperscript{34} United States v. Lancaster, 112 F.3d 156, 158 (4th Cir. 1997) ("[O]nce the defendant proves by a preponderance of the evidence that he is eligible for the additional one-level adjustment, the district court has no discretion to refuse to award it."); see also Steve Statsinger, Point of Controversy, SECOND CIRCUIT BLOG (Aug. 13, 2011, 12:07 PM), http://circuit2.blogspot.com/2011/08/point-of-controversy.html ("[T]he third acceptance of responsibility point—although to be completely faithful to guideline lingo, it is a 'level,' not a 'point,' since 'points' are for criminal history—was something of a given. As long as the defendant either confessed early on or pled guilty timely, the reduction was granted.").
when a defendant satisfied these additional requirements, which are
necessary to move the defendant from the two-level reduction to the
three-level reduction, the district court could not deny his three-level
reduction.\footnote{At 158.}

In 2003, Congress amended section 3E1.1 as part of the
Prosecutorial Remedies and Other Tools to End the Exploitation of
of 18, 28, and 42 U.S.C.).} The PROTECT Act primarily focused on sexual offenses involving children. As explained by a Senate report, the Act was passed to "restore the
[Government's] ability to prosecute child pornography offenses successfuly."\footnote{S. REP. No. 108-2, at 1 (2003).} Representative Tom Feeney offered an amendment to the
PROTECT Act that limited the ability of district courts to depart
from the then-mandatory Guidelines in all cases involving sexual
"addresses the longstanding problem of downward departures from the Federal
Sentencing Guidelines").} The Feeney Amendment ("Amendment") was the first act of Congress to directly amend the
Guidelines.\footnote{United States v. Detwiler, 338 F. Supp. 2d 1166, 1171 (D. Or. 2004). However, although the Feeney Amendment was the result of a congressional directive, "the
Commission amended the language of this adjustment, [G]uideline section 3E1.1(b), to
require a [G]overnment motion for the third point.... [a]nd the Commission justified it
on the theory that only the [G]overnment knew whether its resources had truly been
conserved." Statsinger, \textit{supra} note 34.}

Additionally, the Amendment updated section 3E1.1(b) by
inserting language "substituting the requirement that the
[Government ... make the motion for the third-level reduction that
currently is in subsection (b)."\footnote{United States v. Richins, 429 F. Supp. 2d 1259, 1263 (D. Utah 2006).} The post-Amendment version of
section 3E1.1(b) indicates that the prosecutor's motion should state
"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."\footnote{U.S. SENTENCING GUIDELINES MANUAL \$ 3E1.1(b) (2010).} The Amendment did not affect the substantive basis of section 3E1.1
because the determination regarding a timely guilty plea remains
substantially the same; however, the Amendment changed who initiates and requires deference to the decision of the prosecutor.\textsuperscript{42}

In practice, the original two-level reduction for acceptance of responsibility under section 3E1.1(a) gave most defendants a 20\% sentence reduction for pleading guilty.\textsuperscript{43} The additional one-level reduction for acceptance of responsibility under section 3E1.1(b) raises the sentence reduction to 28\% for sparing the Government the cost of preparing for trial.\textsuperscript{44} Thus, under section 3E1.1(a), a hypothetical defendant's sentence of 51 months could be reduced to 41 months, and if the same defendant were given the additional acceptance of responsibility reduction under section 3E1.1(b), the sentence could be further reduced to 37 months.\textsuperscript{45} Therefore, the structure of the Guidelines rewards a hypothetical defendant with a 14-month reduction to his sentence for deciding to plead guilty and waiving the right to trial.

\textbf{B. Case Law}

Since section 3E1.1(b) was amended in 2003, there has been little litigation regarding the additional one-level reduction.\textsuperscript{46} Circuit courts other than the Fourth Circuit have concluded that the Government has the discretion to refuse to file the motion for the third-level reduction for acceptance of responsibility based on a variety of reasons.\textsuperscript{47} These courts have relied on \textit{Wade v. United States}\textsuperscript{48} and

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\item \textsuperscript{42} United States v. Johnson, 581 F.3d 994, 1010 (9th Cir. 2009) (Smith, J., dissenting in part, but concurring in the judgment); see also United States v. Espinoza-Cano, 456 F.3d 1126, 1137 (9th Cir. 2006) (noting that with the exception of giving the Government discretion to file a motion, "the language of section 3E1.1(b) tracks the former language of section 3E1.1(b)(2)").
\item \textsuperscript{43} Ricardo J. Bascuas, \textit{The American Inquisition: Sentencing After the Federal Guidelines}, 45 WAKE FOREST L. REV. 1, 42 (2010) ("That suggests that, putting collateral consequences of a conviction (such as reduced employability, loss of civil rights, or deportation) aside, a defendant would go to trial only if he believed that his chance of acquittal was at least 20%.")
\item \textsuperscript{44} Id. at 43 ("[M]eaning a defendant who believed the [G]overnment had only a 72\% chance of convicting him would plead guilty."); see also Julie R. O'Sullivan, \textit{In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System}, 91 NW. U. L. REV. 1342, 1415 & n.274 (1997) (collecting sources to support the assertion that, on average, a three-level reduction equals a 35\% reduction in the sentence).
\item \textsuperscript{45} See Bascuas, supra note 43, at 42 n.263, 43.
\item \textsuperscript{46} Statsinger, supra note 34; see also \textit{Sentencing Guidelines}, 39 GEO. L. J. ANN. REV. CRIM. PROC. 699, 715 n.2130 (2010) (collecting section 3E1.1(b) cases).
\item \textsuperscript{47} See, e.g., \textit{Johnson}, 581 F.3d at 1006-07 (refusing to file Rule 35(b) motion because defendant pursued appeal of conviction); United States v. Beatty, 538 F.3d 8, 16-17 (1st Cir. 2008) (contesting the court's failure to award a sentencing reduction for defendant's cooperation with the}
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United States v. Butler\(^49\) in interpreting section 5K1.1, a provision of the Guidelines that allows the Government broad discretion to determine whether the defendant has provided substantial assistance to the Government and whether to file a motion for a downward departure.\(^50\) They use section 5K1.1 to interpret the added requirement of "[u]pon motion of the Government" in section 3E1.1 and conclude that the third-level reduction is no longer based on trial preparation, but instead on the presence or absence of the Government's motion.\(^51\) Other circuits rely on the legislative history when applying section 3E1.1, specifically the change from the prior version to the Amendment's 2003 language.\(^52\)

The Fourth Circuit discussed the amended version of section 3E1.1(b) in United States v. Chase.\(^53\) In Chase, the defendant entered a plea agreement with the Government, in which the Government agreed to move for the third-level reduction for acceptance of responsibility if the defendant met certain conditions.\(^54\) Although the probation officer recommended that Chase receive credit for acceptance of responsibility and the district court concluded that he should get credit, the Government did not file a motion and Chase did not receive the full three-level reduction.\(^55\) Chase raised the issue too late for the court to consider the underlying issue—whether the Government could refuse to move for an extra one-level reduction based on an arbitrary position, there the defendant's refusal to waive his appellate rights.\(^56\)

Chase appealed to the Fourth Circuit and made two arguments: (1) the Government breached the plea agreement by failing to file an

\(49\) 272 F.3d 683 (4th Cir. 2001).
\(50\) United States v. Divens, 650 F.3d 343, 345 (4th Cir. 2011); see also Brief of Appellant, supra note 2, at 10 (discussing the similarity between sections 3E1.1(b) and 5K1.1 in requiring a Government motion).
\(51\) See, e.g., Beatty, 538 F.3d at 15–16 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2003) and determining whether the Government was satisfied with the defendant's acceptance of responsibility).
\(52\) See, e.g., United States v. Espinoza-Cano, 456 F.3d 1126, 1137 (9th Cir. 2006).
\(53\) 466 F.3d 310 (4th Cir. 2006).
\(54\) Id. at 312 (stating that the defendant had to provide information about his criminal conduct and pay a special assessment fee within forty days of the entry of his guilty plea).
\(55\) Id. at 312–13.
\(56\) Id. at 314 n.2 ("Because Chase did not raise this argument in his brief, it is waived.").
acceptance of responsibility motion; and (2) in light of United States v. Booker, the district court had the discretion to give him the third-level reduction without the Government's motion. The Fourth Circuit rejected both arguments. The underlying issue was also not addressed because Chase raised it for the first time at oral argument.

In Divens, the Fourth Circuit discussed the Wade and Butler standard, admitting that "[i]f ... section 5K1.1 reductions were to control cases like this one, involving section 3E1.1(b) reductions, Divens could not prevail." However, the court found that the specific question in Divens had not yet been answered: whether the Government has discretion to refuse to move for extra acceptance of responsibility reduction under section 3E1.1(b). The Fourth Circuit concluded, in light of the entire history of the provision, that the Government did not have discretion to refuse to move for an extra acceptance of responsibility reduction based on a defendant's refusal to waive appellate rights.

II. United States v. Divens

On April 3, 2009, detectives with the Charleston, West Virginia Police Department were engaged in an undercover prostitution sting on the city's west side. While watching for signs of activity, detectives observed suspicious behavior near a gold Pontiac that was consistent with a drug transaction taking place. Detectives noticed the car had one headlight out and decided to approach it. As they did, Leshawn Dwayne Divens, the passenger in the car, got out and started to flee. Detectives observed Divens throw a baggie that

58. Chase, 466 F.3d at 313–16. Chase argued "that a Government motion is no longer required in order to authorize the additional reduction now that United States v. Booker ... has rendered the guidelines advisory only." Id. at 315. The court found that Chase's argument was incorrect and restated "[t]hat the guidelines are non-binding in the wake of Booker does not mean that they are irrelevant to the imposition of a sentence." Id. (quoting United States v. Moreland, 437 F.3d 424, 432 (4th Cir. 2006)).
59. Id.
60. Id. at 314 n.2.
61. See supra notes 47–52 and accompanying text.
63. Id. at 345.
64. Id. at 347.
66. Id.
67. Id.
68. Id.
contained crack cocaine, which they recovered after Divens was arrested.  

A. United States District Court

Divens was charged with a one-count indictment of "possession with intent to distribute a quantity of cocaine base in violation of 21 U.S.C. § 841(a)(1)." The proposed plea agreement contained a provision that waived the appellate rights of both Divens and the Government. The plea agreement stated that Divens "knowingly and voluntarily waives his right to seek appellate review of any sentence of imprisonment or fine imposed by the District Court on any other ground, so long as that sentence is below or within the Sentencing Guideline range determined by the District Court prior to any variance." Divens signed an acceptance of responsibility statement, but declined to sign the plea agreement because it contained the appellate waiver and instead pleaded guilty to distributing cocaine without the benefit of the plea agreement.

Before the sentencing hearing, the probation officer drafted a Presentence Investigation Report ("PSR"). He suggested a two-level reduction for acceptance of responsibility under section 3E1.1(a), stating that he did not anticipate that the Government would move for an additional one-level reduction under section 3E1.1(b) since the defendant did not sign the plea agreement. In Divens's sentencing memorandum, Divens objected to the PSR Guidelines calculation because he did not receive the additional one-level reduction for acceptance of responsibility. The Government responded that it would not move for the additional one-level reduction because it "ha[d] a legitimate interest in preserving [G]overnment resources, not just prior to judgment, but also after judgment in appeal and collateral review proceedings.

On October 13, 2009, Judge Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia held a
sentencing hearing for Divens. Divens argued that since the Government did not move for the additional one-level reduction because Divens declined to sign the plea agreement, the court should compel the Government to do so since the Government's reasons were not rationally related to the legitimate governmental interest described in section 3E1.1. Judge Goodwin heard argument regarding Divens's objection to the Government's decision not to move for the additional one-level reduction. The Government acknowledged that its rationale for withholding the one-level reduction was because "[Divens] refused to execute the appellate waiver." Judge Goodwin overruled Divens's objection, finding that "the statute is clear and unambiguous and requires the Government to make the motion before the Court has the discretion to award the point." The district court sentenced Divens to a 36-month prison term, and Divens appealed.

B. Fourth Circuit

Divens's appeal challenged Judge Goodwin's decision not to compel the Government to move for the section 3E1.1 reduction. The Government's principal argument was that "Divens' failure to sign the appellate waiver justifie[d] the Government's refusal to move for the additional one-level reduction under [section] 3E1.1(b)." Therefore, the fundamental issue for the Fourth Circuit was whether section 3E1.1(b) allows the Government to withhold the additional

79. See id.
80. Id. Divens also argued that the district court should calculate his sentence using a 1-to-1 crack/powder cocaine ratio. Id. at 4-5. Judge Goodwin stated that he would "make an adjustment," id. at 5, regarding the powder-to-crack cocaine ratio and imposed a 20:1 ratio. Brief of Appellee, supra note 65, at 5. Divens objected "to the disparity [100:1] in sentencing between offenses involving cocaine base and cocaine powder." Transcript of Sentencing Hearing at 3, United States v. Divens, No. 2:09-CR-00114 (S.D. W. Va. Oct. 13, 2009), ECF No. 43. This disparity is based on the drug quantity table in the Guidelines, which is used to determine crack-based offense levels. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2011). Divens objected to the disparity in the Guidelines and argued "that a 1:1 ratio should be applied." Transcript of Sentencing Hearing, supra, at 3. Judge Goodwin made an adjustment to a 20:1 ratio, saying: "I categorically disagree with the disparity as set forth in the [G]uidelines." Id.
81. Brief of Appellant, supra note 2, at 5-6.
82. Id.
83. Brief of Appellee, supra note 65, at 5.
84. Id.
86. Id. at 345.
one-level reduction based on its interest in conserving appellate resources.\textsuperscript{87}

The Fourth Circuit split with other circuits in holding that although the Government has discretion to refuse to move for the extra acceptance of responsibility reduction under section 3E1.1(b), the Government’s refusal must be based on “an interest recognized by the guideline itself—not, as with [section] 5K1.1, on the basis of any conceivable legitimate interest.”\textsuperscript{88} The Fourth Circuit’s reasoning was trifold: (1) section 5K1.1 cases are inapplicable in interpreting section 3E1.1(b); (2) judicial interpretation of a Guidelines provision is controlled by the Guidelines commentary; and (3) in contrast to the Government’s broad discretion under section 5K1.1, the Government’s discretion under section 3E1.1 is much more limited.\textsuperscript{89}

The Fourth Circuit initially focused its analysis on \textit{Wade}, determining that \textit{Wade} was inapplicable in interpreting section 3E1.1(b).\textsuperscript{90} In \textit{Wade}, the Supreme Court interpreted section 5K1.1, a Guidelines provision that provides for a downward departure, upon the Government’s motion, when the defendant has provided substantial assistance to the Government.\textsuperscript{91} The \textit{Wade} Court held that section 5K1.1 provided the Government a “power, not a duty, to file a motion.”\textsuperscript{92} However, the Court recognized that if the “refusal to move was not rationally related to any legitimate Government end,” district courts could compel the Government to move for the section 5K1.1 reduction.\textsuperscript{93}

In \textit{Butler}, the Fourth Circuit interpreted \textit{Wade} to permit “the Government to refuse to file a substantial assistance motion under [section] 5K1.1 so long as it provides \textit{any} legitimate reason, even one unrelated to the defendant’s ‘substantial assistance.’”\textsuperscript{94} Therefore, the Fourth Circuit acknowledged that if it applied the section 5K1.1

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\item \textit{Id. at 344–45.}
\item \textit{Id. at 347; see also Kristen Leddy, Just Deserts for Timely Acceptance of Responsibility, FOURTH CIRCUIT BLOG (July 8, 2011, 10:01 AM), http://circuit4.blogspot.com/2011/07/just-deserts-for-timely-acceptance-of.html (“The Fourth Circuit broke with other circuits in determining that the Government does not enjoy the discretion it does under sect. 5K1.1 in sect. 3E1.1, finding that sect. 3E1.1 does not require that a defendant provide the prosecution with assistance that must reduce ‘expense and uncertainty’ at attends an appeal.” (quoting \textit{Divens}, 650 F.3d at 348)).}
\item \textit{Divens}, 650 F.3d at 345–48.
\item \textit{Id. at 345–47.}
\item \textit{Id. at 185.}
\item \textit{Id. at 186.}
\item \textit{Divens}, 650 F.3d at 345 (citing United States v. Butler, 272 F.3d 683, 687 (4th Cir. 2001)).
\end{enumerate}
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standard to Divens's case, which involved section 3E1.1, then Divens could not win. However, the Fourth Circuit declined to apply the section 5K1.1 standard, finding the issue to be one of first impression. The court noted that "the Government never explicitly argue[d] that the standard developed in Wade and Butler governs [section] 3E1.1(b) reductions" and explained that the Guidelines commentary would make such an argument "unteachable."  

C. Why the Fourth Circuit Got It Right

The Fourth Circuit's analysis was correct because the judicial interpretation of a Guidelines provision is controlled by the Guidelines commentary unless the commentary is "inconsistent with, or a plainly erroneous reading of" the Guidelines provision. This is true even if the Guidelines commentary states a "broader interpretation" than the Guidelines provision. After recognizing these two principles of Guidelines provision interpretation, the Fourth Circuit focused on two Guidelines commentaries that indicated that in determining whether to move for the additional one-level reduction pursuant to section 3E1.1(b), the Government's discretion is narrow in comparison to the wide discretion allowed under section 5K1.1.

First, the Guidelines application commentary to section 3E1.1 states "[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)." The court emphasized the word "provides" and explained that the language is significant in the application commentary to section 3E1.1 because the application commentary to section 5K1.1 does not use the same language. Second, the Guidelines background commentary to section 3E1.1 explains that "[s]uch a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner,

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95. Id. (citing United States v. Wiggins, 905 F.2d 51, 53–54 (4th Cir. 1990) (recognizing the legitimacy of appellate waivers)).
96. Id. (citing United States v. Chase, 466 F.3d 310, 314 n.2 (4th Cir. 2006)).
97. Id. at 345.
100. Divens, 650 F.3d at 346–47.
101. Id. at 346.
102. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) cmt. 6 (2010).
103. Divens, 650 F.3d at 346.
thereby appropriately meriting an additional reduction.” 104 Here, the court emphasized the words “thereby” and “meriting” and again noted that the background commentary to section 5K1.1 does not use the same language. 105 Read together, the Fourth Circuit found that while both section 3E1.1(b) and section 5K1.1 reductions were dependent on a “motion of the Government,” the Government’s discretion under section 3E1.1(b) to choose to not file a motion was much more limited than under section 5K1.1. 106

The court addressed two counterarguments to its Guidelines commentary analysis: (1) that parts of the Guidelines commentary it relied upon “originally accompanied a version of section 3E1.1(b) that lacked the current requirement of a Governmental motion”; and (2) while the requirement of a Governmental motion was the result of a congressional directive in the PROTECT Act, the Sentencing Commission wrote the mandatory language in the Guidelines commentary. 107 The court found that neither counterargument affected the persuasive force of the commentary because Congress delegated the authority to interpret the Guidelines to the Sentencing Commission, and its commentary both binds the courts and is outside of Congress’s review. 108

The Fourth Circuit concluded that the Government has some discretion regarding whether to file a motion under section 3E1.1(b). 109 The Guidelines commentary for the 2003 amendment explains that “[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, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing.” 110 Once the motion is filed, this sentence narrows the Government’s discretion to the determination under section 3E1.1 of “whether the defendant’s assistance has relieved it of preparing for trial.” 111 Under the Fourth Circuit’s interpretation of the section 3E1.1 commentary, if the Government concludes that the defendant’s assistance has relieved it of trial preparation, the

104. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) (2010).
105. Divens, 650 F.3d at 346.
106. Id. at 345–46.
107. Id. at 346 n.1 (citing U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b)(2002)).
108. Id. (citing Stinson v. United States, 508 U.S. 36, 46 (1993)).
109. Id. at 346.
111. Divens, 650 F.3d at 346 (emphasis omitted).
Government does not have discretion to file a section 3E1.1 motion; rather, the Government must do so.

Additionally, the court explained that the defendant is entitled to the additional reduction once the Government exercises its discretion and makes the initial determination that a defendant did alleviate the burden of trial. The court emphasized the commentary’s mandatory terms: the application commentary’s provision of the reduction and the background commentary’s determination that a defendant who meets the criteria merits the reduction. Thus, the court concluded that once the Government determines that a defendant satisfies the requirements of subsection (b), “he becomes entitled to the reduction.” Furthermore, the court noted that the difference in the Government’s discretion and the standard that governs under section 3E1.1 is supported by the absence of any analogous commentary to section 5K1.1.

The Government made three other arguments in the Fourth Circuit for upholding Divens’s sentence, and the court rejected all three. First, the Government argued that appellate waivers serve its interest in avoiding expense and uncertainty due to appellate and collateral attacks. The court determined that section 3E1.1(b) only requires that the defendant “timely” enter a “plea of guilty,” which Divens did with a “confession of guilt in open court.” Moreover, the court found that the text of section 3E1.1(b), which evinces a concern for efficient allocation of resources, is a concern for “trial resources, not appellate resources.”

Second, the Government argued that conserving appellate resources is “closely related” to the interests that are recognized in section 3E1.1(b), “namely, to avoid the expense and uncertainty of having to defend defendant’s conviction and sentence on appeal and

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112. Id.
113. Id. The Guidelines application commentary to section 3E1.1 states “[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 conduct by taking the steps set forth in subsection (b).” U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b) cmt. 6 (2010) (emphasis added). The Guidelines background commentary to section 3E1.1 explains that “[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. § 3E1.1(b) (emphasis added).
114. Divens, 650 F.3d at 346.
115. Id.
117. Divens, 650 F.3d at 348.
118. Id.
The court found no basis in the Guidelines provision itself that would justify the Government creating “closely related” interests recognized in section 3E1.1(b). The court explained that “[section] 3E1.1(b) 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.” Furthermore, the Government failed to offer any evidence to support its position that appellate waivers further the interests recognized by Congress in amending section 3E1.1(b).

Third, the Government argued that its decision to mandate an appellate waiver before it moved for a section 3E1.1(b) reduction was necessary to protect it from spending resources “anticipating, and ultimately defending, a complete appeal.” The court explained that the Government’s argument failed to take into account that an unconditional guilty plea itself limits appellate and collateral attacks. This is because attacks regarding whether the plea “was both counseled and voluntary” are out of the reach of any permissible appellate waiver. Therefore, the Government’s interest in avoiding the anticipation of such a challenge would not be affected by a defendant’s refusal to sign an appellate waiver.

The Fourth Circuit split with other circuits on the additional one-level reduction for acceptance of responsibility because it refused to rely on section 5K1.1 cases to interpret section 3E1.1(b). The Fourth Circuit found that the commentary to section 3E1.1(b) mandated a different analysis and pointed out that the commentary “has received little attention from our sister circuits.” The court also contrasted its analysis with other circuits that focused on Congress’s amendment to section 3E1.1(b) to mandate that the

120. Divens, 650 F.3d at 349.
121. Id.
122. Id.
123. Brief of Appellee, supra note 65, at 10 (quoting United States v. Newson, 515 F.3d 374, 378 (5th Cir. 2008)).
124. Divens, 650 F.3d at 350.
125. Id. (quoting United States v. Broce, 488 U.S. 563, 569 (1989)).
126. Id. (citing United States v. Blick, 408 F.3d 162, 169 (4th Cir. 2005) (acknowledging that involuntary or unintelligently entered into appellate waivers have no legal or binding force)).
127. Id. at 347.
128. Id.
additional one-level reduction be initiated upon Government motion.\textsuperscript{129}

The Fourth Circuit explained that the other circuits found the 2003 amendment itself to demonstrate Congress's intent that the Government be allowed the same broad discretion under section 3E1.1(b) as under section 5K1.1.\textsuperscript{130} The court rejected this approach, stating, "nothing in the 2003 reforms evinces such an intent."\textsuperscript{131} The court reasoned that when Congress added the requirement of the Government's motion to section 3E1.1(b), it could have amended the provision's commentary to conform to the section 5K1.1 commentary, but it chose not to do so.\textsuperscript{132} Therefore, in leaving the section 3E1.1(b) commentary unchanged, the commentary's mandatory language regarding "provides," "thereby," and "meriting" would only be applicable to "whether the defendant has assisted authorities in a manner that avoids preparing for trial."\textsuperscript{133}

As support for its disagreement with the other circuits, the court cited the Supreme Court's decision in \textit{Massachusetts v. EPA},\textsuperscript{134} which held that "a statutory grant of discretion is 'not a roving license to ignore the statutory text' but is instead a 'direction to exercise discretion within defined statutory limits.'"\textsuperscript{135} The Fourth Circuit again emphasized the Government's failure to defend this approach.\textsuperscript{136} Specifically, "that Congress's insertion into § 3E1.1(b) of the government motion requirement reveals an intent to confer upon the Government the wide discretion provided it under § 5K1.1."\textsuperscript{137} It reasoned that the Government lacked an argument at all for the same broad discretion under section 3E1.1(b) that it has under section 5K1.1.\textsuperscript{138} Given that the judicial interpretation of a Guidelines

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{129} \textit{Id.} (citing PROTECT Act of 2003, Pub. L. No. 108-21, § 401(g), 117 Stat. 650, 671).
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.} "After all, Congress could have amended the § 3E1.1(b) commentary so that it conformed to the commentary surrounding § 5K1.1." \textit{Id.}
\item \textsuperscript{133} \textit{Id.} (quoting U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. 6 (2003)). "Congress declined to do so; it 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.'" \textit{Id.}
\item \textsuperscript{134} 549 U.S. 497 (2007).
\item \textsuperscript{135} \textit{Divens}, 650 F.3d at 347 (quoting \textit{EPA}, 549 U.S. at 533).
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.}
\end{itemize}
\end{footnotesize}
provision is controlled by the Guidelines commentary, the Fourth Circuit's analysis may prove to be unassailable.

III. THE LEGAL EFFECT OF DIVENS ON UNITED STATES SENTENCING GUIDELINES

The Fourth Circuit indicated its awareness of the split with four other circuits regarding prosecutor discretion in the additional one-level reduction for acceptance of responsibility. Specifically, in splitting with the First, Fifth, Seventh, and Ninth Circuits, the Fourth Circuit noted the other circuits’ conclusion that it is within the Government's discretion to predicate its decision to not move for a section 3E1.1(b) reduction on any rational interest. The Fourth Circuit concluded that these cases principally relied on cases interpreting section 5K1.1. It also disagreed with the other circuits’ reasoning that Congress’s amendment to section 3E1.1(b), which requires the Government motion, “reveals an intent to confer upon the Government the wide discretion provided it under [section] 5K1.1.”

A. The Fourth Circuit and Limitations on Its Effect Elsewhere

The Fourth Circuit's analysis in Divens has already guided the Second Circuit in United States v. Lee. In Lee, defendant Chris Lee pleaded guilty to a four-count indictment for narcotics violations without the benefit of a plea agreement. Lee objected to certain findings in the PSR, and a Fatico hearing was scheduled. Just prior to the scheduled hearing, Lee withdrew most of his objections

140. Divens, 650 F.3d at 347 (“We recognize that this holding does not accord with that of other circuits.”).
141. See supra notes 11–15 and accompanying text.
142. Divens, 650 F.3d at 347 (citing United States v. Deberry, 576 F.3d 708 (7th Cir. 2009)); see United States v. Johnson, 581 F.2d 994, 1002 (9th Cir. 2009); United States v. Beatty, 538 F.3d 8, 15 (1st Cir. 2008) (stating that the Government’s discretion under section 3E1.1(b) is “nearly unfettered”); United States v. Newson, 515 F.3d 374, 378 (5th Cir. 2008)).
143. Divens, 650 F.3d at 347 (citing Beatty, 538 F.3d at 15).
144. Id.
145. 653 F.3d 170 (2d Cir. 2011).
146. Id. at 172.
147. A Fatico hearing is “[a] sentencing hearing at which the prosecution and the defense may present evidence about what the defendant’s sentence should be.” BLACK'S LAW DICTIONARY 683 (9th ed. 2009) (citing United States v. Fatico, 603 F.2d 1053 (2d Cir. 1979)).
148. Lee, 653 F.3d at 172.
and the court resolved the issue in the Government’s favor. At Lee’s sentencing, the Government refused to move for the additional one-level reduction for acceptance of responsibility, and the district court denied Lee’s request to compel the Government to make the motion.

On appeal, the Second Circuit reversed, finding that although a Government motion is “a necessary prerequisite” to the additional one-level reduction, the district court can grant the additional reduction in two situations without a Government motion: (1) if the Government’s refusal is based on an unconstitutional motive; or (2) if the Government acts in bad faith when a plea agreement leaves the decision to move to the Government’s discretion. The Second Circuit based its reasoning on the plain language of section 3E1.1(b), the application commentary for section 3E1.1(b), and the court’s conclusion that a defendant has a due process right to object to errors in the PSR.

Moreover, the Second Circuit found the Fourth Circuit’s decision in Divens “instructive” because the Fourth Circuit’s “observations” applied with “equal force” in Lee’s case. The Second Circuit quoted

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149. Id. The Fatico hearing was limited to Lee’s objection to the PSR’s finding “that he had threatened to kill certain drug couriers who he feared might cooperate with law enforcement officers.” Id.

150. Id. Similar to Divens, the Government agreed to a two-level reduction for acceptance of responsibility under section 3E1.1(a), but refused to move for the additional one-level reduction under section 3E1.1(b) because “the defendant required the Government to undergo extensive preparation for a Fatico hearing on multiple sentencing issues” which the Government said “was akin to preparing for trial.” Id.

151. Id. at 173 (holding “that the Government’s refusal to move for a third-point reduction under [section] 3E1.1(b) in this case was based on an unlawful reason, as the Government could not refuse to move on the grounds that it had been required to prepare for a Fatico hearing”); see also Statsinger, supra note 34 (“[In Lee], since there was no plea agreement, only the first option was available, but the circuit found that it was met, although the court seemingly identified an alternative reason for granting the point: the [G]overnment’s reason for not making the motion was based on an ‘unlawful’—although perhaps not unconstitutional—reason: the refusal was not permitted by the [G]uideline itself, which addresses only avoiding preparing for ‘trial.’ While Lee put the [G]overnment to its burden at a Fatico hearing, he undisputedly pled guilty early on and ‘spared the Government from preparing for trial.’” (quoting Lee, 653 F.3d at 174)).

152. Lee, 653 F.3d at 174 (citing United States v. Eschman, 227 F.3d 886, 890 (7th Cir. 2000) (“Criminal defendants . . . have a due process right to be sentenced on the basis of reliable information.”)); see also Statsinger, supra note 34 (“Thus, under the ‘plain language’ of the [G]uideline, ‘the [G]overnment’s refusal’ was ‘not justified.’ The court [in Lee] also noted that the commentary to [section] 3E1.1—which is binding—likewise limits the determination to whether the [G]overnment has saved resources by avoiding preparing for trial.”).

153. Lee, 653 F.3d at 174–75.
the Fourth Circuit’s holding in *Divens*, which stated that section 3E1.1(b)

instructs the Government to determine simply whether the defendant has “timely” entered a “plea of guilty” and thus furthered the guideline’s purpose in that manner. It 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.\(^\text{154}\)

Furthermore, the Second Circuit’s reasoning, relying on the plain language of section 3E1.1(b) and the commentary for section 3E1.1(b), mirrored the Fourth Circuit’s analysis.\(^\text{155}\)

While the Fourth Circuit’s analysis guided the Second Circuit, thereby adding to the circuit split over acceptance of responsibility, there is a direct conflict with the Fifth\(^\text{156}\) and Seventh Circuits.\(^\text{157}\) However, the Fourth Circuit recognized that its holding in *Divens* would not require a different result in two other circuits’ cases that seem to directly state the contrary proposition because the outcome would be the same under the Fourth Circuit’s analysis.\(^\text{158}\) First, in the Ninth Circuit case of *United States v. Johnson*,\(^\text{159}\) after the district court denied the defendant’s suppression motion, he entered a conditional guilty plea that reserved his right to appeal the district court’s decision.\(^\text{160}\) Second, in the First Circuit case of *United States v. Beatty*,\(^\text{161}\) almost sixteen months after being indicted, the defendant pleaded guilty to four counts of drug distribution; however, “the Government invested significant time and resources” to prove the facts at issue.\(^\text{162}\) The Fourth Circuit stated that “[i]n both cases, the Government well could have properly withheld a [section] 3E1.1(b) motion on the ground that the defendant failed to ‘timely’ enter a true guilty plea sufficient to relieve it of the burden of trial preparation.”\(^\text{163}\) Therefore, the Fourth Circuit’s decision in *Divens*
brought into equipoise the circuit split on the extra acceptance of responsibility reduction.

IV. A RECOMMENDATION FOR CERTIORARI

A. Worthy of a Grant of Certiorari

In light of the Fourth Circuit’s decision in *Divens*, the Supreme Court should be petitioned to grant certiorari. As such, it is important to consider the significance that the *Divens* decision will have for the Court. Particularly in the Roberts Court where circuit splits have become even more important predictors of certiorari grants, *Divens* provides “the oft-needed circuit split to foster SCOTUS review.”

Furthermore, if the Supreme Court does grant certiorari, it should adopt the rationale in *Divens* because the Fourth Circuit’s analysis is logical, clear, and furthers the Guidelines’ purpose of conserving scarce trial resources. Generally, there is an “institutional predisposition against granting certiorari.” However, in selecting the few cases that will be granted certiorari, experts suggest that “law clerks will focus on objective factors to guide their inquiry, most notably the presence or absence of a split among the lower courts on an issue of federal law.” The circuit split regarding acceptance of responsibility presents an objectively identifiable characteristic

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164. See David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981 (2007) (“In recent years [Chief Justice Rehnquist’s last two years and the first year for Chief Justice Roberts on the Court], lower court conflict has become an increasingly important factor guiding the certiorari decisions of the Court. . . . Evaluating petitions for certiorari, lower court opinions, and the Court’s opinion to determine whether a case involved a lower court conflict, the study determined that nearly 70% of the cases reviewed by the Court involved a split among the lower courts.”).


167. *Id.* at 976; see also Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts’ of Appeals Image*, 58 DUKE L.J. 1439, 1448-49 (2009) (stating that over the past twenty years, in more than one-third of the cases for which the Supreme Court has granted certiorari, the reason stated was a circuit split); Stras, *supra* note 164, at 976 n.183 (citing ARTEMUS WARD & DAVID L. WEIDEN, SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT 132 (2006) (“[S]tating that ‘clerks, lacking institutional memory and a broad outline of the Court’s trends, focused on the observable features of the cases that could be justified as being cert-worthy’ and noting a former clerk’s conclusion that a circuit conflict was the first thing clerks would look for in a petition for review.”).
because it involves a direct conflict between the Fourth Circuit and the Fifth and Seventh Circuits. Therefore, the likelihood of a grant of certiorari is greater. For the reasons discussed below, the Supreme Court should grant certiorari to resolve the circuit split regarding the acceptance of responsibility scheme.

B. Compelling Reasons for a Grant of Certiorari

First, and most importantly, the Supreme Court should grant certiorari to resolve the circuit split over acceptance of responsibility because this issue affects the majority of federal criminal sentences. If the Court were to grant certiorari, it is unclear whether the issue would be the narrow issue of whether the government has the power to condition a section 3E1.1 motion on a refusal by defendant to waive appellate rights, or the broader issue of whether section 3E1.1(b) should be read to place near-unreviewable discretion, a la section 5K1.1, with the government over section 3E1.1 motions. In 2010, the section 3E1.1 acceptance of responsibility reduction was applied to 72,926 offenses—94.2% of all offenses. Specifically, 60% of defendants received a three-level reduction, 34.9% of defendants received a two-level reduction, and only 5.1% of defendants did not receive a reduction because they did not accept responsibility.

Furthermore, there are at least three secondary reasons that the Supreme Court should grant certiorari on this issue: (1) the high cost of a defendant’s decision to go to trial; (2) Chief Justice Taft’s vision regarding Supreme Court objectives as embodied in Supreme Court Rule 10; and (3) the Supreme Court’s position allows it to resolve the conflict in sentencing since it involves the scope of trial court discretion.

First, the reduction for acceptance of responsibility motivates guilty pleas. Importantly, “[i]n many cases the anticipated three-point reduction is the only incentive defendants have to plead guilty rather than go to trial.” The structure of the Guidelines gives federal

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168. E-mail from Eric L. Muller, Dan K. Moore Distinguished Professor, to author (Apr. 9, 2012) (on file with the North Carolina Law Review).
defendants a strong incentive to waive their trial rights because it offers “substantial across-the-board” sentencing reductions for defendants who decide to plead guilty rather than go to trial.\textsuperscript{172} Thus, by pleading guilty and waiving the right to trial, a defendant is all but guaranteed the acceptance of responsibility offense level reduction.\textsuperscript{173} “[S]ince the inception of the Guidelines, the [Second] circuit has held to the fiction that institutionalizing lower sentences for defendants who plead guilty does not ‘punish’ going to trial, which would be unconstitutional, it ‘rewards’ pleading guilty, which is not.”\textsuperscript{174} Therefore, the reduction for acceptance of responsibility incentivizes defendants to plead guilty by rewarding them with lower sentences.

Moreover, because “[o]ver ninety-five percent of federal criminal cases are resolved by guilty pleas”\textsuperscript{175} and “[t]he acceptance of responsibility provision of the sentencing Guidelines is the principal sentencing inducement for guilty pleas,”\textsuperscript{176} the high cost of a defendant’s decision to go to trial necessitates consistency and predictability regarding sentence reductions for acceptance of responsibility.\textsuperscript{177} Some scholars argue that unpredictability over the additional one-level reduction will produce additional protracted plea negotiations and increased concern for defendants to plead “blind” without a specific agreement from the Government regarding the third-level reduction.\textsuperscript{178} The current circuit split should be resolved so that when a defendant is forced to weigh the cost of a trial against the potential reward for pleading guilty, the defendant and his attorney will be able to accurately predict his criminal sentence.

\textsuperscript{172} Bascuas, \textit{supra} note 43, at 42 (citing U.S. \textsc{Sentence}ing \textsc{Guidelines} \textsc{Manual} § 3E1.1(a)-(b) (2009) (“Viewed against the backdrop of the harsh schedule of sentences the Guidelines prescribe, the acceptance-of-responsibility reduction effects an abridgement of the right to trial.”)); \textit{see also} Ronald F. Wright, \textit{Trial Distortion and the End of Innocence in Federal Criminal Justice}, 154 U. Pa. L. Rev. 79, 130 (2005) (stating that rates of guilty pleas increased as the Guidelines took effect).

\textsuperscript{173} Wright, \textit{supra} note 172, at 131 (reporting about 94% of defendants who pleaded guilty received the acceptance of responsibility reduction while only 8% of defendants who went to trial received the acceptance of responsibility reduction).

\textsuperscript{174} Statsinger, \textit{supra} note 34. However, as Statsinger points out, there is practically no difference. \textit{Id}. (“What’s the difference? None, of course, or at least none that can be articulated.”).

\textsuperscript{175} Etienne, \textit{supra} note 171, at 112.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Cf.} Arthur D. Hellman, \textit{Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court}, 56 U. Chi. L. Rev. 541, 544 (1989) (explaining why “a high degree of consistency and predictability in the law is necessary to the successful operation of the legal system”).

\textsuperscript{178} Etienne, \textit{supra} note 171, at 112.
Second, Chief Justice Taft believed that the Supreme Court should have broad discretion with regard to which cases it decided to hear. Taft’s vision for the Supreme Court was that Congress would trust the Court “to exercise its discretion responsibly and prudently in order to accomplish two broad objectives: (i) to resolve important questions of law and (ii) to maintain uniformity in federal law.” These Taftian values are now “embodied ... in Supreme Court Rule 10.” In 1922, Taft stated that “[w]henever a petition for certiorari presents a question on which one circuit court of appeals differs from another, then we let the case come into our court as a matter of course.”

In light of Taft’s vision for the Supreme Court as embodied in Supreme Court Rule 10, the circuit split over acceptance of responsibility is particularly ripe for a grant of certiorari by the Roberts Court. In 2005, in his Senate confirmation hearing, Chief Justice Roberts argued the Court should take more cases in order to produce federal law that is more uniform and consistent. The Supreme Court’s responsibility to maintain uniformity in federal law, originally grounded in Taftian values and now drafted into Supreme Court Rule 10, supports the providence of granting certiorari on the federal sentencing circuit split regarding acceptance of responsibility.

180. Id.
181. Id.
182. Stras, supra note 164, at 981 (quoting SUP. CT. R. 10(a)). “The most objective indicia of certworthiness, at least as far as the Rules of the Supreme Court are concerned, [is] whether ‘a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.’ ” Id. at 980 (citing Jurisdiction of Circuit Courts of Appeals and United States Supreme Court: Hearing on H.R. 10479 Before the H. Comm. on the Judiciary, 67th Cong. 2 (1922) (statement of William Howard Taft, Chief Justice of the United States Supreme Court)).
184. See Stephen G. Breyer, Reflections on the Role of Appellate Courts: A View from the Supreme Court, 8 J. APP. PRAC. & PROCESS 91, 92 (2006) (arguing that the Supreme Court is not a court of error correction per se); see also Thomas E. Baker & Douglas D. McFarland, The Need for a New National Court, 100 HARV. L. REV. 1400, 1405 (1987) (same). “Rather than correcting errors, then, the Supreme Court is charged with providing a uniform rule of federal law in areas that require one.” Breyer, supra, at 92.
ACCEPTANCE OF RESPONSIBILITY

Third, in *Booker*, the Supreme Court held that the mandatory provisions of the Sentencing Guidelines were unconstitutional because they violated the Sixth Amendment. 185 The result of the Sixth Amendment being applicable to the Guidelines186 is "that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 187 Post-*Booker*, although there has been a rise in conflicting interpretations of Guidelines provisions, the Supreme Court has exhibited "reluctance to review conflicting interpretations [by courts] of specific Guidelines." 188 However, there are two areas of Guidelines interpretation that are better suited for Supreme Court review than Sentencing Commission review: (1) appropriate standards for appellate court review; and (2) scope of trial court discretion. 189

The Supreme Court is better suited to review the circuit split regarding acceptance of responsibility since the issue is a question regarding the scope of trial court discretion. The Roberts Court has agreed to review less than half of the identified circuit splits. 190 Since the Supreme Court hears so few cases, questions remain as to whether this particular sentencing issue is too discrete to merit Supreme Court review or whether the Roberts Court will exercise judicial modesty if a certiorari petition is filed on the acceptance of responsibility issue and "defer[] to the Commission’s expertise and obligation to ‘periodically review and revise’ as appropriate.” 191

The circuit split over acceptance of responsibility has significant and far-reaching implications. The Fourth Circuit’s decision in
Divens—to look to the plain language of the Guidelines and its commentary in interpreting section 3E1.1(b) instead of congressional intent and section 5K1.1 cases—presents a significantly different approach to analyzing the Guidelines. Furthermore, the interpretation of a Guidelines provision that affects 60% of all federal criminal offense sentences has vast significance.

Moreover, although Divens did not address the important due process implications of the acceptance of responsibility issue, Lee, which followed the Fourth Circuit’s reasoning in Divens, did address those implications. In Lee, the Second Circuit reasoned that “a defendant—even one who pleads guilty—has a due process right to reasonably contest errors in the PSR that affect his sentence” and that “[a] defendant should not be punished for doing so.” The court further explained that “[i]f there is a good faith dispute as to the accuracy of factual assertions in the PSR, the defendant’s request that the dispute be resolved is not a permissible reason for the Government to refuse to make the [section] 3E1.1(b) motion, even if resolution of the dispute requires an evidentiary hearing.”

According to Steve Statsinger, an Assistant Federal Defender in Manhattan and contributor to the Second Circuit Blog,

[T]his [Lee] decision clearly implodes that whole line of reasoning [that institutionalizing lower sentences for defendants who plead guilty does not “punish” going to trial ... it “rewards” pleading guilty], since it expressly holds that denying a defendant the third point for contesting a material sentencing fact—or at least doing so in “good faith”—“punishes” him for doing so. This decision should accordingly open the door to a similar argument that a defendant who goes to trial with a “good faith” claim that he should be acquitted is entitled to all three acceptance of responsibility points.

Because the acceptance of responsibility reduction provides defendants with a significant incentive to plead guilty rather than go

193. Id. (“The court, not the Government, imposes sentence, and the court is entitled to a full and accurate record—as are the parties—before sentence is imposed.”).
194. Statsinger, supra note 34. Statsinger goes on to argue that based on the rationale of the one-level reduction language, the stated purpose is to conserve both Government and court resources. Id. (“While it is true that the Government knows best whether it has expended resources, it is not in a better position than the court itself to know whether the court was inconvenienced by an untimely plea. Accordingly, the Guideline should permit the court to impose the third point on its own if it concludes that no significant judicial resources were consumed by an untimely plea of guilty.”).
to trial, it is important to also consider the defendants’ due process rights that are waived as a result of this decision. Therefore, the circuit split regarding acceptance of responsibility has significant and universal implications that the Supreme Court should resolve.

CONCLUSION

In *Divens*, the Fourth Circuit held that the Government could not base its refusal to move for an acceptance of responsibility reduction on a defendant’s refusal to waive appellate rights.\(^\text{195}\) This decision establishes a new analysis of section 3E1.1(b) that is based on the plain language of the Guidelines and its commentary. Instead of focusing on congressional intent, which in other circuits gave the Government broad discretion under section 3E1.1(b) similar to section 5K1.1, the Fourth Circuit refused to analogize section 3E1.1(b) to section 5K1.1.\(^\text{196}\) This approach narrowed the Government’s discretion under section 3E1.1(b) to determine whether the defendant “timely” entered a “plea of guilty.” The Fourth Circuit correctly split with other circuits over the post-Feeney amendment’s additional one-level acceptance of responsibility reduction. The court’s well-reasoned conclusion under section 3E1.1(b) lends predictability to federal sentencing and may prove to be unassailable because judicial interpretation of a Guidelines provision is controlled by the Guidelines commentary. Therefore, the Supreme Court should grant certiorari to resolve the circuit split over this acceptance of responsibility issue.

*Divens* has already guided the Second Circuit’s reasoning in *Lee*, which increased the existing circuit split over acceptance of responsibility by following the Fourth Circuit’s new analysis.\(^\text{197}\) Most importantly, the acceptance of responsibility circuit split affects 60% of federal criminal sentences.\(^\text{198}\) Moreover, in addition to the sheer number of defendants who are affected by the Guidelines provision, there are other important reasons the Supreme Court should resolve the circuit split. First, the resulting uncertainty from the circuit split could affect a defendant’s decision to plead guilty or go to trial. Second, Taftian values embodied in Supreme Court Rule 10 define a circuit split as a compelling reason to grant a certiorari petition.\(^\text{199}\)

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196. *Id.* at 345–47.
199. *See supra* note 184.
Finally, since the issue involves the scope of trial court discretion, the Supreme Court is better suited to resolve the controversy than the Sentencing Commission. Therefore, in light of the circuit split created by *Divens*, the Supreme Court should grant certiorari and adopt the Fourth Circuit’s position.

TZIPORAH SCHWARTZ TAPP**

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