

The following excerpt from the March 2023 Statement of Michael Caruso contains Defenders’ comments on Part A of Proposed Amendment 4.

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I. Acceptance of Responsibility

To better ensure that §3E1.1(b) operates as Congress and the Commission intended—that is, to reward a person who timely notifies the government of his intent to plead guilty thereby permitting the government to avoid preparing for trial and allowing the government and the court to allocate resources efficiently—the Commission should clarify two aspects of the guideline.

First, Defenders agree that the Commission should clarify the term “preparing for trial.” Because the progression of a case is impacted by a host of unique factors including the pace of each district’s docket, “preparing for trial” should focus on the nature and purpose of the government’s work, as opposed to when that work is performed. Second, the Commission should revise the existing commentary in Application Note 6 to clarify that the government should not withhold a motion for interests not identified in §3E1.1(b).

For better or worse, our criminal legal system is “a system of pleas, not a system of trials.”¹ Last year, 98.3 percent of all persons sentenced in federal

¹ *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); *see also Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)) (recognizing that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system”).

court pled guilty.² In my district, that number was even higher—99.3 percent.³

The decision to plead guilty is one of the few decisions that belongs solely to our clients.⁴ It is not an easy one. When a person pleads guilty, he “forgoes not only a fair trial, but also other accompanying constitutional guarantees,” like the privilege against self-incrimination, the right to a jury trial, and the right to confront his accusers.⁵ If he pleads pursuant to a plea agreement, the government often demands that he waive numerous other rights including the right to ask for a sentence below the calculated guideline range, the right to appeal, the right to collaterally attack his sentence, and even the right to file an extraordinary-and compelling motion under § 3582(c)(1)(A).⁶

In exchange for a plea of guilty, a person may generally expect a lower sentence than if he had chosen to proceed to trial.⁷ Indeed, the guidelines embrace this expectation. When reporting on the original sentencing guidelines, the Commission recognized that “merely pleading guilty has been recognized as a factor that legitimately may result in a sentence reduction.”⁸ The Commission created §3E1.1—which originally provided for a two-level

² See USSC, *Sourcebook of Federal Sentencing Statistics* 56–58 tbl. 11 (2021), <https://bitly.co/HN2k>.

³ See *id.* at 58, tbl. 11.

⁴ See Model Rules of Pro. Conduct r. 1.2, (Am. Bar Ass’n 2020). (“[A] lawyer shall abide by the client’s decision. . . as to a plea to be entered. . .”).

⁵ *Class v. United States*, 138 S. Ct. 798, 805 (2018) (quoting *United States v. Ruiz*, 536 U.S. 622, 628 (2002)).

⁶ In March 2022, the Department of Justice directed prosecutors to not “as a general matter” require individuals to waive “the general right” to file or appeal a compassionate release motion and to decline to enforce such waivers. However, the Department still permits “a narrower form of waiver” in select instances, and Defenders do not know the status of DOJ’s implementation of its new policy. See Memorandum from the Deputy Attorney General on Department Policy on Compassionate Release Waivers in Plea Agreements 1–2 (Mar. 11, 2022), <https://bitly.co/HN3X>.

⁷ See, e.g., Nat’l Ass’n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 20–21 fig. 1 (2018), <https://bitly.co/HN4K> (“NACDL Trial Penalty”).

⁸ USSC, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 50 (1987) (citations omitted), <https://tinyurl.com/45t4fres>.

reduction for acceptance of responsibility—as “the only adjustment that the guidelines recognize for pleas.”⁹

Today, §3E1.1 provides up to three offense levels off for acceptance of responsibility. Pursuant to §3E1.1(a), a two-level reduction is awarded to people who clearly accept responsibility for the offense. For people who get the two-level reduction and who have an offense level of 16 or greater, §3E1.1(b) provides for an additional third-level reduction “upon motion of the government.” As recently recognized by Justices Sotomayor and Gorsuch, the impact of §3E1.1(b)’s one-level reduction “can be substantial”—and can “even make the difference between a fixed-term and life sentence.”¹⁰

The stated purpose of §3E1.1(b)’s reduction is to reward a person who “timely notif[ies] 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.”¹¹ Despite this clear purpose, some courts continue to permit prosecutors to withhold this third level for reasons other than preparing for trial, like litigating a suppression motion or when a person who has pled guilty raises challenges at sentencing.¹² In order to “ensure that §3E1.1(b) is applied fairly and uniformly,”¹³ the Commission should clarify that the proper interpretation of §3E1.1 does not permit these practices.

⁹ *Id.*

¹⁰ *United States v. Longoria*, 141 S. Ct. 978, 979 (2021) (Sotomayor, J., Gorsuch, J., statement respecting denial of cert.).

¹¹ USSG §3B1.3(b).

¹² See Proposed Amendments, 88 Fed. Reg. 7180, 7199 (proposed Feb. 2, 2023) (“2023 Proposed Amendment”) (summarizing the two circuit conflicts).

¹³ *Longoria*, 141 S. Ct. at 979.

A. The Commission should clarify that §3E1.1(b) already limits the government’s discretion to withhold a §3E1.1(b) motion to instances where the lack of a timely plea requires the government to perform work and expend resources for the specific purpose of preparing for trial.

1. The history of §3E1.1.

Section 3E1.1, as originally promulgated, awarded a two-level downward adjustment if the district court determined that a person “clearly demonstrate[d] a recognition and affirmative acceptance of personal responsibility.”¹⁴ In 1992, after receiving a recommendation from the Judicial Conference to provide a greater acceptance of responsibility adjustment “to encourage entries of pleas,”¹⁵ the Commission amended §3E1.1, to instruct that courts should “decrease the offense level 1 additional level” if certain conditions were met:¹⁶

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

¹⁴ See USSG §3E1.1 (Nov. 1987).; see also USSG App. C, Amend. 46 (Jan. 1988) (expanding scope of conduct for which person must accept responsibility from “offense of conviction” to “criminal conduct”).

¹⁵ See USSC, *Acceptance of Responsibility Working Group Report* app. A (1991), <https://bitly.co/HN5n> (noting that “[t]he two-level reduction is seen by many judges as insufficient to encourage plea agreements particularly at higher offense levels”).

¹⁶ USSG App. C., Amend. 459 (Nov. 1, 1992).

The Commission also added Application Note 6 to §3E1.1's commentary to explain that "[s]ubsection (b) provides an additional 1-level decrease in offense level" for someone who "tak[es] one or both of the steps set forth in subsection (b)."¹⁷ Section 3E1.1 maintained this structure for over a decade.

In 2003, Congress passed the PROTECT Act, which contained direct amendments to §3E1.1.¹⁸ These amendments make clear that Congress intended §3E1.1(b)'s third-level reduction to be awarded to people whose timely plea allowed the government and the court to avoid a costly trial.

Congress amended §3E1.1(b) in three ways. First, it required a government motion before the court could grant the additional third-level reduction.¹⁹ Second, it struck §3E1.1(b)(1), which previously permitted a person to receive the third-level reduction for timely providing complete information to the government, instead tying this level exclusively to a timely guilty plea.²⁰ And third, it modified former §3E1.1(b)(2) to account for both government and court resources saved from avoiding trial:²¹

¹⁷ *Id.*; *see also* USSG § 3E1.1 background cmt. (emphasizing that if a person meets §3E1.1(b)'s criteria, the additional one-level reduction is "appropriately merit[ed]").

¹⁸ *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, § 401(g), 117 Stat. 650 (Apr. 30, 2003) ("PROTECT Act").

¹⁹ *Id.* § 401(g)(1)(A).

²⁰ *Id.* § 401 (g)(1)(B).

²¹ *Id.*

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

Further confirming that it intended the §3E1.1(b) motion to be contingent upon a plea that avoids time-consuming trial preparation, Congress added the following language to Application Note 6 of §3E1.1's commentary:²²

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21.

While recognizing that the government is in the best position to determine whether the line prosecutor has avoided preparing for trial, nothing in the PROTECT Act amendments indicated that Congress was permitting the government to withhold its motion for any other reason. In fact, aside from a small conforming change,²³ Congress retained the rest of

²² *Id.* § 401(g)(2)(B).

²³ Because Congress removed one of the steps by which a person could receive a 1-level reduction from §3E1.1(b), it also removed the reference in Application Note 6 to “one or both of the steps” and the background commentary to “one or more of the steps specified in subsection (b).” Now, both Application Note 6 and the background

Application Note 6, including the instruction that “[s]ubsection (b) provides an additional 1-level decrease in offense level” for a person who “take[s] the steps set forth in subsection (b)” and the background commentary explaining that a person who meets the conditions of §3E1.1(b) has “accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner [and] thereby appropriately merit[s] an additional reduction.”²⁴ The PROTECT Act directed that the congressional amendments to §3E1.1 cannot be “alter[ed] or repeal[ed]” by the Commission.²⁵

Although Congress plainly intended the government to move for the third-level reduction for acceptance of responsibility if §3E1.1(b)’s conditions were met, that has not always happened. After the implementation of the PROTECT Act, a circuit conflict emerged as to whether the government could withhold a §3E1.1(b) motion for reasons other than preparing for trial. While some circuits had permitted the government to withhold the §3E1.1(b) motion if a person refused to sign an appellate waiver,²⁶ the Fourth Circuit confirmed that the purpose of the third-level reduction is to permit “the efficient allocation of *trial* resources, not *appellate* resources.”²⁷ The Second Circuit similarly determined that §3E1.1(b) does not permit the government to withhold a motion for the third-level if a person requests an evidentiary hearing on sentencing issues because the plain language of §3E1.1(b) and its commentary confirm that the government is to “determine simply whether the [person] has entered a plea of guilty and thus furthered the guideline’s purpose in that matter,” not whether the person “has declined to perform some other act.”²⁸

commentary refer only to “the steps specified in subsection (b).” *See* PROTECT Act, § 401(g)(2)(A), (3).

²⁴ USSG §3E1.1, cmt. n. 6 & background cmt (2003).

²⁵ PROTECT Act, §401(j)(4).

²⁶ *See United States v. Johnson*, 581 F.3d 994, 1002 (9th Cir. 2009); *United States v. Deberry*, 576 F.3d 708, 711 (7th Cir. 2009); *United States v. Newson*, 515 F.3d 374, 378 (5th Cir. 2008).

²⁷ *United States v. Divens*, 650 F.3d 343, 348 (4th Cir. 2011) (emphasis in original).

²⁸ *United States v. Lee*, 653 F.3d 170, 175 (2d. Cir. 2011) (quoting *Divens*, 650 F.3d at 348) (internal marks omitted).

In 2013, the Commission promulgated Amendment 775 which amended §3E1.1's commentary to address the circuit conflict on the proper interpretation of §3E1.1(b).²⁹ Mindful of both Congress' direct amendments to §3E1.1 and its directive that those amendments not be altered or repealed, the Commission "studied the operation of §3E1.1 before the PROTECT Act, the congressional action to amend §3E1.1, and the legislative history of that congressional action."³⁰ Concluding that it "could discern no congressional intent to allow decisions under §3E1.1 to be based on interests not identified in §3E1.1,"³¹ the Commission endorsed the Fourth and Second Circuit decisions, and added the following to Application Note 6: "The government should not withhold [the §3E1.1(b) motion] based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal."³²

Congress did not disapprove of this amendment, and it went into effect on November 1, 2013.³³

Despite the plain language of §3E1.1(b) and Amendment 775's clarifying efforts, the circuits still disagree about whether the government may withhold a third-level reduction motion for reasons unrelated to §3E1.1(b), including because a person moves to suppress evidence³⁴ or raises sentencing challenges.³⁵

²⁹ See USSC App. C., Amend. 775 (Nov. 1, 2013).

³⁰ *Id.* at Reason for Amendment.

³¹ *Id.*

³² *Id.*

³³ See USSG §3E1.1 (2013); see also 28 U.S.C. § 994(p) (permitting Congress 180 days to modify or disapprove of a promulgated guideline before the guideline goes into effect).

³⁴ Compare, *United States v. Vargas*, 961 F.3d 566, 582 (2d Cir. 2020), *United States v. Price*, 409 F.3d 436, 444–45 (D.C. Cir. 2005), *United States v. Marquez*, 337 F.3d 1203, 1212–13 (10th Cir. 2003), *United States v. Marroquin*, 136 F.3d 220, 224–25 (1st Cir. 1998), *United States v. Kimple*, 27 F.3d 1409, 1414–15 (9th Cir. 1994), with *United States v. Longoria*, 958 F.3d 372, 378–79 (5th Cir. 2020), *cert denied* 141 S. Ct. 978 (2021), *United States v. Collins*, 683 F.3d 967, 707 (6th Cir. 2012), and *United States v. Drennon*, 516 F.3d 160 162–63 (3d Cir. 2008).

³⁵ Compare, *United States v. Castillo*, 779 F.3d 318, 323 (5th Cir. 2015), and *United States v. Lee*, 653 F.3d at 173, with *United States v. Adair*, 38 F.4th 341, 355

2. Section 3E1.1's plain language has always identified when the §3E1.1(b) adjustment is warranted.

The circuits continue to disagree on the bases the government may use to withhold a §3E1.1(b) motion. But §3E1.1(b) and its accompanying commentary have always identified when the reduction is warranted.

Prior to the PROTECT Act, the decision to award the third-level reduction belonged only to the court.³⁶ During that time, all courts of appeals that had considered the question agreed that the §3E1.1(b)'s instruction to “decrease the offense level by an additional level” was required so long as §3E1.1(b)'s conditions were met.³⁷

In the PROTECT Act, Congress conferred discretion to the government to determine in the first instance whether the line prosecutor had prepared for trial “because the government is in the best position” to assess its own preparation. But by changing “*who* initiates [§3E1.1(b)'s] adjustment and giving that decision deference,”³⁸ Congress did not give the government “a roving license to ignore” the limits of the guideline, nor did it revise the expectation that if §3E1.1(b)'s conditions were met, the third-level reduction would be awarded.³⁹ In fact, Congress' preservation of the rest of §3E1.1's commentary—including that a person “appropriately merit[s]” the third-level reduction if §3E1.1(b)'s conditions have been satisfied—indicates Congress intended that the government would exercise its discretion within the limits of §3E1.1(b).⁴⁰

(3d Cir. 2022), *United States v. Jordan*, 877 F.3d 391, 395–96 (8th Cir. 2017), *United States v. Sainz-Preciado*, 566 F.3d 708, 715–16 (7th Cir. 2009), and *United States v. Beatty*, 538 F.3d 8, 16–17 (1st Cir. 2008).

³⁶ See USSC §3E1.1 cmt. n.5 (2002).

³⁷ See Statement of Lisa Hay Before the U.S. Sentencing Comm'n, Washington, D.C., at 8 – 10 (Mar. 13, 2013), <https://bitly.co/HN8w> (collecting cases) (“Statement of Lisa Hay”).

³⁸ *United States v. Johnson*, 581 F.3d 994, 1010 (9th Cir. 2009) (M. Smith, C.J., dissenting in part), *superseded by* Amendment 775.

³⁹ *Divens*, 650 F.3d at 347 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)); USSG §3E1.1(b) & cmt. n.6; see also *United States v. Davis*, 714 F.3d 474, 477 (7th Cir. 2013) (Rovner, C.J., concurring).

⁴⁰ See *Divens*, 650 F.3d at 346 n.1 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 992–93 (2005)).

Further, nothing in Congress' revisions indicate an intent to extend the government's discretion to deny a §3E1.1(b) motion because it expends resources not specifically related to trial.⁴¹ "The text of §3E1.1(b) does not require a defendant to plead without engaging in pretrial motion practice,"⁴² or raising sentencing challenges,⁴³ or providing "the type of assistance that might reduce the expense and uncertainty" of an appeal.⁴⁴ It only requires "that the plea be sufficiently in advance of trial to avoid extensive trial preparation."⁴⁵ Indeed, a contrary reading would "produce absurd results; it could allow the government to cite any defendant-caused government resource expenditure whatsoever, no matter how unrelated to the guilty plea" to justify withholding the §3E1.1(b) motion.⁴⁶

To be sure, there may be cases where actions other than a person's timely plea of guilty may cause the government to expend resources in a way that impacts a person's acceptance of responsibility.⁴⁷ But those actions are properly considered by the court when assessing whether a person receives a two-level reduction pursuant to §3E1.1(a). Nothing in the text of §3E1.1(b) gives the government unfettered discretion to withhold the third level from

⁴¹ See, e.g., *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part) (recognizing that interpreting §3E1.1(b) to render a person ineligible for the adjustment where "he *either* goes to trial *or* causes the government to expend resources. . . . misreads the guideline's plain language").

⁴² *Vargas*, 961 F.3d at 582.

⁴³ See *Lee*, 653 F.3d at 174 (confirming the plain language of §3E1.1(b) and its commentary "do not refer to resources saved by avoiding preparation for a [sentencing] hearing or any other proceeding"); *Castillo*, 779 F.3d at 323 ("[A]lthough the current version of the guideline refers to efficient allocation of governmental resources, it does so only in the context of preparing for trial. . . ."); *Davis*, 714 F.3d at 479 (Rovner, J., concurring) ("[T]he guideline and commentary focus explicitly and exclusively on avoiding the need to prepare for trial (and clearing the district court's trial calendar). No proceeding or event that might occur later is mentioned or even hinted at.").

⁴⁴ *Divens*, 650 F.3d at 348 (internal marks omitted).

⁴⁵ *Vargas*, 961 F.3d at 566 (citation omitted).

⁴⁶ *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part).

⁴⁷ See, e.g., USSG §3E1.1 cmt. n. 4 ("Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct."); cf. *id.* at cmt. n. 1(A)–(H) (listing conduct that should be considered when "determining whether a defendant qualifies under subsection (a)").

someone who has already accepted responsibility and timely notified the prosecutor of his intention to plead guilty for reasons other than preparing for trial.⁴⁸ “The only ‘resources’ that may be considered in gauging the defendant's satisfaction of the guideline are those resources devoted to trial preparation.”⁴⁹

3. Despite §3E1.1’s plain language, prosecutors’ misuse of the §3E1.1(b) motion persists.

In 2013, Defenders commented that, despite the plain language of §3E1.1(b) and its accompanying commentary, some prosecutors use the government motion requirement to “obtain concessions well beyond timely guilty pleas and to impose a cost for the exercise of constitutional rights.”⁵⁰ Ten years later, not much has changed. In my district and across the country, some prosecutors continue to leverage §3E1.1(b) and chill good-faith litigation. This misguided practice is inconsistent with the guideline’s text and purpose.

For example, in my district, many of our clients are charged with maritime offenses pursuant to Title 46. Because the government is not permitted to proscribe drug trafficking conduct in the territorial waters of other nations, in many of these cases, we file motions to dismiss for lack of jurisdiction.⁵¹ Recently, a prosecutor informed an attorney in my office that for any Title 46 case she is handling, she will withhold conditional pleas and the third level of acceptance of responsibility if we seek evidentiary hearings in support of these pretrial motions.

My district is not alone. A recent survey conducted of Federal Public and Community Defenders reveals that in many districts, prosecutors still

⁴⁸ See *Johnson*, 581 F.3d at 1009 (M. Smith, C.J., dissenting in part) (“Moreover, such a reading could produce absurd results; it could allow the government to cite any defendant-caused government resource expenditure whatsoever, no matter how unrelated to the guilty plea.”).

⁴⁹ *Id.* at 1011 (citing *United States v. Vance*, 62 F.3d 1152, 1157 (9th Cir. 1995)).

⁵⁰ Statement of Lisa Hay at 5.

⁵¹ See *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1258 (11th Cir. 2012) (Pryor, C.J.) (holding that the Maritime Drug Law Enforcement Act was unconstitutional as applied where the drug trafficking conduct occurred in the territorial waters of Panama).

see §3E1.1(b) as their own one-level “slush-fund,”⁵² to withhold or threaten to withhold for a host of good-faith litigation unrelated to timely guilty pleas or government trial preparations. Defenders have observed prosecutors withhold or threaten to withhold the third level for a variety of conduct unrelated to §3E1.1(b), including:

- filing of pretrial motions, including motions to suppress, or motions to dismiss for improper jurisdiction or lack of venue;
- requesting additional discovery;
- not pleading guilty or continuing the trial date before the government’s deadline for expert disclosures, even though discovery had not yet been received;
- pleading to an indictment as opposed to a plea agreement;
- obtaining a conditional plea to appeal a suppression issue;
- post-plea conduct, such as testing positive for marijuana or possessing marijuana in pretrial custody;
- raising sentencing challenges including objections to the guideline calculations in the presentence investigation report (PSR) or disputing the accuracy of the factual narratives contained in the PSR;
- failing to pay enough restitution; and
- the government’s dissatisfaction with the state of the interior of a client’s vehicle that was forfeited post-plea.

These practices affect the length of time our clients spend in prison. For some, losing the §3E1.1(b) reduction could “shift the Guidelines range by years.”⁵³ For others, months.⁵⁴ And this leveraging cannot be viewed in

⁵² Transcript of Public Hearing Before the U.S. Sentencing Comm’n, Washington, D.C., at 144 (Mar. 13, 2013) (Lisa Hay) (“2013 AOR Hearing”), <https://bit.ly.co/HNA1>.

⁵³ *Longoria*, 141 S. Ct. at 979.

⁵⁴ See generally *United States v. Fasion*, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020) (“[I]t is crucial that judges give careful consideration to every minute that is

isolation. Rather, it is another tool in the government’s “arsenal” to suppress litigation and obtain hasty dispositions.⁵⁵

The weaponizing of the third level has impacts far beyond an increased sentence for a single client. This practice results in unwarranted disparities and has a chilling effect on the client, the attorney, and the federal criminal legal system.

Unwarranted Disparity. As we recognized in 2013, not all prosecutors exercise their §3E1.1(b) motion authority in ways inconsistent with §3E1.1(b).⁵⁶ But precisely because “government practice varies across and within districts, even among similar cases in the same district,” unwarranted disparities result.⁵⁷ Further, when the §3E1.1(b) motion is used as a bargaining chip to dissuade litigation unrelated to trial, sentencing disparities will result between the cases where the defense succumbs to the prosecutor’s threat to withhold the third level (better ensuring the point is ultimately awarded) and where the defense does not.

Chilling Effect. Our adversarial system “is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.”⁵⁸ Using the third level of acceptance of responsibility to suppress meaningful investigation, litigation, and advocacy frustrates this adversarial process and obstructs counsel from providing “vigorous representation.”⁵⁹

Pressure to not pursue good-faith litigation harms our clients. For example, one colleague from Iowa was recently informed by a prosecutor that

added to a defendant’s sentence. Liberty is the norm; every moment of incarceration should be justified.”).

⁵⁵ NACDL Trial Penalty at 16 (discussing the “arsenal of tools” prosecutors have to achieve speedy convictions); *see also* David E. Patton, *Federal Public Defense in an Age of Inquisition*, 122 Yale L.J. 2578, 2590–94 (2013) (describing pretrial detention, time-sensitive offers to cooperate, safety valve eligibility, 21 U.S.C. §851 informations, and §3E1.1 as all pressures that “have turned the system starkly away from a healthy adversarial process”).

⁵⁶ Testimony of Lisa Hay, at 7.

⁵⁷ *Id.*

⁵⁸ *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (internal marks omitted).

⁵⁹ *Id.*

the prosecutor could withhold the §3E1.1(b) motion preemptively. After a plea of guilty without an agreement, but prior to my colleague submitting his sentencing statement, the government stated in its sentencing submission that while the client's acceptance was timely, acceptance could or could not be appropriate depending on the client's objections to the presentence report and his agreement to the applicable guideline enhancements. A blanket warning like this moves well beyond the discretion Congress conferred to the government in §3E1.1(b) and fuels the dangerous presumption that a person must choose between asserting good-faith challenges and receiving a lower sentence.

The misuse of §3E1.1(b) also harms the public. Another prosecutor recently threatened to withhold a §3E1.1(b) motion if a colleague filed a motion to suppress. My colleague, in consultation with his client, decided to file the motion despite the prosecutor's threat. After a suppression hearing, the court declined to credit the testimony of a police officer and granted the motion, prompting the dismissal of all charges. While the correct result was reached in that case, there may be countless other instances of police misconduct that would not be discovered because counsel or the client were more risk adverse.

4. The Commission can—and should—clarify the proper interpretation of §3E1.1(b).

Because the circuits still disagree as to the proper interpretation of §3E1.1(b), and because some prosecutors continue to withhold the third-level motion for reasons inconsistent with the guideline, the Commission “should take steps” to clarify its proper interpretation.⁶⁰

In 2013, Defenders, DOJ, and the Commission all recognized that the Commission had the authority to clarify the proper interpretation of §3E1.1, even though the guideline was directly amended by Congress.⁶¹ Because a clarifying amendment, by definition, does not change a guideline's meaning

⁶⁰ *Longoria*, 141 S. Ct. at 979.

⁶¹ See Testimony of Lisa Hay, at 5; DOJ Comments on the Sentencing Commission's Proposed Amendments 27 (Mar. 8, 2013); USSC, App. C., Amend. 775, Reason for Amendment (Nov. 1, 2013).

but rather confirms what it has always meant,⁶² such an amendment is consistent with Congress' directive not to repeal or change the PROTECT Act amendments.

And clarification from the Commission is needed. All circuits to have addressed §3E1.1(b) since Amendment 775 agree that the scope of the government's discretion is dictated by the language of §3E1.1. But they disagree on what that language requires. Some courts correctly recognize that §3E1.1(b) permits the government to withhold its motion only for the reasons identified in that provision—that is, if an individual fails to timely notify the government of its intention to plead guilty, thereby requiring the government to prepare and expend resources for trial.⁶³ Others interpret Amendment 775's added commentary to permit the government to withhold a §3E1.1(b) motion as long as any interest in §3E1.1—subsections (a) or (b)—is

⁶² See, e.g., *United States v. Goines*, 357 F.3d 469, 474 (4th Cir. 2004).

⁶³ See, e.g., *Vargas*, 961 F.3d at 582–84 (2d Cir. 2020) (“The text of § 3E1.1(b) does not require a defendant to plead without engaging in pretrial motion practice; it requires that the plea be sufficiently in advance of trial to avoid extensive trial preparation.”); *United States v. Knight*, 710 F. App'x 733, 736 (9th Cir. Oct. 5, 2017) (“[T]he Government does not have unbounded discretion to refuse the third point; it can only refuse to do so for the reasons articulated in section 3E1.1(b).”); *United States v. Rivers*, 572 F. App'x 206, 207 (4th Cir. May 22, 2014) (explaining that the government “may not refuse to make a §3E1.1(b) motion for reasons other than a defendant's failure to fulfill the prerequisites listed therein”); see also generally *United States v. Johnson*, 980 F.3d 1364, 1384–1385 (11th Cir. 2020) (declining address issue but recognized the split of authority and that withholding a §3E1.1(b) motion on the basis of obstruction of justice “takes us far afield from the focus on §3E1.1(b), which looks to the timeliness of a [person]'s notification to the Government that he will be pleading guilty. . . [which] allows the Government to cease the unnecessary expenditure of its resources”); *United States v. Rivera-Morales*, 961 F.3d 1, 16–17 (1st Cir. 2020) (recognizing split while confirming that “[q]uintessentially, section 3E1.1(b) is meant to reward [people] who spare the government the expense of trial”).

identified.⁶⁴ And a single court recently determined that Amendment 775's added commentary is not authoritative at all.⁶⁵

By amending §3E1.1(b)'s text, as the Commission proposes, to define “preparing for trial,” and by clarifying that the scope of the government's discretion to withhold the §3E1.1(b) motion is cabined by the guideline that Congress wrote, the Commission will better ensure the uniform application of the third-level adjustment.

a. The definition of “preparing for trial” should focus on the purpose of government preparations rather than the timing of the preparations.

Defenders applaud the Commission for proposing to clarify what should already be clear: that not all the work performed to prosecute a case constitutes preparing for trial.

We appreciate and agree largely with the definition the Commission proposes. We agree that “preparing for trial” may be appropriately defined as the “substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial,”⁶⁶ We think the definition would be more accurate if it defined “preparing for trial” as: “substantive preparations taken *with the specific purpose* to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial.”⁶⁷

⁶⁴ See, e.g., *Castillo*, 779 F.3d at 323 (interpreting Amendment 775's commentary to allow the government to “withhold a §3E1.1(b) motion based on an interest identified in either subsection (a) or (b) of §3E1.1.”); *Jordan*, 877 F.3d at 396 (holding that the government may withhold a §3E1.1(b) motion for preparing for a sentencing hearing, in part, because “[i]f the Commission intended to exclude contested sentencing hearings from interests identified in §3E1.1, it could have done so. It did not.”); see generally *Johnson*, 980 F.3d at 1385 (“In short, in the case of a timely notification of a decision to plead guilty, it is clear the government can no longer base its refusal to move for a third level reduction on the defendant's refusal to waive appellate rights. Beyond that, nothing else is clear[.]”).

⁶⁵ See *Adair*, 38 F. 4th at 358–361 (3d Cir. 2022).

⁶⁶ 2023 Proposed Amendments, at 7200.

⁶⁷ See *Marquez*, 337 F.3d at 1212 (recognizing that “even where there is substantial overlap between the issues that will be raised at the suppression hearing

We also agree with the Commission’s proposal to specify actions that *do not* constitute “preparing for trial.” For example, we wholeheartedly endorse the Commission’s proposed language that “Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered ‘preparing for trial.’”⁶⁸

We encourage the Commission to similarly confirm that preparation for pretrial proceedings conducted for purposes other than trial are not considered “preparing for trial.” We fear that the Commission’s proposed description of pretrial proceedings is unnecessarily limited and may inadvertently deprive deserving individuals of the third level of acceptance of responsibility. The Commission proposes that:

Preparation for *early* pretrial proceedings (such as litigation related to a charging document, *early* discovery motions, and *early* suppression motions) ordinarily are not considered ‘preparing for trial’ under this subsection.⁶⁹

Better guidance would be: ***“Preparation for pretrial proceedings, such as litigation related to a charging document, discovery motions, and suppression motions are not considered ‘preparing for trial’ under this subsection.”*** This guidance is more straightforward than what is proposed, and it is more accurate. Preparation for the purpose of a pretrial proceeding that is unrelated to trial cannot reasonably constitute preparation for trial.

We at least urge the Commission to omit “early” from the proposed guidance. The focus of the “preparing for trial” inquiry should be the *purpose* of the preparation, not the timing. By including this temporal qualifier to describe pretrial work that ordinarily does not constitute “preparing for trial,” the Commission may unintentionally imply to courts that the government’s engagement in other pretrial work—even work totally

and those that will be raised at trial,” preparation for a motion to suppress would not require” the same preparation as trial).

⁶⁸ 2019 Proposed Amendments, at 7200.

⁶⁹ *id.* (emphasis added).

unrelated to trial or to a person's timely plea—does constitute “preparing for trial” if that work did not occur sufficiently “early” in the case.

Whether government preparation for pretrial proceedings properly constitutes “preparing for trial” should not hinge on timing for several reasons. First, if the preparation is not taken in order to present the government's case against a person at trial, then it should not matter when the preparation happened. The timing of the government's work is not a proxy for the purpose of that work. Indeed, the timing of cases in my district shows why. In *United States v. Miles*, our client was arraigned in October of 2019, we filed a motion to suppress in December, and his trial occurred in February 2020.⁷⁰ The pace and timing of Mr. Miles's case is not unusual.⁷¹ But other cases take longer to litigate. In *United States v. Kachkar*, we were appointed on September 1, 2017. We filed a motion to suppress in July 2018, the judge conducted a two-day evidentiary hearing in October 2019, and Mr. Kachkar's four-week trial commenced in January 2020.⁷² Because “[a]ny experienced criminal lawyer knows that preparing for a jury trial involves more work than preparing for a suppression hearing,”⁷³ preparing for a suppression hearing—no matter when that hearing occurs—should not constitute “preparing for trial.”

Second, by excluding only “early” pretrial preparations from “preparing for trial,” the proposed language fails to account for the cause of the timing. The purpose of §3E1.1(b) is to reward someone who does not plead on the eve of trial after the government has already prepared. But permitting the government to withhold the §3E1.1(b) motion because of delay unrelated to a

⁷⁰ See *United States v. Miles*, No. 19-cr-20687 (S.D. Fla.).

⁷¹ See also, e.g., *United States v. Knight*, No. 18-cr-20033 (S.D. Fla.) (indicted on January 19, 2018, motion to suppress filed on February 20, 2018, suppression hearing held March 5, 2018, and trial started on March 7); *United States v. Nelson*, No. 22-cr-20294 (S.D. Fla.) (arraignment in August 2022, motion to dismiss filed in October 2022, and bench trial held in November 2022); *United States v. Brown*, No. 19-cr-20360 (S.D. Fla.) (arraigned in June 2019, motion to dismiss filed in August 2019, change of plea hearing held in November 2019).

⁷² See *United States v. Kachkar*, No. 16-cr-20595 (S.D. Fla.).

⁷³ *Vargas*, 961 F.3d at 585 (citing *Marquez*, 337 F.3d at 1211–12); see also *Divens*, 650 F.3d at 349 (“[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.”) (citation omitted).

person's own conduct, like the government's late production of discovery, would nullify the benefit of the person's timely plea. If a person does everything in her power to satisfy §3E1.1(b)'s conditions, she should not be penalized for events not of her own making.

Third, a focus on the timing of the government's pretrial preparations would cause unwarranted disparities. What constitutes "early" in one district may be considered late in another because the length of a typical case varies from place to place. For example, last fiscal year in my district the median time from filing to disposition in a criminal felony case was 9 months. But in the Eastern District of New York, the median time was over triple that—almost 30 months.⁷⁴ Variations between case lengths exist even between federal districts in the same state: the median length of a criminal felony case in the Southern District of California is 7.6 months; in the Eastern District of California it is 29.1 months.⁷⁵ And what constitutes "early" in one type of case may not be early in another type of case.

If, despite these problems, the Commission retains its proposed language, we encourage the Commission to make clear in §3E1.1(b) or its commentary that the government should not withhold the motion from an otherwise eligible individual if belated government preparations were not caused by actions taken by the individual for purposes of delay.

b. The Commission should also clarify that the government may not refuse to file the §3E1.1(b) motion for interests not identified in §3E1.1(b).

The Commission does not need to "specify[] a . . . standard" to "address the breadth of the government's discretion to withhold a §3E1.1(b) motion,"⁷⁶ because the breadth of the government's discretion is already identified by the guideline and accompanying commentary.

However, we encourage the Commission to clarify that "the straightforward terms of both the guideline and the accompanying

⁷⁴ See U.S. Courts, *U.S. District Court – Judicial Caseload Profile*, <https://tinyurl.com/4whu9cas> (last visited Feb. 27, 2023).

⁷⁵ *Id.*

⁷⁶ 2023 Proposed Amendments, at 7200.

commentary specify the criteria that control the government's assessment” of when to make the §3E1.1(b) motion.⁷⁷ The Commission proposes to delete the commentary it added in Amendment 775 that “The government should not withhold [a §3E1.1(b)] motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.”⁷⁸ Instead of deleting this commentary we urge the Commission to revise it to state that:

The government should not withhold such a motion based on interests not identified in §3E1.1(b), such as whether the defendant agrees to waive his or her right to appeal, whether the defendant moves to suppress evidence, or whether the defendant raises sentencing challenges.

This slight revision would complement the Commission’s proposed clarification in §3E1.1(b)’s text to better ensure that the government does not withhold a §3E1.1(b) motion if the conditions Congress identified in §3E1.1(b) are not met and to better ensure that courts do not deny the third-level reduction for reasons not identified in §3E1.1(b), like general docket management.⁷⁹

Contrary to the conclusion of one Third Circuit panel, clarifying the proper interpretation of this guideline would not be adding a limitation to “when the government can withhold a motion,”⁸⁰ but rather recognizing one that has always existed. Indeed, amending the guideline to expand the government’s discretion beyond what Congress provided for in its direct amendments, *would* violate the PROTECT Act. For this reason, the

⁷⁷ *Davis*, 714 F.3d at 477 (“Although the PROTECT Act made the government the arbiter of whether a defendant ought to receive the extra reduction for acceptance of responsibility, . . . the straightforward terms of both the guideline and the accompanying commentary specify the criteria that control the government's assessment.”) (Rovner, J., concurring).

⁷⁸ 2023 Proposed Amendments, at 7200.

⁷⁹ See, e.g., Order Setting Jury Trial at 1, *United States v. Babary*, No. 22-cr-60222 (S.D. Fla. Nov. 1, 2022), Doc. No. 8; Order Setting Jury Trial at 1, *United States v. Davis*, No. 22-cr-80181 (S.D. Fla. Nov. 29, 2022), Doc. No. 9.

⁸⁰ *Adair*, 38 F.4th at 359 (holding Amendment 775 invalid because it constitutes an alteration of Congress’ PROTECT Act amendments).

Commission should not incorporate the discretion standard articulated in *Wade v. United States* that is used for §5K1.1 substantial assistance motions.⁸¹

Section 3E1.1(b) “involves far less expansive governmental discretion than under §5K1.1.”⁸² To be sure, both provisions require a “motion of the government,” stating that an individual assisted authorities in a particular way.⁸³ But unlike §5K1.1, §3E1.1(b) and its accompanying commentary are “explicit about what conduct warrants the favorable exercise of the government’s discretion,”⁸⁴ For example, §3E1.1(b) contains a description of the precise assistance necessary to warrant relief. Section 5K1.1 does not.⁸⁵ Section 3E1.1’s commentary articulates the reason for the government’s discretion. Section 5K1.1 does not.⁸⁶ Section 3E1.1’s commentary identifies the precise “steps” a person must take to “appropriately merit[]” the reduction. Section 5K1.1 contains no such prescription.⁸⁷

The Commission wisely rejected the opportunity to incorporate the *Wade* framework into §3E1.1 in 2013.⁸⁸ It should do so again by clarifying

⁸¹ See 2023 Proposed Amendments, at 7200 (citing *Wade v. United States*, 504 U.S. 181, 185–86 (1992)).

⁸² *Divens*, 650 F.3d at 345–46 (quoting USSC §3E1.1, cmt. n.6 & background commentary).

⁸³ Compare USSG §§3E1.1(b), with 5K1.1.

⁸⁴ *Davis*, 714 F.3d at 477 (Rovner, J., concurring).

⁸⁵ Compare USSG §§5K1.1, with 3E1.1(b) (“[U]pon motion of the government stating 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 and permitting the government and the court to allocate their resources efficiently[.]” (emphasis added)).

⁸⁶ Compare USSG §§5K1.1, with 3E1.1 cmt. n.6 (“*Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial*, an adjustment under subsection (b) may only be granted upon a formal motion by the Government.” (emphasis added)).

⁸⁷ Compare USSG §§5K1.1, with 3E1.1 background cmt. (confirming that a person who “tak[es] the steps specified in subsection (b). . . has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction”).

⁸⁸ Compare DOJ Comments on the Sentencing Commission’s Proposed Amendments 27 - 28 (Mar. 8, 2013) (requesting the Commission incorporate a *Wade*-like standard into §3E1.1 that would allow the government to withhold the

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that the government may not refuse to file the §3E1.1(b) motion for interests not already identified in §3E1.1(b).