

No. 08-30094

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

TODD DOUGLAS JOHNSON,

Defendant-Appellant.

**Appeal from the United States District Court
for the District of Alaska
at Anchorage**

**UNOPPOSED MOTION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S
PETITION FOR REHEARING *EN BANC***

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IN THE UNITED STATES COURT OF APPEALS
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Plaintiff-Appellee,) CA No. 08-30094
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v.)
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Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure, and Ninth Circuit Rules 27-1 and 29-2, the Ninth Circuit Federal Public and Community Defenders and the National Association of Criminal Defense Lawyers (NACDL), through their attorneys, Stephen R. Sady and Lisa Hay, respectfully move for leave to file an *amicus curiae* brief in support of Mr. Johnson.

I.

The defendant, Todd Douglas Johnson, is represented by M. J. Haden of the Federal Public Defenders, District of Alaska. Attorney Haden consents to the filing

of this amicus brief on behalf of her client. Further, Attorney Haden has spoken with Assistant United States Attorney Erin White, who represents the United States in this matter, and reports that the United States does not oppose this motion to file an amicus brief.

II.

The prospective amici are the Ninth Circuit Federal Public and Community Defenders and the National Association of Criminal Defense Attorneys. The amici have an interest in this case because their members represent criminal defendants within the Ninth Circuit who will be adversely affected by the Panel's interpretation of § 3E1.1 of the United States Sentencing Guidelines. The ramifications of the Panel's decision are clear to the amici because they litigate a significant majority of the appeals raising Fourth and Fifth Amendment violations and sentencing issues. The Panel's interpretation of § 3E1.1 will chill this appellate litigation over important issues of constitutional law that affect all citizens, not only indigent criminal defendants.

III.

This motion and petition are timely under Ninth Circuit Rule 29-2(e) because they are filed within ten days of the filing of defendant-appellant's petition on October 9, 2009.

Respectfully submitted this October 19, 2009.

/s/ Stephen R. Sady

Stephen R. Sady

Lisa Hay

Attorneys for Prospective *Amicus Curiae*
NACDL and the Ninth Circuit Federal Public
and Community Defenders

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, I electronically filed the foregoing Unopposed Motion for Leave to File Amicus Curiae Brief in Support of Defendant-Appellant's Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Jill C. Dozark

Jill C. Dozark

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I. INTEREST OF AMICI CURIAE

The Ninth Circuit Federal Public and Community Defenders listed in the Appendix provide representation to the indigent accused in each District of the Ninth Circuit pursuant to 18 U.S.C. § 3006A. The National Association of Criminal Defense Lawyers is devoted to ensuring justice and due process for all who are accused of crimes. The Panel's interpretation of U.S.S.G. § 3E1.1 may adversely affect any defendants who plead guilty – 97.5% of federal sentences in this Circuit

– and creates substantial dangers that defendants’ exercise of constitutional and appellate rights will be chilled or punished.

II. REHEARING EN BANC SHOULD BE GRANTED BECAUSE, BY FAILING TO FOLLOW *VANCE* AND ITS PREDECESSORS, THE PANEL MAJORITY VIOLATED THE RULES OF *STARE DECISIS* AND STATUTORY CONSTRUCTION, PERPETUATED ERRONEOUS DICTA FROM *ESPINOZA-CANO*, AND CREATED INTOLERABLE POTENTIAL PUNISHMENT FOR THE EXERCISE OF CONSTITUTIONAL RIGHTS.

Almost twenty years ago, this Court held in *United States v. Watt* that, in order to “avoid unconstitutional application of Sentencing Guidelines,” the § 3E1.1 acceptance of responsibility reduction in offense level had to be construed so that “a sentencing court cannot consider against a defendant any constitutionally protected conduct.” 910 F.2d 587, 592 (9th Cir. 1990) (citing Supreme Court authority on constitutional avoidance).¹ Until recently, relying on *Watt*, this Court has consistently applied this principle, culminating in *Vance*, where the Court held that a defendant’s Fourth Amendment litigation could not justify denying an acceptance of responsibility reduction. *United States v. Vance*, 62 F.3d 1152, 1157 (9th Cir. 1995). *Accord United States v. Kimple*, 27 F.3d 1409, 1414-15 (9th Cir. 1994); *United States v. LaPierre*, 998 F.2d 1460, 1467 (9th Cir. 1993) (“3E1.1 does not allow the judge

¹ *Watt*’s language regarding the weight accorded Guidelines commentary was superseded in *Stinson v. United States*, 508 U.S. 36, 38 (1993).

to weigh against the defendant the defendant's exercise of constitutional or statutory rights").

The Panel, however, erroneously determined that "*Vance* does not govern" any longer and jettisoned precedent that for two decades has protected constitutional rights. *United States v. Johnson*, 2009 WL 2883020, * 9 (9th Cir. Sept. 10, 2009). The Panel ruled that, because the defendant entered a conditional plea in order to appeal his Fourth Amendment claim, the government was entitled to withhold the third level for acceptance of responsibility under § 3E1.1(b). As Judge Smith recognized in his partial dissent, the Panel misconstrued the plain language of the guideline and failed to follow binding Circuit precedent. Further, the Panel relied on erroneous dicta in *United States v. Espinoza-Cano*, 456 F.3d 1126, 1137 (9th Cir. 2006), to authorize an unsupportable increase in the government's discretion to withhold the third level, and in so doing imperiled the delicate balance maintained in this Court's decisions between avoiding punishment for exercise of constitutional rights and rewarding acceptance of responsibility.

A. The Panel Decision Contravenes This Court's Precedents Interpreting Identical Terms Under Former § 3E1.1 As Well As The Governing Rules Of Statutory Construction.

As a general rule, "a subsequent panel of this Court cannot overrule a prior panel." *United States v. Contreras*, 2009 WL 2960623 at *4 (9th Cir. Sept. 17, 2009).

Only if intervening Supreme Court precedent or subsequent legislation “is clearly irreconcilable with ... prior circuit authority” can a panel reject a prior opinion as having been effectively overruled by the new event. *Contreras, supra*, at *4; *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). “[T]he principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law.” *Id.* (citation omitted).

In *Contreras*, Judge Tashima demonstrated the type of legal archeology that can identify how rulings deviate from governing precedent. *Supra* at *5. In that case, historical analysis revealed that panels erroneously adhered to precedent after a guideline amendment deleted previously material language. *Id.* The same type of analysis here reveals that the Panel erroneously abandoned governing precedent based on an amendment that left the operative language unchanged.

1. *As Judge Smith Points Out In His Partial Dissent, The Amendments To § 3E1.1 Did Not Change The Text Interpreted By Prior Panels.*

The Panel effectively overruled *Vance* (“*Vance* does not govern”), and ignored other Circuit precedent cited in *Vance*, because Congress amended § 3E1.1 in 2003, after the prior decisions were issued. *Johnson, supra*, at *9 (citing the PROTECT Act, Pub.L. No. 108-21, § 401(g), 117 Stat. 650, 671-72 (2003)). The changes implemented by Congress, however, did not render the amended § 3E1.1

“irreconcilable” with prior Circuit authority. To the contrary, the prior authority interpreted terms that Congress left substantially untouched:

- *Vance* interpreted: “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.” U.S.S.G. § 3E1.1(b)(2) (1992) (emphasis added);
- *Johnson* interpreted: “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.” U.S.S.G. § 3E1.1(b) (2003) (emphasis added).

In fact, a prior panel decision recognized that, other than giving the government discretion over filing a motion, “the language of section 3E1.1(b) tracks the former language of section 3E1.1(b)(2).” *Espinoza-Cano*, 456 F.3d at 1137.

As Judge Smith demonstrated with the marked-up statute, the pre-and post-amendment versions of § 3E1.1 involve language that did not undergo transformation. *Johnson, supra*, at *12 (M. Smith, J., dissenting in part). The amendment only changed who initiates the adjustment, removed one basis for the defendants receiving an adjustment, and added consideration of the allocation of government resources, not just the court’s resources, in preparing for trial. Congress left unchanged the essential language governing a defendant’s eligibility for the additional level as interpreted in *Vance*: “For purposes of this case, *Vance* interpreted

language substantially identical to that at issue here.” *Johnson, supra*, at *12 (M. Smith, J., dissenting in part).

2. *The Panel Violated The Rules Of Stare Decisis And Statutory Construction By Failing To Defer To This Court’s Prior Constructions Of § 3E1.1.*

The Panel misread the addition of “government” to expand the previously defined term “trial.” Statutory language once construed, does not change meaning in a different context. *Clark v. Martinez*, 543 U.S. 371, 386 (2005) (the court does not “give the same statutory text different meanings in different cases”). The judicial construction of the statute is the authoritative statement of what the statute means and has always meant. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994). Because the prior construction of § 3E1.1 in *Vance* interpreted the words in the current version, the Panel was bound by that construction.

Vance held that a defendant who pled guilty but reserved the right to appeal the denial of a suppression motion – the same facts at issue in this case – was entitled to a three level reduction for acceptance of responsibility where the other prerequisites existed. 62 F.3d at 1157-59. This Court rejected an argument that the government’s preparation for the motion hearing, like trial preparation, could be weighed against the defendant under § 3E1.1: “The guidelines do not mean ‘motions’ where they say ‘trial.’” *Id.* at 1157 (citing *Kimple*, 27 F.3d at 1414-15). Because *Vance* and *Kimple*

have already interpreted the relevant text of § 3E1.1, the Panel violated both *stare decisis* and the rules of statutory construction in declining to follow them.

B. The Panel Decision Misconstrued the Plain Language of § 3E1.1, Relying In Part On Erroneous Dicta from *Espinoza-Cano*.

The current and previous versions of § 3E1.1 link eligibility for the third level to a timely guilty plea that avoids the allocation of resources for unnecessary trial preparation. The commentary to the former § 3E1.1(b)(2) explained that, to qualify for a reduction under (b)(2), a defendant’s notice of his intent to plead guilty must be sufficiently early in the proceedings “so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.” U.S.S.G. § 3E1.1, comment (n. 6) (1992). This focus on rewarding an early guilty plea to avoid unnecessary trial preparation was not changed by the PROTECT Act. Rather, “[b]ecause the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparation for trial,” Congress bestowed on the government the authority to move for the additional reduction. U.S.S.G § 3E1.1, comment (n. 6) (2003). The earlier commentary was not deleted. As demonstrated by the text and the commentary, the focus of the section remains on “avoid[ing] preparation for trial” and the inefficient allocation of resources that would result from preparing for an unnecessary trial. U.S.S.G. § 3E1.1(b) (2003).

1. *As Judge Smith Recognized, The Panel Decision Erroneously Unlinks § 3E1.1 From The Requirement Of Avoiding Unnecessary Trial Preparation And Instead Allows The Government To Consider Any Expenditure of Resources When Determining Whether To Move For A Third Point Reduction In Sentence Under U.S.S.G § 3E1.1.*

The Panel held that the government could decline to move for a third level adjustment based on “the allocation and expenditure of prosecutorial resources for the purposes of defending an appeal.” *Johnson, supra*, at *6. To support this holding, the Panel explained that “[w]hen § 3E1.1(b) speaks of conserving government resources in the ‘prosecution’ of the defendant’s ‘misconduct,’ it means more than simply trial preparation.” *Id.*

This statement departs from the plain language of § 3E1.1, which does not speak at all of “conserving” government resources in “prosecutions.” The Panel reconfigures the plain text of § 3E1.1 to create sweeping new powers for the government. Section 3E1.1 and its commentary refer only to the efficient allocation of resources that occurs when a timely guilty plea allows the government to avoid preparation for unnecessary *trials*. Congress determined that the government is “in the best position” to say whether it has allocated resources for unnecessary trial preparation, but Congress did not give the government authority to withhold a benefit if a defendant causes any unwelcome expenditure of resources.

As Judge Smith recognized, the Panel majority unreasonably expanded the scope of the government's discretion under § 3E1.1 and, in so doing, created serious risks for defendants:

[T]he majority risks giving federal prosecutors undue license to penalize defendants for forcing the government to expend resources, even if the government's justification for doing so is entirely unrelated to the stated objectives of the Sentencing Guidelines.

Johnson, supra, at *10 (M. Smith, J., dissenting in part). *Accord United States v. Richins*, 429 F.Supp.2d 1259, 1263 (D. Utah 2006) (Cassel, J.) (rejecting "sweeping view of the government's power" under § 3E1.1(b) based on the Guideline's legislative background and plain text).

2. *The Panel's Error Stems In Part From Erroneous Dicta In Espinoza-Cano.*

In reaching its erroneous construction of the Guideline, the Panel relied heavily on *Espinoza-Cano*, this Circuit's seminal decision interpreting § 3E1.1 after the PROTECT Act amendment. *Johnson, supra*, at *5-9. That case contains a crucial error of reasoning, which resulted in broad and unwarranted *dicta*.

In *Espinoza-Cano*, the Court for the first time addressed the standard of review applicable to the government's refusal to exercise its then-new authority under § 3E1.1 to move for the third level of reduction. 456 F.3d at 1136. The panel chose to use the standard articulated in *Wade v. United States*, 504 U.S. 181, 185-86 (1992),

for review of the government's refusal to file under U.S.S.G. § 5K1.1 to reward a defendant's "substantial assistance" to the government. Although both § 5K1.1 and § 3E1.1 allow a decrease in sentence "upon motion of the government," the *Espinoza-Cano* panel's resort to the *Wade* standard of review failed to recognize significant textual and functional differences in § 5K1.1 and § 3E1.1 that rendered parts of the *Wade* reasoning inapposite in the context of § 3E1.1 motions.

First, the *Espinoza-Cano* panel began its analysis by conflating Chapter Five departures and Chapter Three adjustments, incorrectly stating that both sections address when a "court may depart downward." 456 F.3d at 1135. Section 5K1.1 provides for downward departure, but § 3E1.1 provides for a sentencing adjustment, not departure, thereby implicating different levels of review. *Compare United States v. Fleming*, 215 F.3d 930, 939 (9th Cir. 2000) (denial of a reduction under § 3E1.1 reviewed for clear error) *with United States v. Laney*, 189 F.3d 954, 963 (9th Cir. 1999) (extent of discretionary departure under § 5K1.1 not subject to appellate review).

Second, sentence reductions for substantial assistance to the government do not involve constitutional tensions surrounding the relinquishment of constitutional rights, as do reductions for acceptance for responsibility. The statutory standards for substantial assistance focus solely on rewarding activity that could be compelled by

subpoena and immunity. 18 U.S.S.C. § 3553(e). In contrast, the tensions between rewarding acceptance of responsibility and punishing assertions of constitutional rights has resulted in a generation of well-established case law, as discussed below.

Finally, the *Espinoza-Cano* panel failed to acknowledge the difference in the triggering events established by Congress to justify a government motion for reduction of sentence under § 5K1.1 and § 3E1.1. The government's motion for sentence reduction under § 5K1.1 is left to the government's subjective assessment of whether a defendant has "substantially assisted in the prosecution of another." In contrast, the government's motion under § 3E1.1 has three objective components, all linked to the defendant's plea: the motion must state that the defendant (1) has assisted the authorities, (2) by a timely guilty plea (3) that avoids trial preparation and the inefficient allocation of resources. Without recognizing these different triggering events, the *Espinoza-Cano* panel quoted, in *dicta*, the *Wade* language regarding "costs and benefits" for assessing the government's denial of § 5K1.1 motions. *Espinoza-Cano*, 456 F.3d at 1138.² Because of the different requirements for a

² The language is *dicta* because the defendant in *Espinoza-Cano* never pled guilty, as stated under § 3E1.1. 456 F.3d at 1138. The *Wade* language is preceded by an unfulfilled condition "[e]ven if we were to equate a stipulated bench trial with an outright guilty plea, ..." and thus qualifies as *dicta*. *Id.*

motion under 5K1.1 and § 3E1.1, the *Espinoza-Cano* Panel erred in suggesting that *Wade*'s subjective language should apply to assessment of § 3E1.1 motions.

A government motion under § 3E1.1 does not depend on a cost-benefit analysis of the defendant's actions (*i.e.*, whether the defendant's assistance was "substantial"). Instead, a § 3E1.1 motion must state whether a specific action of the defendant – timely notice of a guilty plea – resulted in specific effects for the government and the court: avoidance of inefficient allocation of resources for *trial* preparation. Unlike in *Wade*, the government cannot substitute its benefits wish list for objective trial preparation.

Other cases have cited *Espinoza-Cano* for the proposition that the government has broad discretion under § 3E1.1. *E.g.*, *United States v. Medina-Beltran*, 542 F.3d 729, 731 (9th Cir. 2008). Because motions under § 5K1.1 and § 3E1.1 have different triggering criteria, implicate constitutional rights to different degrees, and address different reductions (adjustments vs. departures) under the Guidelines, the *Espinoza-Cano* Panel erred in broadly applying the *Wade* standard to assessment of § 3E1.1 motions.

C. An Interpretation of Section 3E1.1 That Allows The Government To Penalize Defendants' Assertion Of Fourth Amendment and Other Constitutional Protections Would Imperil Constitutional Rights And Must Be Avoided.

The majority opinion is notable for the absence of any consideration of the constitutional perils from a construction of § 3E1.1 that provides the government with virtually unreviewable discretion to, in effect, impose a liberty tax for exercise of constitutional and statutory appellate rights. The Panel correctly noted that liberty is at stake, given the requirement that the Guidelines provide the starting point for all sentencing decisions. *Johnson, supra*, at 15 n. 4. Under the controlling precedent of *Watt*, the Panel should have considered the constitutional dangers of its construction, then construed the statute to avoid the risk to individual rights. *Martinez*, 543 U.S. at 384 (requiring the “plausible” interpretation of a statute that avoids constitutional problems). The reading of § 3E1.1 to apply only to trial preparation, not pretrial motions and appeals, is not only a plausible reading but the ordinary and natural meaning of the text. The Panel’s reading of the amended § 3E1.1 trenches upon protected Fourth, Fifth, and Sixth Amendment rights, upsets the careful separation of powers approved in *Mistretta v. United States*, 488 U.S. 361 (1989), and unconstitutionally conditions the adjustment downward upon relinquishment of basic rights.

1. *By Conditioning The Third Point Adjustment On Relinquishment Of Non-Trial Rights To Pretrial Motions And Appeals, The Panel Jeopardized The Exercise Of Rights Under The Fourth, Fifth, And Sixth Amendments.*

In *Watt*, this Court protected defendants' assertions of constitutional rights by prohibiting denial of the adjustment under § 3E1.1 based on a defendant's refusal to make inculpatory statements and to disclose the location of evidence. 910 F.2d at 593. The Court's solicitude for rights enforced through pretrial motions has a distinguished pedigree. In *Simmons v. United States*, the Court recognized the fundamental importance of the Fourth Amendment right of defendants "in federal prosecutions, upon motion and proof, to have excluded from trial evidence which had been secured by means of an unlawful search and seizure." 390 U.S. 377, 389 (1968).

In order to secure this right, defendants had to be free from both the direct use and chilling effect of the prosecution's potential use at trial of the defendant's testimony in the suppression hearing. *Simmons*, 390 U.S. at 393 (contrary rule "may deter [the defendant] from asserting a Fourth Amendment objection"). The Court held that the protection of the Fourth Amendment, and assurance against deterring the exercise of those rights in pretrial motions, were so important that the Constitution required that the testimony be protected by immunity:

When [the assumption that the defendant has a choice] is applied to a situation in which the 'benefit' to be gained is that afforded by another

provision of the Bill of Rights, an undeniable tension is created. Thus, in this case [the defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. *In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.*

Id. (emphasis added).

By allowing the prosecutor to, in effect, start the sentencing calculation at a higher level for those who do not relinquish non-frivolous Fourth Amendment claims, the Panel breaks from a distinguished tradition of recognizing that the litigation of suppression issues not only defends the individual's rights but performs an essential societal purpose. "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States v. Munoz*, 701 F.2d 1293, 1301 (9th Cir. 1983) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

The liberty tax that prosecutors can place on assertion of pretrial and appellate rights is by no means limited to the Fourth Amendment. Pretrial motions and their appeals involve a broad panoply of rights, including Fifth Amendment rights against involuntary statements, Sixth Amendment rights to counsel and venue, and constitutional protection against impermissibly suggestive identification procedures.

See also *North Carolina v. Pearce*, 395 U.S. 711, 723-25 (1969) (prohibiting more severe punishment based on exercise of appellate rights).

The constitutional dangers are emphasized by the amendment's inclusion in the PROTECT Act, which injected a new factor not addressed in *Mistretta*: “whether the federal Sentencing Guidelines system, in its present form, violates the separation of powers doctrine by aggrandizing the Executive Branch at the expense of the Judicial Branch.” *United States v. Detwiler*, 338 F.Supp.2d 1166,1169-70 (D. Or. 2004).³ In finding the PROTECT Act unconstitutional under the pre-*Booker* regime, the court in *Detwiler* identified a number of constitutional dangers:

- The Feeney Amendment was actually authored by Attorney General Ashcroft's subordinates in the Department of Justice, leaving Congressman Feeney to describe himself as merely the “messenger,” and Congress never addressed Chief Justice Rehnquist's concerns on behalf of the Judicial Conference “that this legislation, if enacted, would do serious harm to the basic structure of the sentencing guideline system and would seriously impair the ability of courts to impose just and responsible sentences.” *Detwiler*, 338 F.Supp.2d at 1170-72.
- The Feeney Amendment to § 3E1.1 created risks of constitutional abuse: “For instance, the third point might be withheld from a defendant . . . who annoys the prosecutor by moving to suppress the fruits of an illegal search. Fear of retaliation might itself chill defense counsel's efforts.” *Id.* at 1177 (citation omitted).

³ In *Medina-Beltran*, the Court found the PROTECT Act constitutional without analysis of whether expansion of § 3E1.1 as applied beyond trial preparation affected the *Mistretta* analysis. 542 F.3d at 731-32.

- The transfer of power to the prosecutor from the sentencing judge tips the balance from constitutional separation of powers barely approved in *Mistretta* to an unconstitutional accretion of Executive Branch authority over both the power to prosecute and the power to sentence. *Id.* at 1178-79.

Although superficially a minor change in language, given the Panel's broad reading, the amendment creates a concentration of Executive Branch authority that must be narrowly construed to avoid serious constitutional questions.

2. *Well-Established Constitutional Law Prohibits Legislation That Conditions The Lower Level On The Relinquishment Of Statutory And Constitutional Rights.*

The principle that state action cannot burden the exercise of constitutional rights by requiring the sacrifice of statutory rights is a basic motif in the Supreme Court's jurisprudence. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); accord *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The Supreme Court has articulated a delicate balance between denouncing as unconstitutional a statute that only allowed the death penalty for those who opted for trial (*United States v. Jackson*, 390 U.S. 570 (1968)) and permitting a harsher sentence for a defendant who exercised his right to testify at trial, then perjured himself (*Dunnigan v. United States*, 507 U.S. 87 (1993)). In formulating the original § 3E1.1, the Sentencing Commission was aware that the Constitution prohibited imposition of a penalty for a "defendant's unsuccessful choice to stand trial." United States Sentencing Commission Public Hearing On Plea

Agreements, at 3-4 (Sept. 23, 1986) (citing *Smith v. Wainwright*, 664 F.2d 1194, 1196 (5th Cir. 1981)).⁴

As § 3E1.1 was originally conceived, the sentencing judge's discretion provided the critical element to avoid constitutional difficulties: "Investing the Court with discretion to mitigate the sentence by a specified amount or amounts, rather than directing specified 'guilty plea credit' in all cases, would very much undercut any Constitutional objection to the plan." *Id.* The Feeney Amendment cut out the Judicial Branch discretion that protected the constitutionality of § 3E1.1, replacing it with the Executive Branch's motion as a condition precedent, to be overseen by thousands of different prosecutors with radically varying ideas regarding the proper scope of this new power. As construed by the Panel, the amended § 3E1.1 allows punishment for the assertion of constitutional and statutory rights.

Well before the transfer of § 3E1.1 authority to the prosecutor, now-Chief Judge Kozinski and Judge Reinhardt identified the constitutional dangers of the slippery distinction between rewarding acceptance of responsibility and punishing exercise of constitutional rights. "[W]hether a sentencing disparity is viewed as a

⁴ The same concerns could have been voiced based on this Court's precedents holding unlawful more severe sentences based on exercise of constitutional rights. *See, e.g., United States v. Capriola*, 537 F.2d 319, 320 (9th Cir. 1976); *United States v. Stockwell*, 472 F.2d 1187, 1187 (9th Cir. 1973).

burden or a benefit depends ‘upon whether the shorter sentence is compared to the longer or the longer to the shorter.’” *United States v. Aichele*, 941 F.2d 761, 769 (9th Cir. 1991) (Kozinski, J., dissenting) (quoting *United States v. Carter*, 804 F.2d 508, 517 (9th Cir. 1986) (Reinhardt, J., dissenting)). “In any event, the limits of this rationale are surely reached where a defendant is required to give up the ‘benefit’ of a shorter sentence in order to preserve his right to effect an appeal.” *Aichele*, 941 F.2d at 769.

These constitutional concerns have not evaporated over the time the Guidelines have been in effect. Institutionalized violations of the Sixth Amendment were not identified and remedied until 20 years after the Guidelines were promulgated. The Feeney Amendment’s shift of sentencing authority away from the Judicial Branch to the Executive Branch, as applied in this case to pretrial motions and appeal, intensifies the serious constitutional concerns expressed by judges from the outset of the Guideline era. The serious constitutional questions require that § 3E1.1 be construed as narrowly as possible to avoid the constitutional issues raised by the Panel’s interpretation.

III. CONCLUSION

The Court should grant rehearing en banc: review of the issues raised by this case is necessary to restore the integrity of this Court’s governing precedent and to

resolve questions of exceptional importance in the administration of the federal criminal justice system. The Court should vacate the Panel decision, and remand for resentencing with the third level reduction.

Respectfully submitted this 19th day of October, 2009.

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Stephen R. Sady

/s/ Lisa Hay

Lisa Hay

Counsel For Amicus Curiae

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,) CA No. 08-30094
)
v.)
)
TODD DOUGLAS JOHNSON,)
)
Defendant-Appellant.)

BRIEF FORMAT CERTIFICATION
PURSUANT TO RULE 32(e)(4)

Pursuant to Ninth Circuit Rule 32(e)(4), I certify that the Amicus Curiae Brief is proportionately spaced, has a typeface of 14 points or more and contains 4,171 words.

Dated this October 19, 2009.

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/s/ Lisa Hay
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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2009, I electronically filed the foregoing Amicus Curiae Brief of Ninth Circuit Federal Public and Community Defenders and the National Association of Criminal Defense Lawyers in Support of Defendant-Appellant's Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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