



New 4th Circuit Ruling Is Major Sentencing Win for Defendants

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The U.S. Court of Appeals for the 4th Circuit handed down a ruling earlier this month in *United States v. Divens* that made it harder for the government to refuse to grant a defendant an additional one-step downward departure for an acceptance of responsibility under United States Sentencing Guideline (U.S.S.G.) § 3E1.1(b).

Under the guidelines, defendants are typically given a two-level reduction for acceptance of responsibility pursuant to § 3E1.1(a). Defendants can get another one-step reduction under § 3E1.1(b) on the motion of the government. The Fourth Circuit in *Divens* rejected the argument that the government should be able to decline to move for an additional one-step departure because the defendant rejected the government's plea agreement.

This case is a significant win for defendants because it makes it much harder for the government to deny a defendant an additional one-step reduction. Additionally, by not being under any pressure to accept a plea agreement, a defendant is able to preserve his appellate rights.

This decision marks a sharp departure from all other circuits that have ruled that the additional one-step downward departure could be denied to defendants who did not agree to waive their appellate rights.

In *Divens*, Lawshawn Dwayne Divens pleaded guilty to possession with intent to distribute cocaine. Divens signed an acceptance of responsibility statement but declined to sign a plea agreement waiving certain rights to appellate review and collateral attack. Solely on the basis of Divens' refusal to sign the plea agreement, the government declined to move for the additional one-level guideline reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(b). The 4th Circuit held that the district court erred by failing to compel the government to move for the §3E1.1 (b) reduction.

This ruling conflicts with the 1st, 5th, 7th, and 9th Circuits, all of which have held that the government may withhold a § 3E1.1 (b) motion based on any rational interest. The other circuits have justified their rulings largely by relying on cases interpreting § 5K1.1, a provision in the Guidelines that allows for a downward departure if the government makes a motion to the court indicating that the defendant provided substantial assistance in the investigation or the prosecution of another person.

The 4th Circuit came to its *Divens* opinion largely through a differing view of the legislative history of § 3E1.1 (b). In exploring the legislative history of § 3E1.1, the court in *Divens* found that the government does not possess the same wide discretion



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afforded under §5K1.1 in deciding whether to move for an additional one-level departure.

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The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!

