25-1294-cr

United States Court of Appeals
For the Second Circuit

Docket No. 25-1294

UNITED STATES OF AMERICA,
Appellant,

-against-

VAZHA GABADADZE, KAKHA KATSADZE,
DAVIT TIKARADZE

Defendants.

TEIMURAZ TAVBERIDZE

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Amicus Brief for the National Association of Criminal Defense Lawyers in Support of Defendant-Appellee Teimuraz Tavberidze

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Association of Criminal Defense Lawyers ("NACDL") submits the following corporate disclosure statement, as required by Fed. R. App. P. 26.1 and 29: NACDL is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The jury trial right is a foundational safeguard of our constitutional democracy. 5

II. Trial penalties undermine the jury right's core functions. 10

A. The Constitution prohibits penalizing those who exercise a right—and conditioning a lesser penalty on waiving it. 10

B. Fear-driven pressure to forego trial and plead guilty undermines adversarial fact determination, diverts power to the Executive, and increases the risk that outcomes reflect bargaining leverage, not justice. 12

III. Virtually all federal criminal defendants now forgo their right to trial—a dramatic change that is due to a federal trial penalty. 17

IV. Guideline § 3E1.1(b) functions as an unconstitutional trial penalty. 18

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

Alleyne v. United States,
570 U.S. 99 (2013) 7

Blackledge v. Perry,
417 U.S. 21 (1974) 12, 24

Blakely v. Washington,
542 U.S. 296 (2004) 8, 16

Brady v. United States,
397 U.S. 742 (1970) 13

Duncan v. Louisiana,
391 U.S. 145 (1968) 3, 7

Erlinger v. United States,
602 U.S. 821 (2024) 3, 9, 16

Friedman v. Rehal,
618 F.3d 142 (2d Cir. 2010).....12

Griffin v. California,
380 U.S. 609 (1965) 11

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013) 23

Lee v. United States,
582 U.S. 357 (2017) 13

North Carolina v. Pearce,
395 U.S. 711 (1969) 12, 24

Pena-Rodriguez v. Colorado,
580 U.S. 206 (2017) 9

Poventud v. City of New York,
750 F.3d 121 (2d Cir. 2014) 12

Powers v. Ohio,
499 U.S. 400 (1991) 9

Simmons v. United States,
390 U.S. 377 (1968) 11

Taylor v. Kentucky,
436 U.S. 478 (1978) 8

Taylor v. Louisiana,
419 U.S. 522 (1975) 3, 7, 9

United States v. Cruz,
156 F.3d 366 (2d Cir. 1998) 22

United States v. Goffer,
529 F. App'x 17 (2d Cir. Jul. 1, 2013) 25

United States v. Jackson,
390 U.S. 570 (1968) 10, 11, 24

United States v. Oliveras,
905 F.2d 623 (2d Cir. 1990) 22, 23

United States v. Parker,
903 F.2d 91 (2d Cir. 1990) 19, 20

United States v. Powell,
No. 24-1461, 2025 WL 3022475 (2d Cir. Oct. 29, 2025) 25

United States v. Taylor,
475 F.3d 65 (2d Cir. 2007) 19

United States v. Vargas,
961 F.3d 566 (2d Cir. 2020) 19

United States v. Washington,
No. 24-3173, 2025 WL 3628306 (2d Cir. Dec. 15, 2025) 26

United States v. Whitten,
610 F.3d 168 (2d Cir. 2010) 23, 24, 25

Statutes

18 U.S.C. § 3553(a) 20

United States Sentencing Guidelines

U.S.S.G. § 3E1.1(a) 18, 19, 21, 26

U.S.S.G. § 3E1.1(b) ..... *passim*

Rules

Fed. R. App. P. 26.1 i

Fed. R. App. P. 29(a) 1

Fed. R. App. P. 29(c)(5) 1

Other Authorities

Amar, Akhil Reed, *The Bill of Rights As A Constitution*, 100 Yale L.J. 1131 (1991) 8

Barkow, Rachel E., *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33 (2003) 6

Dervan, Lucian E., *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 Utah L. Rev. 51 (2012) 14

Dripps, Donald A., *Guilt, Innocence, & Due Process of Plea Bargaining*, 57 Wm. & Mary L. Rev. 1343 (2016) 14

Johnson, Brian D., *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent'g Rep. 256, 261 (2019) 18

Kim, Andrew Chongseh, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 Miss. L.J. 1195 (2015) 14, 17, 18

Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams (R. Taylor ed. 1977) 6

Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 The Papers of Thomas Jefferson (Julian P. Boyd ed., 1958) 6

Lynch, Gerard E., *Screening Versus Plea Bargaining: Exactly What Are We Trading Off*, 55 Stan. L. Rev. 1399 (2003) 16, 21

Reddy, Vikrant P. & Richardson, R. Jordan, *Why the Founders Cherished the Jury*, 31 Fed. Sent'g Rep. 316 (2019) 7

The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....5

The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It, Nat'l Ass'n of Crim. Def. Laws. (July 2018) 2, 13, 17, 18, 20

Turner, Jenia I., *Plea Bargaining*, Reforming Crim. Just.: A Report of the Acad. for Just. on Bridging the Gap between Scholarship and Reform, vol. 3 (Erik Luna ed., 2017).....15

U.S. Sent'g Comm'n, 2024 Sourcebook of Federal Sentencing Statistics.....17

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of more than 12,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an

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[1] In accordance with Fed. R. App. P. 29(a), counsel for amicus states that all parties consent to the filing of this brief. Counsel for amicus further states pursuant to Fed. R. App. P. 29(c)(5) that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

affiliated organization and awards it full representation in its House of Delegates.

NACDL has an interest in ensuring that defendants are not punished for exercising their constitutional trial rights and has conducted research and authored reports related to this topic. *See, e.g., The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, Nat'l Ass'n of Crim. Def. Laws. (July 2018) ("NACDL Report"), *available at* https://www.nacdl.org/Landing/TheTrialPenalty.

SUMMARY OF ARGUMENT

Since the Founding, the Sixth Amendment jury trial right has been cherished as a foundational tenet of democracy, a critical part of what John Adams called "'the heart and lungs' of liberty." *Erlinger v. United States*, 602 U.S. 821, 829 (2024). It constrains the Executive's authority to convict and punish, and guards against arbitrary exercises of power and prosecutorial overreach. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). It breathes life into the core procedural rights of criminal defendants. And it serves an important democratic function by ensuring citizen participation in the criminal justice system, thereby improving public confidence and transparency. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

Today, however, criminal defendants face the specter of a steep penalty should they elect to exercise their constitutional right to a jury trial. Because of the gulf between sentences imposed after a guilty plea versus those imposed after trial, few rational defendants can afford to hold the government to its constitutionally mandated burden to prove their guilt by competent evidence, beyond a reasonable doubt, to a jury of their peers. This

trial penalty—the enhanced punishment a defendant faces for exercising fundamental constitutional rights—has led to the virtual disappearance of the federal jury trial. This has undermined the integrity of the federal criminal system, rendering it less just, less transparent, and more prone to error. Troublingly, this modern development also has shifted the democratic balance of power in a way the Founders did not envision.

While plea bargaining is now an entrenched part of the criminal justice system, the Constitution does not permit sentencing provisions that punish or improperly chill defendants' exercise of their fundamental trial rights. Here, the district court correctly identified U.S.S.G. § 3E1.1(b) as one such provision and held it unconstitutional. This holding, and the district court's judgment, should be affirmed.[2]

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[2] Appellee's brief persuasively argues that the Court need not reach this constitutional issue in this case for several reasons, including that any purported error is harmless in light of the overwhelming record evidence that the district court would have imposed the same sentence regardless. Def't Br. at 18-31. However, if the Court reaches the constitutional issue, it should affirm.

ARGUMENT

I. The jury trial right is a foundational safeguard of our constitutional democracy.

The Sixth Amendment's guarantee of a jury trial reflects—and underpins—our nation's most important values. *First*, it acts as a structural constraint on the government's authority to convict and punish. At the Founding, the jury was conceived as an institutional backstop: a way to limit executive power by requiring public proof, presented to ordinary citizens, before punishment could be imposed. This understanding arose from colonial experience. The Declaration of Independence charged the Crown with "depriving us in many cases, of the benefits of Trial by Jury." The Sixth Amendment was the Founders' answer to this abuse.

Indeed, Alexander Hamilton viewed the jury trial as the most valuable "defense against the oppressions of an hereditary monarch." The Federalist No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961), *available at* https://ia800102.us.archive.org/2/items/federalistpapers1961hami/federalistpapers1961hami.pdf. Thomas Jefferson described trial by jury as "the only anchor ever yet imagined by man, by which a government can be held to the

principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 The Papers of Thomas Jefferson, at 267 (Julian P. Boyd ed., 1958), *available at* https://founders.archives.gov/documents/Jefferson/01-15-02-0259. John Adams framed the issue most starkly, writing that representative government and trial by jury

> are the heart and lungs, the main spring, and the center wheel of liberty, and without them, the body must die; the watch must run down; the government must become arbitrary…. In these two powers consist wholly, the liberty and security of the people: They have … no other indemnification against being rid-den like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds: No other defence against fines, imprisonments, whipping posts, gibbets, bastenadoes and racks.

Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Adams, at 169 (R. Taylor ed. 1977), *available at* https://founders.archives.gov/documents/Adams/06-01-02-0063-0004. *See also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 55 (2003) ("Only by interposing the people directly between the state and the individual charged with a crime could the

people guarantee that the new government would not mimic the tyranny of its predecessor.").

The Supreme Court has consistently acknowledged this original understanding. The jury trial right exists to "guard against the exercise of arbitrary power" by introducing "the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor." *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). It is an "inestimable safeguard against the corrupt or overzealous prosecutor." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). The "historical role of the jury" has been "as an intermediary between the State and criminal defendants." *Alleyne v. United States*, 570 U.S. 99, 114 (2013).

Thus, "the right to trial by jury was probably the most valued of all civil rights" at the Founding. Vikrant P. Reddy & R. Jordan Richardson, *Why the Founders Cherished the Jury*, 31 Fed. Sent'g Rep. 316, 317 (2019). This venerable right "summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of

Rights." Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 Yale L.J. 1131, 1190 (1991).

Second, the jury trial right also preserves those most critical pillars of criminal procedure: the presumption of innocence and the government's burden of proof beyond a reasonable doubt. These twin "essential[s] of a civilized system of criminal procedure," *Taylor v. Kentucky*, 436 U.S. 478, 485–86, n.13 (1978), can only be enlivened and exercised in a public courtroom, before a body of citizen jurors. The Supreme Court has therefore rejected any attempt to minimize the jury's role as secondary or technical, explaining that it is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004). The "accused's constitutional right to be judged solely on the basis of proof adduced at trial," *Taylor v. Kentucky*, 436 U.S. at 486, is one of the most lauded and notable features of American criminal law.

Finally, the jury serves an indispensable democratic function. Jury duty is one of the few direct ways ordinary citizens participate in the administration of criminal justice. Lay jury service at a trial promotes

transparency, legitimacy, and public confidence. "Community participation in the administration of the criminal law… is …critical to public confidence in the fairness of the criminal justice system." *Taylor v. Lousiana*, 419 U.S. at 530. As the Supreme Court has observed, "[t]he jury is a tangible implementation of the principle that the law comes from the people." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017); *see also Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.").

In sum, the Sixth Amendment trial right "place[s] the jury at the heart of our criminal justice system" and democracy. *Erlinger v. United States*, 602 U.S. 821, 831 (2024). It ensures that the government's power to punish "remains always controlled by[] the jury and its verdict" and "mitigate[s] the risk of prosecutorial overreach and misconduct, including the pursuit of 'pretended offenses' and 'arbitrary convictions.'" *Id.* at 822, 832 (quoting Alexander Hamilton, *supra*). It breathes life into the core procedural rights

of criminal defendants. And it ensures citizen participation and public confidence in the justice system.

II. Trial penalties undermine the jury right's core functions.

A. The Constitution prohibits penalizing those who exercise a right—and conditioning a lesser penalty on waiving it.

Because the jury trial right is foundational to democracy, the Constitution is concerned not only with outright denial of the right, but also with institutional practices that systematically burden its exercise. Schemes that impose such "trial penalties" are not mere policy concerns; they are structurally corrosive. Thus, a legal mechanism that assesses increased punishment because a defendant insists on trial operates as an unconstitutional condition: it pressures a defendant to trade away the jury right to avoid a state-imposed surcharge for invoking it.

The Supreme Court recognized this danger in *United States v. Jackson*, 390 U.S. 570 (1968), when it invalidated the death penalty provision of the Federal Kidnapping Act. This statute had trial-avoidance incentives built into its sentencing scheme: it encouraged jury trial waivers by providing that pleading guilty would take the death penalty off the table. The constitutional

"evil," the Court explained, was not limited to guilty-plea coercion in individual cases. Rather, the problem was that the punishment scheme "needlessly encourages" defendants, as a whole, to forgo their right to trial. *Id*. at 583. The Court emphasized that "a procedure need not be inherently coercive" to impose "an impermissible burden upon the assertion of a constitutional right." *Id*.

Jackson's animating principle reflects a broader constitutional concern. The Supreme Court has repeatedly rejected governmental practices that make the exercise of constitutional rights more dangerous or costly than their surrender. The Court has outlawed "penalt[ies] imposed by courts for exercising a constitutional privilege"; those that "cut[] down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965). And the Court has cautioned that it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968).

The prohibition on vindictiveness in sentencing is cut from the same cloth. Under this doctrine, a judge may not increase a defendant's sentence

because he exercised a constitutional right. However, due process *also* requires that defendants be entirely "freed of apprehension" that this will occur. *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969). That is because the mere specter of retaliation may "unconstitutionally deter" their exercise of that right *ab initio*. *Blackledge v. Perry*, 417 U.S. 21, 27–28 (1974).

B. Fear-driven pressure to forego trial and plead guilty undermines adversarial fact determination, diverts power to the Executive, and increases the risk that outcomes reflect bargaining leverage, not justice.

Trial-penalty schemes suffer from all these impairments. They fuel defendants' apprehension. And they make defendants choose—at minimum, *believe they must choose*—between exercising the trial right on the one hand and avoiding additional punishment on the other. In doing so, trial penalties distort outcomes, encouraging innocent defendants to plead guilty. *See Poventud v. City of New York*, 750 F.3d 121, 141–45 (2d Cir. 2014) (en banc) (Lynch, J., concurring) (recognizing that risk of substantial sentence may cause defendant to accept plea carrying lesser penalty, regardless of guilt); *Friedman v. Rehal*, 618 F.3d 142, 158 (2d Cir. 2010) (based on pretrial pressures, including severe sentence if convicted at trial, "[e]ven if innocent,

petitioner may well have pled guilty"); NACDL Report at 6, 9–10 (summarizing data regarding guilty pleas by innocent defendants). They also shift power back to the Executive—exactly what the Founders sought to prevent when they enshrined the jury trial right in the Constitution.

As an initial matter, trial penalties undermine the very focus of jury trials: ensuring that convicted defendants are guilty beyond a reasonable doubt. When defendants know that proceeding to trial will expose them to a trial penalty with a materially greater range of punishment—unrelated to guilt or culpability—the rational response is often to plead guilty, regardless of innocence. After all, "individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose." NACDL Report at 5.

The Supreme Court has acknowledged this reality, *i.e.,* that pleas may be motivated by calculations of future consequences rather than actual guilt. *See Brady v. United States*, 397 U.S. 742, 750 (1970); *Lee v. United States*, 582 U.S. 357, 367 (2017) (recognizing that "decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and

by plea"). It is a well-known, troubling phenomenon peculiar to the modern plea-based criminal justice system. *See* Donald A. Dripps, *Guilt, Innocence, & Due Process of Plea Bargaining*, 57 Wm. & Mary L. Rev. 1343, 1360–63 (2016); Andrew Chongseh Kim, *Under-estimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 Miss. L.J. 1195, 1212–13 (2015) ("Many scholars argue that trial penalties in America are so large that defendants have no real choice but to accept whatever sentence the prosecutor chooses to offer for pleading guilty."); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 Utah L. Rev. 51, 95 (2012) ("At some point, the sentencing differential becomes so large that it destroys the defendant's ability to act freely and decide in a rational manner whether to accept or reject the government's offer.").

Guilty pleas based on the fear of trial penalties undermine accuracy and truth-seeking. Trials test evidence and constrain improper prosecutions. An increase in plea bargains thus leads to "incomplete investigations, inadequate disclosure, limited adversarial testing," and "perfunctory

judicial oversight." Jenia I. Turner, *Plea Bargaining*, Reforming Crim. Just.: A Report of the Acad. for Just. on Bridging the Gap between Scholarship and Reform, vol. 3, at 75 (Erik Luna ed., 2017). This is particularly problematic when the penalty pressures the defendant to plead early in the case, or by some arbitrary deadline determined by the prosecutor—for example, soon enough to "permit[] the government to avoid preparing for trial and ... [to] allocate [its] resources efficiently," § 3E1.1(b). If a defendant is penalized not only for going to trial, but for taking "too long" to plead guilty, he and his counsel are less likely to have adequate time to investigate the allegations and to develop a defense.

Moreover, sentencing schemes that discourage trials and marginalize the adversarial crucible also increase the risk that outcomes reflect bargaining leverage and naked power, rather than factual guilt. Indeed, Judge Lynch has observed that the essence of plea bargaining is that prosecutors displace the judge and jury as the "central adjudicator of facts" and "arbiter of most legal issues and of the appropriate sentence to be imposed"—thus standing "in absolute distinction from a model of

adversarial determination of fact and law before a neutral judicial decision maker." Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off*, 55 Stan. L. Rev. 1399, 1404 (2003). This results in great stress to core notions of justice, the individual's right to be free from executive and law enforcement overreach, and public oversight. In the Supreme Court's words, without adversarial truth-seeking, there is an increased "risk of prosecutorial overreach and misconduct" and "arbitrary convictions." *Erlinger*, 602 U.S. at 832; *Blakely*, 542 U.S. at 306.

Taking all this into account, a sentencing scheme that openly barters leniency for the avoidance of trial—without regard to guilt, remorse, or rehabilitation—does more than streamline dockets. It reshapes incentives in ways that undermine truth-finding, public confidence, and the constitutional balance of power. It teaches defendants that the jury right is dangerous to invoke. And it teaches the government that punishment may be leveraged to secure the right's waiver. At the most profound level, that is not the system the Founders designed.

III. Virtually all federal criminal defendants now forgo their right to trial—a dramatic change that is due to a federal trial penalty.

The data is alarming. When NACDL published its 2018 trial penalty report, only 2.8 percent of federal criminal defendants went to trial. NACDL Report at 14. In ensuing years, this number has not improved. *See* U.S. Sent'g Comm'n, 2024 Sourcebook of Federal Sentencing Statistics, at 30, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2024/2024_Sourcebook.pdf (reporting that, nationally, 2.8% of federal defendants are convicted by trial). These anemic figures stand in marked contrast to decades past: In the early 1900s, for instance, 50 percent of federal defendants proceeded to trial, NACDL Report at 19 n.39; and, in 1970, 15 percent did, *id.* at 5 n.2.

Scholars have attributed that change to the dramatically higher sentences federal defendants now face after trial. Against this backdrop, "very few federal defendants rationally can choose to exercise their constitutional right to trial" and "most of the defendants who do go to trial do so against their own best interests." Kim, *supra,* at 1249. Study after study supports the existence of a trial penalty in the federal system and its

contribution to the jury trial's disappearance, making it "among the most robust findings in the empirical sentencing literature." Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent'g Rep. 256, 261 (2019); *accord* NACDL Report at 17 (noting that the "discrepancy between average sentences post-trial as opposed to those imposed following a guilty plea" supports the existence of a trial penalty); Kim, *supra*, at 1199–1200 (referring to 2015 study concluding that "the average federal trial penalty is actually around sixty-four percent").

IV. Guideline § 3E1.1(b) functions as an unconstitutional trial penalty.

In light of the foregoing principles, dating to the Founding and drafting of the Constitution, the district court correctly ruled that U.S.S.G. § 3E1.1(b) functions as an unconstitutional trial penalty. Section 3E1.1 of the Guidelines, "Acceptance of Responsibility," has two components: § 3E1.1(a) provides for a two-point offense level reduction for any defendant who "clearly demonstrates acceptance of responsibility for his offense." Subsection (b) directs a further one-level reduction "upon motion of the government stating that the defendant" has timely notified the government

of his intention to plead guilty, "thereby permitting the government to avoid preparing for trial."

The first provision, § 3E1.1(a), is not at issue in this appeal. This Guideline is premised on a defendant's factual acceptance of responsibility and his expression of remorse. Accordingly, a conviction by trial "does not automatically preclude a defendant from consideration" for this reduction. U.S.S.G. § 3E1.1 cmt. n.2. A defendant may "demonstrate an acceptance of responsibility" and receive this reduction "even though he exercises his constitutional right to a trial." *Id.*; *see also United States v. Taylor*, 475 F.3d 65, 69 (2d Cir. 2007) ("[G]oing to trial does not necessarily foreclose the acceptance of responsibility adjustment[.]").

This "acceptance of responsibility" rationale is why the Court deemed § 3E1.1's original two-level reduction lawful.[3] In *United States v. Parker*, 903

[3] Before 1992, the Guidelines provided for only a two-level reduction for acceptance of responsibility. *See United States v. Vargas*, 961 F.3d 566, 573 (2d Cir. 2020) (discussing history of § 3E1.1, noting "the original guideline did not absolutely tie the reduction to the entry of a guilty plea").

F.2d 91 (2d Cir. 1990), the Court rejected a due process challenge to a predecessor version of § 3E1.1 (which included the reduction now found in (a), but not (b)). It reasoned that fostering acceptance of responsibility, and therefore rehabilitation, was a legitimate aim of sentencing: "One of the goals of sentencing is rehabilitation … and a defendant's admission of responsibility or expression of contrition 'is often a significant first step towards his rehabilitation and, for that reason, deserving of a possible reward in the form of a lessened sentence.'" *Id*. at 105 (citation omitted). "Admission of guilt thus may properly be taken into account in determining what sentence is needed to achieve rehabilitation." *Id.*

In other words, there may be legitimate penological reasons, tied to 18 U.S.C. § 3553(a)'s statutory sentencing factors, to reduce a defendant's sentence if he sincerely accepts responsibility for his crime. *See also* NACDL Report at 11. Thus, this reduction should be equally available to all defendants who sincerely accept responsibility—even if they do so only after exercising their fundamental constitutional right to a trial. *Id.*

But Section 3E1.1(b) makes no such allowance. It provides a one-level reduction that can only be granted if the defendant waives his trial rights and therefore permits "the government to avoid preparing for trial," on a timetable set by the government.

This distinguishes § 3E1.1(b) from other Guidelines provisions, including its neighbor, subsection (a). While subsection § 3E1.1(a) is rarely applied to defendants convicted after trial, it still *may* be applied to those who proceed to trial and is not *legally unavailable* simply because a defendant exercises his Sixth Amendment rights. Section 3E1.1(a) at least also relates to the legitimate statutory sentencing aim of rehabilitation.

In contrast, subsection (b) exists only to "permit[] the government to avoid preparing for trial." It is unmoored from any legitimate statutory sentencing aim. And it is legally unavailable to any defendant who has the temerity to exercise his fundamental trial rights. This aspect of § 3E1.1(b) is particularly troubling: it shifts power back toward the government and casts prosecutors as "arbiter[s] of . . . the appropriate sentence," not the judge. Lynch, *supra*, at 1404.

The government asserts that subsection (b) cannot possibly be a "penalty" because the Guidelines frame it as a benefit. But as the government itself acknowledges, the question of whether a sentencing provision functions as a benefit or penalty depends on the legal baseline—"the normal sentence that would be meted out." Gov't Br. at 25. In a system where more than 97% of cases are resolved by guilty pleas, the sentence for a plea is the baseline; it is "the overwhelming norm." A-133. When a provision subjects the extreme minority of defendants who choose to exercise their trial rights to a sentence above this baseline, that provision operates as a trial penalty, not as a normative "benefit" to the 97% of defendants who forewent their trial rights. The district court's ruling therefore correctly ensures that defendants do not receive disparate treatment based exclusively on the exercise of their Sixth Amendment rights.

More broadly, decisions of this Court "have rejected such a simple dichotomy" between a sentencing "benefit" and a "penalty." *See United States v. Oliveras*, 905 F.2d 623, 628 (2d Cir. 1990) (per curiam); *see also United States v. Cruz*, 156 F.3d 366, 373 (2d Cir. 1998) ("We acknowledge that the

benefit/penalty distinction is not entirely satisfactory … and there may well be instances where we would not find it controlling."). Under the "unconstitutional conditions doctrine," conditioning a benefit on a defendant's surrender of a constitutional right may be unlawful, just as it is unlawful to vindictively penalize the exercise of that right. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them."); *United States v. Whitten*, 610 F.3d 168, 194 (2d Cir. 2010).

In *Oliveras*, for example, this Court explained why any meaningful difference between an unconstitutional penalty and a supposedly lawful benefit can be illusory when a defendant is required to surrender a basic constitutional right to obtain the "benefit": "one need only consider the ready response the court would have to a government proposal that … would offer a reduction in any later sentencing in return for the defendant agreeing to surrender his right to counsel." 905 F.2d at 628. Just as it would be improper to condition a sentencing "benefit" exclusively on the surrender

of a defendant's right to counsel, so too is it improper for § 3E1.1(b) to condition its "benefit" exclusively on the defendant's early surrender of his right to a trial.

Moreover, the constitutional infirmity lies not just in the actual punishment a defendant suffers by going to trial and losing the benefit of the one-point reduction, but also because this provision chills or deters exercise of the trial right from the start. *Blackledge*, 417 U.S. at 27–28; *Pearce*, 395 U.S. at 725; *Jackson*, 390 U.S. at 583. The fear of this trial penalty—increased punishment after a jury verdict, when § 3E1.1(b)'s reduction won't be available—has led countless defendants to forego their right to a trial and instead plead guilty, calculating that it is better to avoid the trial penalty imposed by § 3E1.1(b).

Finally, the district court correctly determined that no Circuit precedent forecloses this holding. As the district court noted, the government's heavy reliance on *United States v. Whitten*, 610 F.3d 168 (2d Cir. 2010), is misplaced. *Whitten* was not even a Guidelines case, and a "passing" line in *Whitten* that § 3E1.1 does not "contemplate increased punishment" is

true "dicta at best," in no way necessary to the Court's holding that the government there had improperly infringed a defendant's constitutional rights by inviting a jury to impose the death penalty based on his "constitutionally protected" conduct of pursuing a jury trial. *See* A-134–35; *Whitten*, 610 F.3d at 194–96. In addition, *Whitten* referred to § 3E1.1 generally and gave no consideration to issues with § 3E1.1(b) specifically. *See* 610 F.3d at 196.

In its appellate briefing, the government also cites summary orders which, of course, are not precedential, and do not address the specific question of whether § 3E1.1(b) alone is unconstitutional, as the district court held. *See United States v. Powell*, No. 24-1461, 2025 WL 3022475, at *3–4 (2d Cir. Oct. 29, 2025) (summary order) (stating § 3E1.1 generally was not unlawful and finding no record evidence court penalized defendant for refusing to plead guilty); *United States v. Goffer*, 529 F. App'x 17, 19 (2d Cir.

Jul. 1, 2013) (summary order) (same).[4] As discussed above, § 3E1.1(a) is distinguishable from subsection (b), because (a) does not explicitly require a defendant to forgo trial. Thus, (a) may be constitutional, while (b) is not. For these reasons, no Circuit precedent stands in the way of this Court reaching the conclusion that common sense and common law compel: that U.S.S.G. § 3E1.1(b) functions as an improper trial penalty.

* * *

Appellee's brief compellingly argues fact-specific reasons that the Court need not decide the constitutionality of § 3E1.1(b) in this case. *See supra* n.2. But if the Court reaches this issue, it should affirm the district court's ruling and hold that § 3E1.1(b) is an unconstitutional trial penalty.

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[4] In *United States v. Washington*, No. 24-3173, 2025 WL 3628306, at *2–3 (2d Cir. Dec. 15, 2025), another summary order, the Court specifically considered a constitutional challenge to § 3E1.1(b). This challenge had not been raised below, so the Court reviewed for "plain error." The Court held that Washington had not received the two-level reduction under (a), so he was "foreclosed" from any reduction under (b). The Court added that, in any event, subsection (b) was not a punishment. This dictum, from a non-precedential order that arose in a plain-error posture, is not binding on this Court.

CONCLUSION

The district court's judgment should be affirmed.

Dated: New York, New York
February 9, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

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This brief complies with the type-volume limitations of the applicable federal rules because this brief contains 4,472 words, excluding the parts of the brief exempted by the rules, and has been prepared in a monospaced typeface using Microsoft Word with 14 characters per inch in Palatino Linotype type style.

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