NOTE

THE SIXTH AMENDMENT ON ICE—UNITED STATES v. JONES: WHETHER SENTENCE ENHANCEMENTS FOR FAILURE TO PLEAD GUILTY CHILL THE EXERCISE OF THE RIGHT TO TRIAL

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INTRODUCTION

In the battle against overloaded criminal dockets and overburdened judicial resources, one District of Columbia federal judge has fired a shot that may wound the constitutional right to a jury trial. The bullet comes in the form of an additional six-month sentence that the judge stated he had imposed solely because the defendant opted to go to trial rather than plead guilty. Although the judge explicitly requested that his decision be reviewed for "constitutional error," the U.S. Court of Appeals for the District of Columbia, sitting en banc in United States v. Jones, affirmed without addressing the constitutional questions raised by such an apparent enhancement of sentence for exercising the right to trial. The court avoided a constitutional discussion by characterizing the judge's sentencing order as a denial

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3. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").
4. See Sentencing Transcript at 13, United States v. Jones, No. 90-240 (D.D.C. Jan. 24, 1991) (adding six months to defendant's sentence because case "did go to trial" and indicating that, had defendant pled guilty in advance of trial, judge would have imposed minimum sentence that guidelines allowed).
5. Id. ("I would like to know whether or not there is some constitutional error I commit by recognizing that the case was taken to trial, albeit a matter of constitutional right to take the case to trial, rather than acknowledging in advance the guilt that was obviously supported by the proof").
of the full benefit\(^9\) allowed under section 3E1.1 of the United States Sentencing Guidelines\(^9\) for "acceptance of responsibility"\(^10\) as

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8. See id. at 1477 (finding that trial judge had denied full benefit but had not imposed penalty).


The Sentencing Guidelines provide a numerical basis that correlates the nature of the offense charged with a number of mitigating or aggravating factors. See U.S.S.G., supra, § 5A (containing sentencing table listing 43 offense levels and six criminal history categories). After computing the defendant's base offense level, the judge must make adjustments, either up or down, based on (1) the harm to the victim, (2) the defendant's role in the offense, (3) any obstruction of justice, (4) whether the defendant was convicted on multiple counts, and (5) whether the defendant has accepted personal responsibility. Id. §§ 1B1.1(a) to (e). After adjusting for any of these factors, the judge must then calculate the defendant's criminal history category. Id. § 4A1.1. The judge then computes the sentencing range according to the defendant's total offense level and criminal history categories. Id. § 5A. See generally Joshua S. Levy & Bruce L. Plotkin, Project, Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-90—Sentencing, 79 GEO. L.J. 1089, 1089-1107 (1991) (providing overview of how judges calculate offense levels under Sentencing Guidelines).

Congress had passed the Act to address disparities in sentencing that developed due to broad discretion on the part of sentencing judges. See S. REP. No. 225, 98th Cong., 2d Sess. 38 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3221 [hereinafter S. REP. No. 225] (noting that reliance on "outmoded rehabilitation model" of punishment allowed judges to justify individualized sentence determinations and produced wide disparity in sentences). Prior to the Guidelines, judges had long labored under the assumption that punishment served the purposes of rehabilitating the offender. In Williams v. New York, 337 U.S. 241 (1949), Justice Black stated: "Retribution is no longer the dominant objective of the criminal law. Reformulation and rehabilitation of offenders have become important goals of criminal jurisprudence." 337 U.S. at 248; see also Charles R. Eskridge, Note, The Constitutionality of the Federal Sentencing Reform Act After Mistretta v. United States, 17 PEPP. L. REV. 683, 687, 688 n.29 (1990) (noting that Williams introduced era of rehabilitation as primary theory of criminal punishment). Rehabilitation differs from its precursor, retribution, in that rehabilitation focuses on the personality of the criminal, not merely the criminal act. See Eskridge, supra, at 688 n.29 (asserting that modern criminality considers personality of offender to be as important as his or her act) (citing G. PATON, A TEXTBOOK OF JURISPRUDENCE (1946)).

The rehabilitative model of punishment, however, came under attack for its premise that criminal behavior could be treated like a disease. See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 89 (1973) (noting that rehabilitative model operates under dubious premise that "criminals are 'sick' in some way that calls for 'treatment'"). Congress found that because sentencing laws did not reflect the problems inherent in the rehabilitative model, each judge acted on the basis of his or her "own notion of the purposes of sentencing." S. REP. No. 225, supra, at 38, reprinted in 1984 U.S.C.C.A.N. 3182, 3221. Such individualized determinations produced "an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." Id.


opposed to a penalty for going to trial.\textsuperscript{11} The D.C. Circuit's decision in \textit{United States v. Jones} deserves attention for the questions that it raises regarding the extent to which a judge may burden the constitutional right to trial. The decision is a victory for judges who desire to clear clogged court dockets by encouraging plea bargaining.\textsuperscript{12} The opinion, however, represents a marked departure from the unanimous opinion of other circuits that sentence adjustments based solely on defendants' decisions not to plead guilty constitute impermissible penalties for exercising a constitutional right.\textsuperscript{13}

Part I of this Note traces the history of the law regarding the constitutionality of sentencing schemes that burden a defendant's constitutional right to trial. This part begins by examining earlier Supreme Court decisions demonstrating concern over "chilling" a defendant's decision to exercise the right to trial.\textsuperscript{14} More recent

\textsuperscript{3}E1.1 (Nov. 1990) [hereinafter 1991 U.S.S.G.]. Under either version of the Guidelines, though, a guilty plea is good evidence that a defendant is deserving of credit for accepting responsibility. \textit{Compare id. § 3E1.1 comment. (n.3) (stating that guilty plea constitutes "significant evidence" of acceptance of responsibility) with U.S.S.G., supra note 9, § 3E1.1 comment. (n.3) (duplicating substantially text of 1991 U.S.S.G. but adding that guilty plea does not entitle defendant to adjustment "as a matter of right").}

Because the defendant in Jones had not pled guilty, the en banc court concluded that the Guidelines required the sentencing judge to withhold leniency. Jones, 997 F.2d at 1478 (en banc). The court also noted that the defendant already had received a benefit because the judge imposed a sentence that was at the bottom of the permissible range under the Guidelines. \textit{Id. at 1478-79.}

\textsuperscript{11.} \textit{See United States v. Jones, 973 F.2d 928, 933 (D.C. Cir. 1992) (expressing view that judge's sentencing order constituted "extra time"), aff'd, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994).}

\textsuperscript{12.} \textit{Cf. Karle & Sager, supra note 1, at 403-04 (positing that incidence of plea bargaining may decline due to lack of incentives to negotiate pleas under federal sentencing guidelines); U.S.S.G., supra note 9, § 3E1.1 comment. (n.3) (providing that guilty plea will not guarantee reduced sentence).}

\textsuperscript{13.} \textit{See, e.g., United States v. Saunders, 973 F.2d 1354, 1362 (7th Cir. 1992) (declaring that defendant may not be subjected to more severe punishment for exercising constitutionally protected right to jury trial), cert. denied, 113 S. Ct. 1026 (1993); United States v. Watt, 910 F.2d 587, 592-93 (9th Cir. 1990) (prohibiting sentencing court from considering defendant's exercise of constitutional right, including right to trial, against defendant when making sentencing decision); United States v. Frost, 914 F.2d 756, 774 (6th Cir. 1990) (barring district judge from penalizing defendant for exercising constitutional right to jury trial even if evidence of guilt is overwhelming); United States v. Mazzaferro, 865 F.2d 450, 460 (1st Cir. 1989) (declaring that judge may not punish defendant for exercising constitutional right to stand trial); United States v. Hutchings, 757 F.2d 11, 14 (2d Cir. 1985) (criticizing trial court for considering sentence increase for defendant's decision to stand trial), cert. denied, 472 U.S. 1051 (1985); Hess v. United States, 496 F.2d 936, 988 (8th Cir. 1974) (ruling that defendant's decision to exercise constitutional right to trial by jury must have no effect on sentencing decision).}

\textsuperscript{14.} \textit{See, e.g., Bordenkircher v. Hayes, 484 U.S. 357, 365 (1978) (declaring that punishing individual for exercising constitutional rights constitutes due process violation of "the most basic sort"); North Carolina v. Pearce, 395 U.S. 711, 724-26 (1969) (warning that court must not use its power to coerce defendant); United States v. Jackson, 390 U.S. 570, 581-85 (1968) (holding unconstitutional federal statute that guaranteed life imprisonment for defendants who pled guilty but required death penalty for those convicted by jury).}
Court decisions, however, permit schemes that burden the right to trial, but where both the defendant and the state stand to benefit. This Note specifically examines inducements to plead guilty and waive one's right to trial under the federal sentencing laws. Part I concludes by examining the difficulty in distinguishing a denial of the benefit of a sentence reduction for refusing to plead guilty from the imposition of a penalty for exercising the right to trial. Part II provides the facts and procedural history of United States v. Jones and examines and analyzes the reasoning of both the panel and en banc opinions of the Court of Appeals for the D.C. Circuit. The facts reveal the unilateral nature of the district court judge's action. Although the trial judge factored into his sentencing decision the defendant's failure to plead guilty, the prosecutor refused to engage in plea negotiations with the defendant. The procedural history indicates the complexity of the case in that both a panel of the D.C. Circuit and the entire D.C. Circuit affirmed, but on widely different interpretations as to whether the judge's order constituted a denial of a full benefit or an imposition of an enhanced sentence. Ultimately, it is evident that the panel decision relies on an overly broad interpretation of the relevant constitutional precedent. In contrast, the en banc decision rests on an overly narrow reading of the trial judge's order, a reading that avoids the

15. See, e.g., Corbitt v. New Jersey, 439 U.S. 212, 218-19 (1978) (allowing state to burden exercise of right to trial by encouraging guilty pleas); Brady v. United States, 397 U.S. 742, 753 (1970) (holding constitutional state scheme whereby state offered benefit to defendants by granting leniency at sentencing when defendants offered benefit to state by confessing guilt).


17. See Appellant's Brief for Rehearing En Banc at 3, United States v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (No. 91-3025), aff'd, 997 F.2d 1475 (D.C. Cir. 1993) (en banc) (noting that only plea that prosecutor offered was for defendant to plead guilty to crime charged), cert. denied, 126 L. Ed. 2d 704 (1994); see also infra note 130 (describing policy of U.S. Attorney not to engage in plea bargaining).

18. Compare United States v. Jones, 973 F.2d 928, 933 (D.C. Cir. 1992) (characterizing six-month sentence as "extra time") with United States v. Jones, 997 F.2d 1475, 1477 (D.C. Cir. 1993) (en banc) (characterizing six-month sentence as "less of a benefit" than defendant who showed greater remorse at earlier stage in proceedings would have received).

19. References in this Note to the "panel" decision refer to the opinion of the majority in United States v. Jones, 973 F.2d 928 (D.C. Cir. 1992). The majority consisted of Judges Silberman and Williams. The majority did not include Chief Judge Mikva, who filed a separate opinion in which he concurred in part and dissented in part.

20. See Jones, 973 F.2d at 940 (Mikva, C.J., concurring in part and dissenting in part) (stating that majority had characterized precedent at "sweeping level of generality," ignoring Supreme Court's observant differentiation between diverse state actors and diverse situations in which they act).

constitutions questions entirely. Both decisions, however, reach the conclusion that a judge may weigh against a defendant the fact that she exercised the right to trial.

Part III recommends that the United States Sentencing Commission propose for congressional enactment an amendment to the Sentencing Guidelines prohibiting judges from imposing enhanced sentences or denying the benefit of a sentencing reduction solely because a defendant refuses to plead guilty. Reform of the Guidelines' mandatory minima is also necessary to encourage defendants to plead guilty without requiring judges to resort to actions that chill the right to trial.

This Note concludes that, by affirming the sentencing judge's order, the D.C. Circuit panel and en banc opinions ignore important distinctions between courts, prosecutors, and legislatures in an adversarial system of criminal justice. Such a breakdown of the adversarial system is apparent in the sentencing order of the trial judge in United States v. Jones. The judge turned the defendant's punishment into a test case and deprived him of liberty, in the words of Immanuel Kant, "merely as a means subservient to the purposes of another."

I. THE CONSTITUTIONALITY OF SENTENCING DIFFERENTIALS

The plain text of the Constitution says nothing about the permissibility of "sentencing differentials," a term that signifies the disparity between the sentence that a defendant receives for pleading guilty and the sentence that the same defendant would receive for exercising his right to trial. The Fifth Amendment protection against

22. See Jones, 997 F.2d at 1488 (en banc) (Wald, J., dissenting) (asserting that en banc court had read record to find different case than that decided by district court in order to "avoid a troublesome constitutional conflict").

23. See Jones, 973 F.2d at 937-38 (stating that judge may use defendant's decision to exercise right to trial as "evidence that defendant has not accepted responsibility"); Jones, 997 F.2d at 1479 (holding that sentencing judge may offset credit for acceptance of responsibility against decision to go to trial because assertion of trial right belies sincerity of acceptance of responsibility).


26. See United States v. Klotz, 943 F.2d 707, 710 (7th Cir. 1991) (describing "sentencing differential" as "one sentence if the defendant is mum (or insists on trial), a lower sentence if the defendant sings (or pleads guilty)").
compelled self-incrimination and the Sixth Amendment guarantee of the right to a jury trial would appear to prohibit enhancements or reductions of sentences based solely on a defendant's decision to stand trial. Furthermore, the Fifth and Fourteenth Amendments' guarantees of "due process of law" would seem to disfavor any action in which a judge is, or appears to be, biased against a defendant who exercises her right to trial. Finally, the Fourteenth Amendment's guarantee of equal protection would appear to prohibit differential sentencing where a defendant who pleads guilty to an offense receives a lesser sentence than another defendant who is tried and convicted for committing the same offense.

While seemingly straightforward, these constitutional guarantees have proven to be elastic in the hands of the Supreme Court with

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The Fifth Amendment right against compelled self-incrimination comports with an adversarial model of criminal justice in that it "spare[s] the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts with the Government." Doe v. United States, 487 U.S. 201, 213 (1988); see also Miranda v. Arizona, 384 U.S. 435, 460 (1966) (stating that adversarial system of criminal justice mandates that government produce evidence against defendant "by its own independent labors," rather than through "cruel, simple expedient" of compulsion).

28. See U.S. Const. amend. VI. The Sixth Amendment serves the adversarial model by preserving the right to trial. Cf. Randolph N. Jonakait, Foreword: Notes for a Consistent and Meaningful Sixth Amendment, 82 J. Crim. L. & Criminology 713, 726 (1992) (positing that right to jury trial in criminal cases is core of Sixth Amendment).

29. See United States v. Jackson, 390 U.S. 570, 581 (stating that "inevitable effect" of provision that guaranteed life imprisonment for defendants who plead guilty but required death penalty for those convicted by jury was "to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial"). But see Daniel J. Capra, Sentencing Guidelines and the Fifth Amendment, N.Y. L.J., Jan. 3, 1991, at 3, 3 (noting that although Supreme Court has found imposition of penalty for exercising Fifth Amendment right to be "impermissible compulsion," Court has been "more vague" on question of whether conditioning benefit on waiver of Fifth Amendment right constitutes compulsion).

30. See U.S. Const. amend. V; id. amend. XIV, § 1.

31. See United States v. Crocker, 788 F.2d 802, 809 n.3 (1st Cir. 1986) (finding that judge's mid-trial warning that he would take into account at sentencing defendant's "imposing upon the time and resources of the Court," might induce defendant to doubt judge's impartiality); see also infra note 202 (discussing reasons underlying prohibition on judicial involvement in plea negotiations). But cf. Corbitt v. New Jersey, 439 U.S. 212, 219 (1978) (allowing state to encourage guilty pleas by offering "substantial benefits" in exchange for pleas).

32. See U.S. Const. amend. XIV, § 1.

33. See Heller v. Doe, 113 S. Ct. 2637, 2638-39 (1993) ("Classifications neither involving fundamental rights nor proceeding along suspect lines do . . . run afoul of the Equal Protection Clause if there is [not] a rational relationship between the disparity of treatment and a legitimate governmental purpose."). But see United States v. Mayes, 917 F.2d 457, 466 n.12 (10th Cir. 1990) (refusing to find equal protection violation in sentencing scheme that provided leniency for defendants who admitted guilt because such scheme was "rationally related to government's legitimate interest in rehabilitating convicted criminals"), cert. denied, 498 U.S. 1125 (1991).
regard to differential sentencing schemes. The Court initially determined that differential sentencing is constitutionally prohibited. More recent decisions, however, acknowledge that these measures burden constitutional rights but allow them on the grounds that they conserve scarce judicial and prosecutorial resources and benefit defendants who plead guilty. Nevertheless, a question left open by the Court's decisions is the extent to which a judge may, on his own initiative, employ a sentencing scheme to encourage a defendant to waive his rights.

A. Sentencing Differentials as a Burden on Constitutional Rights

The Supreme Court has declared that punishing a defendant for exercising her constitutional rights is a "due process violation of the most basic sort." The Court has also barred agents of the state from pursuing courses of action calculated to penalize defendants for exercising constitutional rights. The U.S. Courts of Appeals, following Supreme Court precedent, also purport to prohibit actions that penalize a defendant for exercising constitutional rights. The Supreme Court, however, has not been resolute in its opposition to all schemes that may burden the defendant's decision to exercise his constitutional rights. The Court's analysis of such

34. See generally Luke T. Dokla, Section 3E1.1 Contrition and Fifth Amendment Incrimination: Is There an Iron Fist Beneath the Sentencing Guidelines' Velvet Glove?, 65 St. John's L. Rev. 1077, 1094 n.79 (1991) (discussing Supreme Court's failure to consider sentencing schemes that grant leniency in exchange for admissions of guilt to be unconstitutional conditions) (citing Corbitt v. New Jersey, 439 U.S. 212, 223 (1978)); Capra, supra note 29, at 3 (illustrating how Supreme Court has found imposing punishments for invocation of rights to be unconstitutional in some contexts but not others).


37. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). In Bordenkircher, however, the Court determined that there is no element of punishment in the "give-and-take" of plea bargaining because the defendant is at liberty to "accept or reject the prosecution's offer." Id.

38. Id. (deeming actions intended to penalize defendant for exercising constitutional right "patently unconstitutional").

39. See, e.g., United States v. Monroe, 943 F.2d 1007, 1017-18 (9th Cir. 1991) (prohibiting retaliation on part of sentencing judge for defendant's decision to exercise right to trial), cert. denied, 112 S. Ct. 1585 (1992); United States v. Frost, 914 F.2d 756, 774 (6th Cir. 1990) (barring district judge from penalizing defendant for exercising constitutional right even if evidence of his guilt is "overwhelming") (quoting United States v. Derrick, 519 F.2d 1, 3 (6th Cir. 1975)); United States v. Watt, 910 F.2d 587, 592 (9th Cir. 1990) (holding that sentencing judge may not hold "constitutionally protected conduct" against defendant) (citing Estelle v. Smith, 451 U.S. 454, 462-63 (1981)).

40. In the context of plea bargaining, the Court has expressed a willingness to allow the threat of an enhancement of punishment: "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissi-
schemes initially began with a subjective, defendant-oriented inquiry into the "chilling" of a defendant's rights. The Court then shifted to a judge-oriented or prosecutor-oriented inquiry into "vindictive" behavior against a defendant who exercises her constitutional rights. The Court subsequently abandoned this line of inquiry and required that the accused challenge the characteristics of the scheme, rather than the behavior of the judge or prosecutor.

1. The chilling effect

The Supreme Court's inquiry into the subjective impact of a sentencing scheme on a defendant's decisionmaking process originated in *United States v. Jackson.* In *Jackson,* the Court expressed concern about the "chilling" effect a sentencing scheme may have on a defendant's decision to exercise his right to trial. The Court invalidated a portion of the Federal Kidnaping Act that gave the jury discretion to impose the death penalty on a defendant convicted of kidnaping, but did not provide a similar penalty for a defendant who waived her right to a jury trial or pled guilty.
Furthermore, the Court found the death penalty provision unconstitutional in that it tended to “discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.” The Court concluded that a statute need not “coerce” guilty pleas and jury trial waivers to be violative of a defendant’s Fifth and Sixth Amendment rights; it need only “needlessly encourage” one to plead guilty or waive one’s right to a trial.

2. The presumption of vindictiveness

After Jackson, the Supreme Court shifted its focus from a broad concern about “chilling” the exercise of the right to trial to a more narrow analysis of whether a judge or prosecutor intended to burden the exercise of such a right. In North Carolina v. Pearce, the Court held that a presumption of “vindictiveness” exists “whenever a judge imposes a more severe sentence upon a defendant after a new trial.” To rebut such a presumption, the record must show that the longer sentence was based on “objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentence.”

In cases decided since Pearce, however, the Court has expressed an increasing reluctance to presume vindictiveness and has required that the defendant demonstrate that a particular sentencing scheme is unconstitutional. In Blackledge v. Perry, the Court summarized the development of the vindictiveness standard since Pearce and concluded that a violation of due process must constitute more than a mere possibility of vindictiveness. The Court concluded that it is necessary for the defendant to show a “realistic likelihood of

suggested, however, that Congress could impose such a restriction on judges. Id.

49. Id. at 581.
50. Id. at 583.
53. Id. at 726.
'vindictiveness.'\textsuperscript{57}

In \textit{United States v. Goodwin},\textsuperscript{58} the Court further elevated the defendant's burden of demonstrating vindictiveness.\textsuperscript{59} There, the Court refused to entertain the presumption that a prosecutor's action was vindictive even where he reindicted the defendant on a felony charge after the defendant had refused to plead guilty to a misdemeanor charge for the same criminal conduct.\textsuperscript{60} Nevertheless, the Court in \textit{Goodwin} underscored the basic conclusion of \textit{Pearce}: that schemes tending to deter the exercise of the right to trial or appeal by introducing a possibility of higher punishment are vindictive.\textsuperscript{61}

\section*{B. Sentencing Differentials as a Benefit to the State and the Defendant}

In contrast to earlier decisions that found certain sentencing schemes unconstitutional because they introduced the risk of higher punishment for exercising rights,\textsuperscript{62} more recent cases have upheld waivers of the right to trial in circumstances where the process clearly encouraged such waivers by offering leniency at sentencing.\textsuperscript{63}

\begin{itemize}
  \item \textsuperscript{57} \textsuperscript{Id. at 27.} The Blackledge Court found that a prosecutor's threat to bring more severe charges against a defendant who sought de novo rehearing of his conviction on a lesser charge would give rise to a realistic likelihood that the prosecutor was vindictively punishing the defendant for exercising his right to a rehearing. \textit{Id.} at 27-28.
  \item \textsuperscript{58} \textsuperscript{457 U.S. 366 (1982).}
  \item \textsuperscript{59} \textsuperscript{See United States v. Goodwin, 457 U.S. 368, 384 (1982) (refusing to allow per se rule of vindictiveness where prosecutor reindicted defendant on more serious charge after defendant had refused to plead guilty). \textit{See generally} Murray R. Garnick, \textit{Note, Two Models of Prosecutorial Vindictiveness}, 17 GA. L. REV. 467, 467-68 (1983) (arguing that Goodwin evidences Court's trend away from due process model toward crime control model).}
  \item \textsuperscript{60} \textsuperscript{See \textit{Goodwin}, 457 U.S. at 384 (finding it unlikely that prosecutor would respond to defendant's refusal to plead guilty by pursuing indictments that were not in public interest). \textit{But see id. at} 390 (Brennan, J., dissenting) (arguing that prosecutors are likely to be vindictive in pretrial period because of their desire to avoid work that preparation for trial necessitates).}
  \item \textsuperscript{61} \textsuperscript{Id. at 372-84 (reiterating conclusion of \textit{Pearce} that punishment for exercise of right to trial violates due process and refusing to foreclose possibility that defendant may prove in appropriate case that prosecutor's charging decision was motivated by vindictiveness).}
  \item \textsuperscript{62} \textsuperscript{See Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (declaring that punishing person for exercising rights is "due process violation of the most basic sort").}
  \item \textsuperscript{Reliance on a guilty plea for a sentence reduction has long been considered a permissible strategic decision for defense counsel. \textit{See} \textit{Brady v. United States}, 397 U.S. 742, 751 (1970) (refusing to find that guilty plea was compelled for Fifth Amendment purposes where counsel advised client that judge usually was more lenient toward defendants who pled guilty than to those who exercised right to trial). As a strategic decision, however, defense counsel often mistakenly relied on a particular judge's reputation for conditioning leniency on admission of guilt. \textit{See} \textit{Strickland v. Washington}, 466 U.S. 668, 699 (1984) (finding in capital sentencing case
Sentencing schemes that encourage waiver of rights through offers of leniency involve either "explicit" or "implicit" bargaining. In "explicit bargaining," the defense counsel and the prosecutor engage in contract-style negotiations over the degree of punishment. "Implicit bargaining" between judge and defendant is evident in the long standing judicial practice of considering guilty pleas as evidence of "contrition" or "acceptance of responsibility" for purposes of granting leniency at sentencing. The Court has approved both explicit and implicit bargaining because of the benefits of guilty pleas to both the defendant and society.

that defense counsel erroneously made strategic decision to rely on client's remorse although judge had tendency to be more lenient toward defendants who demonstrated remorse.

64. See Albert W. Alschuler, Departures and Plea Agreements Under the Sentencing Guidelines, 117 F.R.D. 459, 471 (1987) (describing "implicit bargaining" as "practice of sentencing defendants who plead guilty less severely than defendants who are convicted at jury trials" and "explicit bargaining" as practice of negotiation that "occurs between prosecutors and defense attorneys").


66. See United States v. Thompson, 476 F.2d 1196, 1201 (7th Cir.) (noting that contrition may be evidenced by admitting guilt), cert. denied, 414 U.S. 918 (1973).

67. See United States v. Henry, 883 F.2d 1010, 1012 (11th Cir. 1989) (noting that acceptance of responsibility was permissible consideration in sentencing long before enactment of Sentencing Guidelines).

68. Professor Alschuler of the University of Colorado Law School notes empirical evidence indicating that the practice of implicit bargaining may provide more incentive to plead guilty than the "explicit" bargaining between defense attorneys and prosecutors. See Alschuler, supra note 64, at 471 (suggesting that 'implicit' bargaining may be more significant in shaping sentences in the federal courts than... "explicit" bargaining"). Professor Alschuler also cites evidence indicating that federal judges seem to offer significant deductions in penalty to defendants who plead guilty. See id. at 471 n.45 (noting that average sentence issued when defendant pleads guilty may be as much as 40% below that if defendant had been convicted at trial) (citing U.S. SENTENCING COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 48 (1987)).

69. See Santobello v. New York, 404 U.S. 257 (1971). In Santobello, the Court reasoned:

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to the prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id. at 261; see also infra notes 76-79 and accompanying text (discussing Supreme Court arguments in favor of encouraging entry of guilty pleas and facilitating plea bargaining). See generally Douglas A. Smith, The Plea Bargaining Controversy, 77 J. CRIM. L. & CRIMINOLOGY 949, 966-67 (1986) (discussing research findings suggesting that plea bargaining is neutral component of criminal case that neither undermines preventive influence of law nor creates "two tier sentencing system"). But see Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. CHI. L. REV. 931 (1983). Professor Alschuler finds that plea bargaining treats human liberty as a "commodity," id. at 932, makes "figureheads of judges," id. at 933, "promotes perceptions of corruption," id., "increases the likelihood of favoritism and personal influence," id. at 934, and "treats almost every legal right as a bargaining chip to be traded for a discount in sentence." Id.
1. **Explicit incentives to plead guilty**

In the context of “explicit bargaining” between the defendant and the prosecutor, the Supreme Court is willing to ignore the clear chilling effect of a sentencing scheme and focus instead on whether the defendant made a voluntary plea of guilty.\(^7\) In *United States v. Brady*,\(^7\) the Court upheld a waiver of rights made under the same sentencing scheme that the Court in *Jackson* had found to needlessly encourage waivers of constitutional rights.\(^7\) The Court stressed that *Jackson* did not determine that the Federal Kidnaping Act was “inherently coercive.”\(^7\) Thus, the Court narrowed the dispute to the sole question of whether the defendant entered the plea voluntarily.\(^7\)

The Court in *Brady* found that the defendant’s fear of the death penalty did not impermissibly coerce him to engage in plea-bargain negotiations with the prosecutor.\(^7\) Furthermore, the Court was

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\(^7\) See *United States v. Goodwin*, 457 U.S. 368, 380-84 (1982) (holding that while possibility exists for vindictiveness in plea bargain process, *Pearce* presumption of vindictiveness does not extend to charging decisions of prosecutor); *Bordenkircher v. Hayes*, 434 U.S. 357, 360-65 (1978) (finding that prosecutor did not act inappropriately in responding to defendant’s refusal to plead guilty by rein indicting defendant under recidivist statute that carried mandatory life sentence); *Brady v. United States*, 397 U.S. 742, 751-53 (1970) (finding that mere possibility of higher penalty for crime charged where conviction obtained by trial does not constitute coercion to plead guilty).

\(^7\) *397 U.S. 742* (1970).

\(^7\) See *United States v. Brady*, 397 U.S. 742, 743-45 (1970) (relating facts of defendant’s indictment under federal kidnapping statute, which provided for death penalty if defendant were convicted by jury but which provided for life imprisonment if defendant pled guilty). The United States had charged Brady under the federal kidnapping statute before the Supreme Court invalidated the death penalty provision in *United States v. Jackson*. *Id.* at 743.

\(^7\) See *id.* at 746 (noting that mere fact that federal statute tends to discourage defendants from exercising right to trial does not mean that all defendants who plead guilty under statute do so involuntarily) (quoting *United States v. Jackson*, 390 U.S. 570, 583 (1968)).

\(^7\) See *id.* at 755 (relating that guilty pleas will be deemed voluntary unless induced by threats or “improper” promises) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)).

\(^7\) See *id.* at 747 (refusing to rule that all pleas of guilty that are entered out of fear of possible death sentence are involuntary). The Court noted that the mere encouragement of guilty pleas is insufficient to render such pleas invalid. See *id.* at 750 (noting that state encourages guilty pleas at all stages of criminal process).

The Court indicated, however, that it would hesitate to uphold waivers of rights if empirical evidence demonstrated that innocent defendants were being persuaded to plead guilty by a sentencing scheme such as the one utilized in *Brady*. See *id.* at 758 (indicating that Court would have reservations in upholding *Brady*-type sentencing scheme if, even after receiving advice of competent counsel, defendants were more likely to please falsely). See generally Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1983 (1992) (noting two conflicting perceptions of plea bargaining: (1) “bargaining convicts too many innocents” because defendants are naturally risk averse and would rather settle than risk sentence after conviction, and (2) “bargaining convicts too few innocents” because inherent problems with structure of bargaining prohibits defendant from settling for least available sentence). The Court in *Brady* expressed confidence that trial courts would guard against such occurrences by ensuring that pleas of
unwilling to invalidate such negotiations because plea bargaining benefits both the defendant\textsuperscript{76} and society.\textsuperscript{77} The Court argued that guilty pleas demonstrate a defendant's willingness "to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary."\textsuperscript{78} For society, the Court asserted that the avoidance of trials conserves scarce resources "for those cases . . . in which there is substantial doubt that the State can sustain its burden of proof."\textsuperscript{79}

2. Implicit incentives to plead guilty

In the context of "implicit bargaining," the Court also has upheld schemes that encourage waivers of the right to trial by conditioning leniency on the admission of guilt. In \textit{Corbitt v. New Jersey},\textsuperscript{80} the Court validated a New Jersey statute that offered an inducement to plead \textit{non vult} or \textit{nolo contendere}.\textsuperscript{81} The statute mandated a life sentence for a defendant convicted by a jury of first degree murder, but allowed the judge to impose a lower sentence if the defendant pled \textit{non vult} or \textit{nolo contendere}.\textsuperscript{82} The defendant argued that the New Jersey statute interfered with his rights under the Fifth and Sixth Amendments because it represented a "needless encouragement to plead guilty or to waive a jury trial."\textsuperscript{83} The Court asserted, however, that the New Jersey statute was not necessarily an encouragement because the sentencing judge retained the discretion to impose the maximum penalty of life imprisonment in any case.\textsuperscript{84}
Furthermore, the Court stated that even if the statute burdened the defendant's right to trial, "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." The majority justified such implicit burdens on the right to trial on the same policy grounds that Brady had asserted to buttress explicit plea bargaining: both the defendant and the State stand to benefit from the entry of guilty pleas. The Court reiterated that the defendant who pleads guilty receives both a reduced sentence and an early start on the road to rehabilitation. The Court further underscored its belief that plea bargaining helps the government "conserve vital and scarce resources."

3. Inducement to plead guilty under the federal Sentencing Guidelines

Another legislatively approved implicit bargaining scheme can be found in section 3E1.1 of the Sentencing Guidelines. Section 3E1.1 codifies the common-law tradition of allowing judges to consider a defendant's acceptance of responsibility for the purpose of granting leniency at sentencing. The provision permits the judge to reduce a defendant's sentence upon a showing that the defendant has accepted responsibility for the crime charged. Confession of guilt is only one of many factors that a judge may consider in granting

85. Id. at 218. One federal judge has described the Court's approach in Corbitt as "the rough-and-tumble theory of justice." United States v. Aichele, 941 F.2d 761, 769 (9th Cir. 1991) (Kozinski, J., dissenting in part).
86. See United States v. Brady, 397 U.S. 742, 752-53 (1970) (noting that prevalence of guilty pleas does not validate system, but recognizing benefit to defendant and society of encouraging such pleas).
87. Corbitt, 439 U.S. at 222.
88. Id. at 222 n.12 (asserting that "properly administered" guilty pleas "can benefit all concerned") (citing Blackledge v. Allison, 431 U.S. 63, 71 (1977)).
89. Id.
90. U.S.S.G., supra note 9, § 3E1.1.
91. See United States v. Aichele, 941 F.2d 761, 767-68 (9th Cir. 1991) (Kozinski, J., dissenting in part) (noting that § 3E1.1 reflects "hoary tradition" allowing judge to factor admissions of guilt into sentencing determinations); United States v. Henry, 883 F.2d 1010, 1012 (11th Cir. 1989) (finding that § 3E1.1 clarifies common-law sentencing leniency by providing defendants with better warning of consequences of their choices); see also Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 28-29 (1988) (noting that § 3E1.1 reflects past sentencing practice of reducing defendant's sentence by 30-40% for pleading guilty without explicitly telling defendant that guilty plea guarantees lower sentence or that election of jury trial guarantees higher sentence).
92. See U.S.S.G., supra note 9, § 3E1.1(a) (providing for two-level reduction in offense if defendant clearly demonstrates acceptance of responsibility for offense); id. § 3E1.1(b) (providing additional one-level reduction if defendant has offense level of 16 or greater and 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").
a sentence reduction.\footnote{93} Section 3E1.1 of the Sentencing Guidelines resembles the New Jersey statute that the Court upheld in Corbitt in that both provisions may encourage a defendant to waive his right to trial.\footnote{94} Section 3E1.1, like the New Jersey statute, also allows the judge to reduce a defendant's sentence for pleading guilty.\footnote{95} Furthermore, neither provision guarantees that a guilty plea will result in a lower sentence\footnote{96} and give broad discretion to the sentencing judge.\footnote{97}

While the Supreme Court has upheld the validity of the Guidelines

93. See U.S.S.G., supra note 9, § 3E1.1, comment. (n.1). The commentary to § 3E1.1 lists, nonexclusively, the following factors appropriate to consider when determining whether the defendant has demonstrated clear acceptance of responsibility for the offense:

(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct) . . . ;
(b) voluntary termination or withdrawal from criminal conduct or associations;
(c) voluntary payment of restitution prior to adjudication of guilt;
(d) voluntary surrender to authorities promptly after commission of the offense;
(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;
(f) voluntary resignation from the office or position held during the commission of the offense;
(g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and
(h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

Id.

The circuits are split over whether judges may grant sentencing reductions to defendants who plead guilty but deny admitting participation in criminal acts. Compare United States v. Tucker, 925 F.2d 990, 992-93 (6th Cir. 1991) (stating that defendant's admission of guilt while maintaining innocence does not preclude reduction for acceptance of responsibility) with United States v. Cook, 922 F.2d 1026, 1037 (2d Cir.) (finding that defendant who pled guilty but stated that "I will go to my grave saying I did nothing wrong" was not entitled to two-point reduction for acceptance of responsibility), cert. denied, 111 S. Ct. 2235 (1991).

94. See Corbitt v. New Jersey, 439 U.S. 212, 218-19 (1978) (holding as constitutional New Jersey statute that encouraged defendant to waive right to trial); United States v. Cordell, 924 F.2d 614, 619 (6th Cir. 1991) (recognizing that § 3E1.1 burdens exercise of right to trial in order to encourage pleas of guilty).

95. Compare U.S.S.G., supra note 9, § 3E1.1(a) (providing for two-level reduction in base-level offense if defendant demonstrates acceptance of responsibility) and U.S.S.G., supra note 9, § 3E1.1(b) (providing additional one-level reduction if defendant's offense level is 16 or greater and defendant assists prosecution by entering guilty plea) with N.J. STAT. ANN. § 2A:113-3 (West 1969 & Supp. 1978-79) (repealed 1979) (providing that if judge accepts plea of non vult or nolo contendere to charge of murder in first degree, punishment shall be either imprisonment for life or 30 years, but if defendant is convicted by jury, punishment shall be life imprisonment).

96. Compare Corbitt, 439 U.S. at 226 (Stewart, J., concurring) (recognizing that under New Jersey statute defendant can be sentenced to maximum penalty whether she pleads non vult or goes to trial) with U.S.S.G., supra note 9, § 3E1.1, comment. (n.3) ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.").

97. Compare Corbitt, 439 U.S. at 222 (finding that provisions of New Jersey statute that allow judge to accept or reject plea of non vult and to impose life in prison or term of years vest discretion in trial judge) with U.S.S.G., supra note 9, § 3E1.1, comment. (n.5) ("The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.").
in general, the Court has never had occasion to rule on the
constitutionality of section 3E1.1.98 The courts of appeals that have
addressed the issue have unanimously rejected challenges to the facial
constitutionality, on either Fifth or Sixth Amendment grounds, of
section 3E1.1.99 One court, however, has found that section 3E1.1
may be applied in an unconstitutional manner.100 In United States
v. Watt,101 the Ninth Circuit held that a sentencing court may not
consider any exercise of a constitutional right to the defendant’s
detriment.102

Despite the Ninth Circuit’s emphatic statement in Watt, there are
at least two problems in ascertaining when a judge has unconstitu-
tionally considered the exercise of a constitutional right against a
defendant. First, section 3E1.1 clearly allows judges to count, as
positive evidence in the defendant’s favor, the waiver of the right to
trial.103 The consideration of such positive evidence at sentencing,
though, may not be a sufficient inducement for a defendant to plead
guilty.104 Given the important policy goals underlying implicit
bargaining,105 a question then arises as to why a judge may not

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Guidelines on nondelegation and separation of powers grounds); Dokla, supra note 34, at 1083
n.19 (noting that Supreme Court has yet to address constitutionality of § 3E1.1); Eskridge, supra
note 9, at 685 (relating that Mistretta declined to consider constitutionality of individual
Sentencing Guidelines provisions).
99. See, e.g., United States v. Saunders, 973 F.2d 1354, 1362-63 (7th Cir. 1992) (holding that
approach embodied in § 3E1.1 does not constitute per se policy of punishing those who stand
trial, even though leniency is more commonly granted to defendants who plead guilty), cert.
denied, 113 S. Ct. 1026 (1993); United States v. Cordell, 924 F.2d 614, 619-20 (6th Cir. 1991)
(holding that § 3E1.1 is constitutional on its face); United States v. Gonzalez, 897 F.2d 1018,
1020-21 (9th Cir. 1990) (asserting that § 3E1.1 does not infringe on defendant’s Fifth and Sixth
Amendment rights by encouraging defendant to incriminate himself and waive jury trial to
obtain benefit of reduction); United States v. Henry, 883 F.2d 1010, 1011-12 (11th Cir. 1989)
(holding that § 3E1.1 may add to defendant’s dilemmas but provision was not intended to
punish defendant for exercising rights).

One commentator argues that § 3E1.1’s two-point reduction is too low to constitute an
unconstitutional inducement to plead guilty. See Frank H. Easterbrook, Plea Bargaining as
Compromise, 101 YALE L.J. 1969, 1977-78 (1992) (stating that reduction under § 3E1.1 is
historically less than pre-Guidelines reduction for acceptance of responsibility). But see Capra,
supra note 29, at 3 (asserting that reduction can result in substantially shorter sentence).
100. See United States v. Watt, 910 F.2d 587, 592-93 (9th Cir. 1990) (finding that court had
applied § 3E1.1 in violation of Fifth Amendment self-incrimination clause because it had
considered defendant’s failure to assist in recovery of fruits and instrumentalities of crime to be
incriminatory).
101. 910 F.2d 587 (9th Cir. 1990).
103. U.S.S.G., supra note 9, § 3E1.1; see Henry, 883 F.2d at 1012 (maintaining that § 3E1.1
formalizes tradition of granting leniency to defendants who manifest acceptance of responsibility
by admitting guilt).
104. Cf. Karle & Sager, supra note 1, at 404 (predicting decrease in plea bargaining due to
lack of incentives to plea bargain under Sentencing Guidelines).
105. See supra notes 76-79 and accompanying text (relating policy behind encouragement of
guilty pleas).
count the exercise of a constitutional right against a defendant.

Second, if a judge may consider the exercise of a constitutional right against a defendant, yet another query arises as to whether it matters if the judge characterizes the sentencing differential as a denial of a benefit available under the Guidelines or an enhancement of the defendant's sentence. The case law reveals no clear line with which to distinguish between the denial of a benefit for failure to waive rights and the imposition of a penalty for exercising the same rights. Although courts on the whole have refused to prohibit denials of the benefit of a sentencing reduction in the same way that they have prohibited enhancements of sentences, certain cases suggest that such denials of benefits are per se prohibited as

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109. See Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973) (holding that New York statute violated plaintiffs' Fifth Amendment rights by denying contractors' privilege of contracting with state for period of five years if contractors refused to testify without immunity).

The decision in Turley is similar to other cases in which the Court has recognized that conditioning benefits on the waiver of rights can rise to the level of compulsion. See, e.g., Minnesota v. Murphy, 465 U.S. 420, 435 (1984) (suggesting that if state conditioned benefit of remaining free on parole on waiver of Fifth Amendment freedom from compelled self-incrimination, such condition would be unconstitutional); Lefkowitz v. Cunningham, 431 U.S. 801, 807 (1977) (ruling that state could not condition benefit of holding public office on waiver of immunity from prosecution); Garrity v. New Jersey, 385 U.S. 493, 497-98 (1967) (finding that statute requiring defendant to forfeit job or waive Fifth Amendment right against compelled self-incrimination exerted such pressure as to prevent person from making free choice).

Elsewhere, though, the Court has indicated that it is difficult to draw a "principled distinction" between a condition of benefit and a punishment. See Roberts, 445 U.S. at 557 n.4 (asserting difficulty of distinguishing between enhancement of punishment and denial of leniency). The inability of the Court to draw a principled distinction is due primarily to the fact that the Court has "never developed a coherent rationale for determining when... offers [of conditioned
unconstitutional conditions. Indeed, one circuit has ruled a sentence void where the benefit was denied simply because a defendant did not plead guilty.

The advent of fixed sentences under the Guidelines appears to make distinguishing among rewards, penalties, and denials of benefits easier than in the pre-Guidelines environment where each sentence was left entirely to the discretion of the trial judge. Although the Guidelines specify a range of permissible sentences for each offense, determining what is a "normal" sentence is still problematic. One circuit has concluded that the presumptive range is itself the norm.

Treating the permissible range as the norm, however, is problematic because of the broad discretion that federal judges have to arrive at a sentence within that range. Indeed, judges may consider any information about a defendant that is not prohibited by law.

Due to the uncertainty over when consideration by the sentencing judge of the exercise of the right to trial rises to the level of infringing on a constitutional right, it is difficult to ascertain when a judge has

benefits] rise to the level of coercion." Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1415, 1428 (1989); see also Howard E. Abrams, Systemic Coercion: Unconstitutional Conditions in the Criminal Law, 72 J. CRIM. L. & CRIMINOLOGY 155-64 (1981) (arguing that Supreme Court should recognize that while threats made in plea bargain context may not penalize defendants who insist on exercising rights, they may "induce waivers favorable to the state by rewarding those who forego their entitlements").

110. See Sullivan, supra note 109, at 1415 ("The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."). But see Cass R. Sunstein, Is There an Unconstitutional Conditions Doctrine?, 26 SAN DIEGO L. REV. 344-45 (1989) (asserting that unconstitutional conditions doctrine is "awkward and crude" effort to scrutinize measures that burden constitutional rights and obscures analysis of justifications state may have for burdening rights).

111. United States v. Sitton, 968 F.2d 947, 962 (9th Cir. 1992) (holding that district court may not deny reduction because of choice to remain silent or to proceed to trial where there are "other manifestations of sincere contrition"); cert. denied, 113 S. Ct. 478, and cert. denied, 113 S. Ct. 1306 (1993).

112. See United States v. Klotz, 943 F.2d 707, 710 (7th Cir. 1991) (noting that pre-Guidelines sentencing was "so individualistic" as to make it "next to impossible to tell" when judges considered exercise of constitutional right).

113. See id. at 710-11 (rejecting claim that lower limit of range or even midpoint should be benchmark for determining rewards and penalties).

114. See U.S.S.G., supra note 9, § 1B1.4 (stating that within Guidelines range judge may "consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law").

115. See U.S.S.G., supra note 9, § 1B1.4 (declaring that race, sex, national origin, creed, religion, and socio-economic status are not relevant in determining sentence and are prohibited by law).

impermissibly weighed a decision to go to trial in fixing a sentence within a range. Furthermore, unless the judge is explicit about how he arrives at the final sentence, it is difficult to determine whether the judge has denied a benefit or exacted a penalty for the defendant's exercise of the right to trial.\footnote{For example, judges may surreptitiously establish either a low benchmark within the range from which they can enhance a sentence for exercising the right to trial or a high benchmark within the range from which they can deny the benefit of a reduction for failure to accept responsibility by pleading guilty. Roberts v. United States, 445 U.S. 552, 557 n.4 (1980); \textit{cf.} United States v. Klotz, 943 F.2d 707, 710 (7th Cir. 1991) (stating that entire sentencing range is starting point, and reasons for deviations up or down are not easily shown).}

The difficulties inherent in distinguishing a denial of a benefit from a punitive sentence enhancement provided an opportunity for the trial judge in \textit{United States v. Jones} to adjust the defendant's sentence solely because the defendant went to trial.\footnote{See \textit{infra} note 141 and accompanying text (relating judge's sentencing order).} They also enabled the U.S. Court of Appeals for the D.C. Circuit to render two separate opinions offering widely different interpretations as to whether the adjustment constituted a denial of a benefit or an enhanced sentence.\footnote{Compare \textit{United States v. Jones}, 973 F.2d 928, 938 (D.C. Cir. 1992) (characterizing judge's order as acceptable enhancement of sentence) \textit{with} \textit{United States v. Jones}, 997 F.2d 1475, 1477 (D.C. Cir. 1993) (en banc) (characterizing judge's order as acceptable denial of full benefit available under Sentencing Guidelines for acceptance of responsibility).}

II. \textit{United States v. Jones}

A. Facts of the Case

On the morning of May 2, 1990, Thomas T. Jones stepped off a Greyhound bus in Washington, D.C. and a plainclothes detective asked Jones to identify himself.\footnote{\textit{Jones}, 973 F.2d at 929.} Jones replied that his identification was on the bus and offered to retrieve it.\footnote{\textit{Id.}} Instead of getting back on the bus, however, Jones fled on foot.\footnote{\textit{Id.}} Police officers apprehended him shortly thereafter.\footnote{\textit{Id. at 930.}} Meanwhile, the bus passengers had claimed all the luggage on the bus except for a green tote bag, which Jones denied owning.\footnote{\textit{Id.}} A search of the bag's contents revealed an airline ticket with Jones' name on it and a bag containing cocaine.\footnote{\textit{Id.}}

A grand jury indicted Jones on one count of unlawful possession with intent to distribute fifty grams or more of cocaine base in
violation of 21 U.S.C. §§ 841(a)\textsuperscript{126} and 841(b)(1)(A)(iii),\textsuperscript{127} which carry a minimum mandatory sentence of ten years in prison.\textsuperscript{128} Before the trial in the U.S. District Court for the District of Columbia, the defendant attempted to enter into plea negotiations with the prosecutor.\textsuperscript{129} The government, however, refused to entertain any plea bargain,\textsuperscript{130} and the jury found Jones guilty.\textsuperscript{131} District Court Judge Thomas Penfield Jackson ordered a presentence report and scheduled a date for sentencing.\textsuperscript{132}

Judge Jackson, applying the Sentencing Guidelines, calculated that the defendant's base offense level was thirty-four.\textsuperscript{133} This level, combined with a criminal history score of one,\textsuperscript{134} established a sentencing range of 151 to 188 months.\textsuperscript{135} A full two-level credit for acceptance of responsibility\textsuperscript{136} would have reduced the base sen-

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\textsuperscript{126} Appellant's Brief for Rehearing En Banc at 2, United States v. Jones, 973 F.2d 944 (D.C. Cir. 1992) (No. 91-3025), aff'd, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994). Section 841(a) specifies:

\textit{Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.}


\textsuperscript{127} Appellant's Brief at 2, Jones (No. 91-3025). Section 841(b) specifies the penalties for violating subsection (a) where the defendant is accused of possession of "50 grams or more of a mixture or substance," 21 U.S.C. § 841(b)(1)(A)(iii) (1988), "containing a detectable amount of cocaine." \textit{Id.} § 841(b)(1)(A)(ii). These penalties include "imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life." \textit{Id.} § 841(b) (1988).


\textsuperscript{129} Appellant's Brief at 3, Jones (No. 91-3025).

\textsuperscript{130} See \textit{id.} ("Each time [defendant] was informed [by the government] that he could plead guilty to the indictment... [defendant] respectfully declined those 'offers.'"). Under the Bush administration, Attorney General Richard Thornburgh instructed individual U.S. Attorneys to avoid plea bargaining. \textit{See Memorandum from Attorney General Richard Thornburgh to Federal Prosecutors 3} (Mar. 13, 1989) (stating that "charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government's ability to prove a charge for legal or evidentiary reasons"); \textit{see also Brief of Amicus Curiae on Behalf of Appellant at 6, United States v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (No. 91-3025) (noting policy of U.S. Attorneys to refuse to plea bargain), aff'd, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994).}

\textsuperscript{131} Appellant's Brief at 1, Jones (No. 91-3025).

\textsuperscript{132} \textit{Id.} at 3 (asserting that defendant cooperated with presentence report writer).

\textsuperscript{133} United States v. Jones, 973 F.2d 928, 982 (D.C. Cir. 1992), \textit{aff'd}, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994); \textit{see U.S.S.G., supra note 9, § 2D1.1(a)(3) (establishing offense levels according to drug quantity).}

\textsuperscript{134} \textit{See U.S.S.G., supra note 9, § 4A1.1 (setting forth specific factors to be considered in determining criminal history).}

\textsuperscript{135} U.S.S.G., \textit{supra} note 9, § 5A tbl.

\textsuperscript{136} \textit{See U.S.S.G., supra note 9, § 3E1.1(a) (allowing two-level reduction for acceptance of responsibility).}
tence to 121 months. Judge Jackson, however, questioned whether the defendant was entitled to the full credit. The judge ruled that the defendant's admission of guilt after trial constituted a "rather meager basis" upon which to give a full benefit. He therefore imposed a sentence of 127 months, six months longer than the sentence that would have been proper had he awarded the full credit available for acceptance of responsibility. The judge cited the defendant's decision to go to trial as the sole reason for imposing the additional six-month sentence.

The defendant appealed both the conviction and the sentence. A panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld the conviction and upheld the sentence by a vote of two to one. The panel characterized the six months as an extra term for going to trial and held that a defendant's Fifth and Sixth Amendment rights are not violated where a federal judge imposes an enhanced sentence solely because the defendant elected trial over a

137. U.S.S.G., supra note 9, § 5A tbl.
139. Id. at 2.
140. See id. at 13 (indicating judge's discomfort with imposing minimum sentence because defendant who pled guilty could receive same sentence).
141. Id. At sentencing, Judge Jackson explained the imposition of the additional six-month sentence:

I do think that there is some premium that should be recognized for pleading guilty in advance of trial rather than taking a case to trial in which the defendant knows that he is guilty and he is properly charged and there is no defense to it.

I do, however, think that in the circumstances, I intend to give Mr. Jones a major portion of the benefit that he derives from his acceptance of responsibility.

I would, had this case been disposed of with a plea in advance of trial, have sentenced him at the very bottom of the guidelines and imposed the minimum sentence that I could possibly have imposed.

Because, however, the case did go to trial, I am going to add an additional six months to the guideline sentence that I intend to impose, and will impose a sentence of 127 months.

I am articulating this so that anybody that wishes to take it to the sentencing commission and/or the court of appeals may do so. I would like to have some thought given to the considerations I've articulated today. And I would like to know whether or not there is some constitutional error I commit by recognizing that the case was taken to trial, albeit a matter of constitutional right to take the case to trial, rather than acknowledging in advance the guilt that was obviously supported by the proof.

143. See id. at 930-31 (dismissing defendant's claims that district court erred in failing to find illegal search or seizure).
144. See id. at 932-38 (detailing grounds for upholding sentencing order). But see id. at 940 (Mikva, C.J., concurring in part and dissenting in part) (characterizing majority's reasons for affirming sentence as unpersuasive).
145. See id. at 932-38 (detailing rationale for upholding sentencing judge's imposition of additional six months).
The defendant argued that the additional six-month sentence violated his due process rights by punishing him for exercising his right to trial, but the panel found "no constitutional obstacle to the extra time." The panel reasoned that the judge's order was constitutional, given the tension between Supreme Court cases that prohibit the chilling of a defendant's decision to go to trial and those that allow the government to create sentencing schemes that induce defendants to plead guilty. The panel also found support in decisions upholding the constitutionality of the Sentencing Guidelines' acceptance-of-responsibility provision. Furthermore, the panel reasoned that the judge's sentencing order served the important policy goal of reducing the burden on federal judges through the encouragement of plea bargaining.

The D.C. Circuit subsequently granted the defendant's motion for rehearing on the question of the sentence imposed. On rehearing, the en banc court affirmed the sentence in a seven to four decision, but did so on narrower grounds. Whereas the panel had viewed the six-month sentence as an enhancement for failure to plead guilty, the en banc court characterized the sentence as a denial of the full benefit allowed under the Guidelines. The court determined that such a denial was permitted, reasoning that granting leniency to defendants who plead guilty requires withholding leniency from those who do not. The court also found support in the commentary to the 1990 version of section 3E1.1, which advised a judge to refuse the two-point sentence reduction where a defendant does not plead guilty. Finally, the court upheld the sentence on the grounds that it was well below the minimum sentencing range for the defendant's offense.

Although each court affirmed the sentence, the panel and en banc
decisions reflect widely differing interpretations of whether the trial judge’s order denied a benefit or enhanced a sentence. An examination of each decision is necessary in order to ascertain whether this distinction makes any constitutional difference. Ultimately, it is evident that the denial of benefit/sentence enhancement distinction is a red herring. For constitutional purposes, the more important distinction is that between weighing the exercise of the right to trial as the sole evidence against a defendant and counting the waiver of the same right as evidence in the defendant’s favor.

B. The Panel Opinion

1. The judge’s order as a sentence enhancement

The panel that first considered the defendant’s appeal characterized the six-month sentence differential as an enhancement based on the exercise of the right to trial. Indeed, the notion that the sentence was an enhancement is fully supported by the record. The sentencing transcript indicates that the judge explicitly tied the defendant’s decision to go to trial to the additional six months. Judge Jackson stated that “because... the case did go to trial, I am going to add an additional six months to the Guideline sentence.”

The characterization of the sentencing order as an enhancement for going to trial, however, raised nettlesome constitutional questions for the panel. A two-member majority of the panel addressed these questions and found that differential sentencing, even with its concomitant burden on the right to trial, is necessary to preserve judicial resources through the encouragement of plea bargaining.

158. See id. at 1489 (Sentelle, J., dissenting) (suggesting that case should be remanded to trial judge for clarification given large difference between panel and en banc court’s interpretations of record below).
159. See Jones, 997 F.2d at 1483 (Mikva, C.J., dissenting) (asserting that whether judge was enhancing punishment or denying leniency probably did not matter).
160. See id. at 1484 (Wald, J., dissenting) (acknowledging that dividing line between allowing weighing of waiver of right to trial as evidence in defendant’s favor and prohibiting counting exercise of right to trial against defendant “may seem exquisitely refined, but it has nonetheless endured in our jurisprudence”).
162. Cf: A Penalty for Going to Trial?, LEGAL TIMES, Mar. 22, 1993, at 1, 26 (quoting Marc Miller, co-editor of Federal Sentencing Reporter, as stating that he had never “heard of a judge making the link so clearly”).
164. Jones, 973 F.2d at 938.
2. **Tension among Supreme Court cases**

In addressing the constitutional questions, the panel first identified what it believed to be a tension among Supreme Court precedent on sentencing differentials. To demonstrate this tension, the panel juxtaposed the line of cases "seem[ing] to draw in question any sentencing practice that disfavored the decision to go to trial" with later cases that "establish that in many contexts the government (state or federal) may impose sentencing differentials that favor defendants who plead guilty over those who go to trial."

The panel presented *United States v. Jackson*, *North Carolina v. Pearce*, and *Blackledge v. Perry* as three opinions that seemed to restrict government-sponsored inducement of guilty pleas. The panel initially considered dismissing *Jackson* on a number of grounds relating to the especially difficult choice that the defendant in that case had to make regarding whether to risk the death penalty by electing a jury trial. The panel acknowledged, however, that it could not dismiss *Jackson* because *Pearce* "speaks more broadly" in its prohibition against "vindictiveness." It further noted that *Blackledge* seemed to equate vindictiveness with any desire to discourage the defendant from going to trial.

The panel then contrasted this seemingly broad prohibition against deterring the exercise of the right to trial with the later cases of *Brady v. United States*, *Bordenkircher v. Hayes*, and *Corbitt v. New Jer-

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165. See id. at 935 (stating that Supreme Court has recognized "mingling of legitimate and illegitimate" purposes in sentencing practices).
166. Id. at 933.
167. Id.
171. *Jones*, 973 F.2d at 938. See generally *supra* notes 37-61 and accompanying text (providing background on line of cases supporting notion that state may not deter defendant from exercising constitutional rights).
172. See *Jones*, 973 F.2d at 933 (suggesting that one might dismiss *Jackson* because of "excruciating" choice presented by death penalty, "perceived disproportion" of consequences of going to trial as opposed to pleading guilty, or by "implausibility" of government's argument that rule lessened seriousness of punishment).
173. Id.
174. Id. (citing United States v. Pearce, 395 U.S. 711, 725 (1969)). The court suggested that *Pearce* is broader because it established the rule that imposing a higher sentence on remand than that which the defendant successfully challenged at trial raises a presumption of vindictiveness. Id.
175. See id. (noting that Supreme Court did not explicitly define vindictiveness in *Blackledge*) (citing Blackledge v. Perry, 417 U.S. 21, 28 (1974)).
that permitted the state to provide a benefit to a defendant who pleads guilty in advance of trial. Through these cases, the panel maintained, the Supreme Court had both implicitly and explicitly endorsed sentencing schemes that encourage waiver of the right to trial. The panel concluded that, in order to reconcile the tension in the Supreme Court precedent, it is impossible to declare every practice that discourages the right to trial or appeal unconstitutional. The panel argued that the Supreme Court itself had reconciled these cases by restricting the factual circumstances under which the Court would presume vindictiveness and by adopting a narrow definition of what constitutes vindictiveness.

For three reasons noted in a strongly worded dissent by Chief Judge Mikva, the majority's portrayal of tension in constitutional case law is a contrived attempt to support its conclusion that judges may impose a penalty on defendants who choose to stand trial. First, no other court has detected this tension in Supreme Court precedent. Indeed, the Supreme Court explicitly denied the existence of any tension when it asserted that the prohibition on punishing a defendant for exercising a legal right is a principle originating "with

179. See supra notes 62-119 and accompanying text (discussing line of cases that permits some burdening of constitutional right to trial).
181. See Jones, 973 F.2d at 934 (asserting that Corbitt demonstrates explicit acceptance of sentencing schemes that favor pleas of guilty) (citing Corbitt v. New Jersey, 439 U.S. 212, 218-23 (1978)).
182. See id. at 934 (asserting that, although Jackson, Pearce, and Blackledge may suggest that practices deterring exercise of right to trial or appeal are prohibited, such reading is inconsistent with Bordenkircher and Corbitt).
183. See id. at 934 (citing Alabama v. Smith, 490 U.S. 794, 801-02 (1989) for proposition that presumption of vindictiveness should not apply where sentence is higher after trial than sentence issued after guilty plea because of inference that higher trial sentence may result naturally from information gathered at trial).
184. See id. at 935 (suggesting that Court has settled on definition of vindictiveness that refers to personal inconvenience or loss of face, not concern over burden on court's resources).
185. See id. at 939 (Mikva, C.J., concurring in part and dissenting in part) (stating that district judge had added six months "simply to raise the question that my colleagues leap to decide").
186. See id. at 940 (Mikva, C.J., concurring in part and dissenting in part) (noting that "Supreme Court and every other circuit" have emphasized consistency).

Second, any apparent inconsistency most likely stems from the panel’s overly broad reading of constitutional precedent. 188 In fact, the holdings of Pearce and Blackledge were “far narrower” 189 than the panel suggested. 190 The holding of Pearce was limited to the danger of retaliation by a judge during sentencing. 191 Moreover, the Court in Blackledge focused its decision on the potential for prosecutorial vindictiveness after trial. 192 Indeed, the Supreme Court itself distinguished these two cases in Bordenkircher, where it allowed a prosecutor to threaten the defendant with a more serious charge during plea bargaining. 193 Rejecting an application of Pearce and Blackledge, the Court in Bordenkircher stated that these cases dealt with “the State’s unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right—a situation ‘very different from the give-and-take negotiation common in plea bargaining.” 194

Third, the panel opinion failed to recognize the Supreme Court’s distinctions between the roles of the judge, the prosecutor, and the legislature. 195 The court ignored the distinct role of the judge even though the Supreme Court had expressly noted in Pearce that the judge has tremendous power to influence a defendant’s decision to exercise his or her constitutional rights. 196 In announcing its test of “vindictiveness,” the Court in Pearce did not weigh, as the panel did, society’s interests in combating crime against the preservation of the defendant’s due process rights. 197 In Pearce, the Supreme Court

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188. Jones, 973 F.2d at 940 (Mikva, C.J., concurring in part and dissenting in part).
189. Id.
190. Id. (disputing assertion that Pearce and Blackledge “suggest that all practices tending to deter the exercise of a right to trial or appeal... constitute forbidden vindictiveness”).
191. See North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (requiring that sentence handed down after retrial must be untouched by any vindictiveness judge has due to defendant’s successful attack of first conviction).
192. See Blackledge v. Perry, 417 U.S. 21, 27 (1974) (noting interest that prosecutors have in “discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo” because appeals drain prosecutorial resources and new trials may result in reversals).
195. See id. at 363-64 (noting discretion of prosecutor regarding charges filed, limited by both Constitution and legislators’ definition of chargeable offenses).
196. See Pearce, 395 U.S. at 724 (declaring that court may not use its sentencing power to put defendants in position of making “unfree” choices) (quoting Worchester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966)); see also id. at 725 n.20 (acknowledging defendant’s fear that, on reconviction, sentencing judge might impose greater sentence in retaliation for accused’s exercise of constitutional right).
197. Compare Pearce, 395 U.S. at 725-26 (declaring that due process requires that vindictiveness “play no part” in sentence defendant receives after new trial) with United States v. Jones,
firmly held judges to a higher standard by declaring that their discretion at sentencing must be limited by respect for the defendant’s constitutional rights.\footnote{198}

As the dissent notes, the panel opinion in \textit{Jones} also failed to distinguish between judges and prosecutors.\footnote{199} While prosecutors possess broad latitude to offer inducements to plead guilty,\footnote{200} judges are prohibited from doing so because the court may not participate in any plea negotiations.\footnote{201} The rationale behind this rule is that, were a judge allowed to participate, a defendant may have justifiable concerns that she would not receive a fair trial, especially if she declined to accept the judge’s plea offer.\footnote{202}

\begin{footnotesize}
\begin{enumerate}
\item[198] See \textit{Pearce}, 395 U.S. at 724 (refusing to give court right to put “price on an appeal”) (quoting \textit{Worcester}, 370 F.2d at 718).
\item[199] \textit{Jones}, 973 F.2d at 940 (Mikva, C.J., concurring in part and dissenting in part) (noting that Supreme Court has carefully distinguished state actors and “differing contexts in which they act,” and Court’s decisions are based on distinction between prosecutors and judge because they play different roles in area of punishment).
\item[200] See \textit{Bordenkircher v. Hayes}, 434 U.S. 357, 362 (1978) (refusing to find vindictiveness in context of “give-and-take negotiation common in plea bargaining between the prosecution and defense”); Appellant’s Brief for Rehearing En Banc at 8, United States v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (No. 91-3025) (arguing that Supreme Court places considerable weight on defendant’s ability to make free decisions before trial as reason for giving prosecutors broad latitude), aff’d, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994).
\item[201] Indeed, the only time the Court has restricted a prosecutorial inducement was in an instance where the prosecutor demonstrated the same kind of post-trial vindictiveness exhibited by the trial judge in \textit{Pearce}. See \textit{Blackledge v. Perry}, 417 U.S. 21, 27 (1974) (holding that prosecutor acted vindictively in securing felony indictment based on same evidence that originally gave rise to misdemeanor charge after defendant had been convicted on misdemeanor charge and chose to exercise right to trial \textit{de novo}).
\item[202] \textit{Fed. R. Crim. P. 11(e)(1)} (“The court shall not participate in any [plea] discussions.”).
\item[203] \textit{See United States v. Bruce}, 976 F.2d 552, 556-58 (9th Cir. 1992) (vacating guilty plea where judge participated in discussion and negotiation of plea agreement). In \textit{Bruce}, the court set forth three reasons for announcing a per se prohibition on judicial involvement in plea bargaining. \textit{See id.} (discussing “bright-line rule” of \textit{Fed. R. Crim. P. 11(e)(1)}). First, the court argued that such participation “carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty.” \textit{Id.} at 556. Second, the court noted that Rule 11 “protect[s] the integrity of the judicial process,” by protecting the role of the judge as neutral arbiter rather than adversary. \textit{Id.} Third, the court asserted that judicial involvement in plea bargaining taints the post-plea negotiation process by making it difficult for judges to assess the voluntariness of pleas, maintain impartiality at trial, and remain objective in “post trial matters such as sentencing.” \textit{Id.} at 558 (emphasis added).
\end{enumerate}
\end{footnotesize}
Finally, the panel did not recognize the distinction between a Corbitt-style, legislatively created sentencing scheme and a judicially imposed scheme.203 The fact that the scheme in Corbitt was of legislative origin is crucial to its constitutionality because the origin of the law made it difficult for the Supreme Court to find any “element of retaliation or vindictiveness”204 toward the defendant personally.205 Furthermore, under a legislative scheme, the defendant has the opportunity to obtain counseling about the opportunities and risks inherent in the law.206 In Jones, however, the defendant had no choices available to him because the prosecutor refused to plea bargain207 and the judge imposed his own sentencing scheme after trial.208

3. Staleness of circuit court precedent prohibiting unilateral judicial action

The panel also refused to follow the precedent of its own circuit,209 as well as that of other circuits, prohibiting a judge from negotiations. A plea induced by the influence of the judge cannot be said to have been voluntarily entered. The solicitor is the adversary of the defendant and his counsel. The negotiations should be between the adversaries. The judge is not the adversary of either. An agreement reached between the solicitor and his adversary can never be more than a recommendation. The judge must remain in a position of complete neutrality such that he may, in the last analysis, exercise freedom of sentencing judgment based on all of the facts.

Id. at 516-17 (emphasis added).

203. United States v. Jones, 973 F.2d 928, 943 (D.C. Cir. 1992) (Mikva, C.J., concurring in part and dissenting in part) (asserting that legislature may encourage guilty pleas by offering benefits but that Corbitt does not stand for proposition that trial judge may unilaterally offer same benefits), aff'd, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994).


205. See Jones, 973 F.2d at 943 (Mikva, C.J., concurring in part and dissenting in part) (arguing that fact that legislatures are less likely to manifest vindictiveness toward individual defendants dispels notion that tension exists between Pearce and Corbitt). The dissent also maintained that the lack of vindictiveness on the part of legislatures supports a finding that the Sentencing Guidelines’ reduction for acceptance of responsibility is constitutional. See id. (distinguishing congressionally sanctioned passage of acceptance-of-responsibility provision of Sentencing Guidelines from unilateral action on part of sentencing judge).

206. See Corbit, 439 U.S. at 225 (finding no indication that defendant “was not well counseled or that he misunderstood the choices that were placed before him”); see also Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (declaring that state does not encroach on defendant’s due process rights as long as “accused is free to accept or reject” prosecution’s offer).

207. Jones, 973 F.2d at 932 (contending that government’s refusal to plea bargain limited defendant’s choices but concluding that this did not prevent defendant from pleading guilty).

208. See Appellant’s Brief for Rehearing En Banc at 9, United States v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (No. 91-3025) (arguing that Supreme Court’s plea bargaining cases do not apply because defendant was not afforded opportunity to make informed choice prior to trial), aff’d, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994).

209. See Scott v. United States, 419 F.2d 264, 274 (D.C. Cir. 1969) (announcing rule barring trial judge from encouraging guilty pleas by policy of differential sentencing because it affects defendant’s decision to exercise right to trial). But see Jones, 973 F.2d at 936 (finding that Scott’s
unilaterally increasing a sentence because a defendant decided to go to trial.110 Every circuit that has addressed this issue has concluded that such sentence enhancements violate due process.111 Nevertheless, the panel discounted the contrary precedent on the basis that these decisions either predated112 or else failed to consider Supreme Court opinions allowing the state to encourage waivers of the right to trial.113

While the panel claimed that it could dismiss the contrary circuit court decisions because they either predated or ignored the relevant Supreme Court developments, at least two of these “developments” actually appear in earlier cases on sentencing differentials. First, the panel gave considerable weight to Corbitt’s “explicit” acceptance of the idea that the state may create schemes that favor guilty pleas.214
The Supreme Court in *Corbitt* conceded, however, that the state’s legitimate interest in inducing guilty pleas\(^{215}\) derives from *Bordenkircher*\(^{216}\) and even earlier cases that had acknowledged the efficiency advantages of plea bargaining.\(^{217}\) The circuit courts that decided cases preceding *Corbitt* therefore had ample opportunity to consider the advantages of encouraging guilty pleas, and they determined that it is not the judge’s role to supply this type of encouragement.\(^{218}\)

Second, the panel identified *United States v. Goodwin*\(^{219}\) as the first decision to adopt a narrow definition of vindictiveness that includes the “illegitimate” concern over personal inconvenience of the judge or prosecutor but excludes “legitimate” concern over the waste of prosecutorial or judicial resources.\(^{220}\) The *Bordenkircher* decision, however, actually predates *Goodwin* in adopting such a narrow view of vindictiveness.\(^{221}\) In both cases, the Supreme Court made efforts to avoid labelling as “vindicative” outcomes produced through the give-and-take bargaining that occurs between prosecutors and defense counsel before trial.\(^{222}\) Given the importance of the plea bargaining context of *Bordenkircher* and *Goodwin*, it is not surprising that other circuits have readily applied the narrow definition of vindictiveness to circumstances where judges unilaterally increase sentences because defendants opted for trial.\(^{223}\)

\(^{215}\) See *Corbitt v. New Jersey*, 439 U.S. 212, 222 (1978) (citing numerous authorities in support of proposition that state has legitimate interest in encouraging guilty pleas).

\(^{216}\) See id. at 221 (stating that “there is no difference of constitutional significance” between *Bordenkircher* and case at issue).

\(^{217}\) Id. at 222 n.12 (citing Blackledge v. Allison, 431 U.S. 63, 71 (1977) for proposition that “properly administered” scheme encouraging guilty pleas “can benefit all concerned” and Santobello v. New York, 404 U.S. 257, 260 (1971) in support of assertion that disposition of charges through plea discussions is “essential component” in administration of justice).

\(^{218}\) See, e.g., United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir.) (noting that although many factors are relevant at sentencing, court is prohibited from using sentencing power as “carrot and stick” to clear congested dockets), *cert. denied*, 411 U.S. 948 (1973).

\(^{219}\) 457 U.S. 368 (1982).

\(^{220}\) See *United States v. Jones*, 973 F.2d 928, 935 (D.C. Cir. 1992) (asserting that Court in *Goodwin* reconciled tension in precedent by settling on definition of vindictiveness that only prevents action motivated by illegitimate concern about loss of face), *aff’d*, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), *cert. denied*, 126 L. Ed. 2d 704 (1994).

\(^{221}\) See *Bordenkircher v. Hayes*, 434 U.S. 357, 363-64 (1978) (finding that prosecutor’s desire to encourage guilty plea by threatening to reindict defendant on more serious charge does not constitute vindictiveness because prosecutor’s motivation comports with legitimate policy of plea bargaining).

\(^{222}\) See *Goodwin*, 457 U.S. at 380 (drawing comparison to *Bordenkircher* and noting that both cases arose from pretrial conduct on part of prosecutor).

The panel also failed in its attempt to dismiss the contrary circuit court precedent by citing the age of the line of Supreme Court cases prohibiting sentencing differentials.\textsuperscript{224} Clearly these Court cases remain good law\textsuperscript{225} because the Court has explicitly denied the existence of any tension between the earlier and later decisions.\textsuperscript{226}

4. Judicial construction of section 3E1.1 as support for sentence enhancements

While ignoring contrary circuit court precedent, the panel found support in another line of circuit court cases that upholds the constitutionality of section 3E1.1 of the Sentencing Guidelines.\textsuperscript{227} These cases acknowledge that it is a rare situation where a defendant who stands trial will be eligible for a sentence reduction\textsuperscript{228} and, therefore, section 3E1.1 makes the defendant’s decision to go to trial even more difficult.\textsuperscript{229} The circuits, however, uphold section 3E1.1’s constitutionality on the grounds that not every burden on a

\textsuperscript{224} See Jones, 973 F.2d at 933 (stating that Supreme Court decisions that seem to prohibit sentencing differentials are 20 years old).

\textsuperscript{225} See id. at 944 (Mikva, C.J.), concurring in part and dissenting in part (“I was not aware that Supreme Court decisions have a twenty year shelf-life.”).

\textsuperscript{226} See Goodwin, 457 U.S. at 372 (noting that continuous theme in opinions is that punishment for exercising legal rights is due process violation).

\textsuperscript{227} See supra note 99 (listing cases that have upheld facial constitutionality of § 3E1.1); see also U.S.S.G., supra note 9, § 3E1.1, comment. (n.3) (providing that entry of plea of guilty prior to commencement of trial is significant evidence of acceptance of responsibility).

\textsuperscript{228} See United States v. Guadagno, 970 F.2d 214, 225 (7th Cir. 1992) (finding that defendant who chose not to plead guilty was not punished for exercising right to trial pursuant to U.S.S.G. § 3E1.1); see also U.S.S.G., supra note 9, § 3E1.1, comment. (n.2) (providing that defendant who stands trial will have difficulty proving acceptance of responsibility unless defendant goes to trial to challenge issue not related to “factual guilt,” such as constitutionality of statute or application of statute to defendant’s conduct).

The circuits have split on whether going to trial to raise certain defenses, such as entrapment, constitutes a challenge to factual guilt that bars a defendant from a reduction for acceptance of responsibility. \textit{Compare} United States v. Haddad, 976 F.2d 1088, 1095 (7th Cir. 1992) (holding that net impact of defendant’s stance, which featured entrapment defense, was one of nonacceptance of responsibility) \textit{with} United States v. Molina, 934 F.2d 1440, 1451 (9th Cir. 1991) (finding that sentence reduction for accepting responsibility is not necessarily incompatible with entrapment defense) \textit{and} United States v. Demes, 941 F.2d 220, 222 (3d Cir.) (encountering difficulty in reconciling claim of entrapment with acceptance of responsibility, but concluding that two are not necessarily inconsistent), \textit{cert. denied}, 112 S. Ct. 399 (1991) \textit{and} United States v. Fleener, 900 F.2d 914, 918 (6th Cir. 1990) (rejecting notion that invocation of entrapment defense precludes reduction for acceptance of responsibility).

\textsuperscript{229} See United States v. Cordell, 924 F.2d 614, 619 (6th Cir. 1991) (acknowledging that § 3E1.1 may affect defendant’s choice whether to exercise constitutional rights).
defendant's decision to go to trial is impermissible.\textsuperscript{230} Furthermore, these decisions admit the difficulty of distinguishing between denial of leniency and enhancement of punishment.\textsuperscript{231} The panel concluded that, given the circuit courts' reasoning in support of section 3E1.1, there is no constitutional barrier to prevent a judge from creating a sentencing scheme that encourages defendants to waive their rights to trial.\textsuperscript{232}

A closer reading of the cases that uphold section 3E1.1, however, reveals that they pointedly denounce schemes that penalize defendants for exercising constitutional rights.\textsuperscript{233} These cases have maintained repeatedly that defendants may not be subjected to more severe punishment for exercising their constitutional right to stand trial.\textsuperscript{234}

The application, as opposed to the interpretation, of section 3E1.1 also refutes the panel's conclusion that the provision supports the action of the district court judge in Jones. In fact, the appellate review process has operated to ensure that defendants are not denied the benefit of leniency solely because they exercised the right to trial.\textsuperscript{235} Furthermore, the Sentencing Commission has amended section 3E1.1 in order to mitigate some of the provision's more coercive aspects.\textsuperscript{236} First, section 3E1.1 specifies that a plea of guilty is merely one factor that may justify a reduction of sentence for acceptance of

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  \item \textsuperscript{230} See United States v. Henry, 883 F.2d 1010, 1011-12 (11th Cir. 1989) (holding that § 3E1.1 may add to defendant's dilemmas but provision was not intended to punish defendant for exercising rights) (citing United States v. Belgard, 694 F. Supp. 1488, 1497 (D. Or. 1988)).
  \item \textsuperscript{231} See Roberts v. United States, 445 U.S. 552, 557 n.4 (1980) (noting difficulty in drawing "principled distinction" between benefit and penalty); United States v. White, 869 F.2d 822, 825 (5th Cir.) (finding that grant of leniency to defendants who plead guilty does not mean that those who stand trial are penalized), cert. denied, 490 U.S. 1112 (1989). But see Brief of Amicus Curiae on Behalf of Appellant at 4, United States v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (No. 91-3025) (pointing out that Court in Roberts did not reach issue of punishment for exercising constitutional right because no such claim had been properly presented), aff'd, 975 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994).
  \item \textsuperscript{232} Jones, 973 F.2d at 937.
  \item \textsuperscript{233} See Brief of Amicus Curiae on Behalf of Appellant at 2, Jones (No. 91-3025) (arguing that cases in fact "refute" majority position).
  \item \textsuperscript{234} See, e.g., United States v. Parker, 903 F.2d 91, 105 (2d Cir.) (rejecting notion that sentence reduction for defendant who waives right to trial is equivalent to increase in sentence for one who does not), cert. denied, 498 U.S. 872 (1990); United States v. Gonzalez, 897 F.2d 1018, 1020 (9th Cir. 1990) (finding prohibition on increased punishment for exercising right to trial "settled in this and other circuits"); United States v. Henry, 883 F.2d 1010, 1011 n.6 (11th Cir. 1989) (stating that "nothing in section 3E1.1 authorizes enhancement of punishment").
  \item \textsuperscript{235} See United States v. Sitton, 968 F.2d 947, 962-63 (9th Cir. 1992) (remanding case to district court for additional findings as to reasons for denying reduction based on acceptance of responsibility), cert. denied, 113 S. Ct. 478, and cert. denied, 113 S. Ct. 1306 (1993).
  \item \textsuperscript{236} See Amendments to the Sentencing Guidelines for the United States Courts, 57 Fed. Reg. 20,148, 20,156 (1992) (replacing language requiring clear demonstration that defendant recognizes and affirms acceptance of personal responsibility for criminal conduct with requirement that "defendant clearly demonstrates acceptance of responsibility for his offense").
\end{itemize}
responsibility. Second, the commentary to section 3E1.1 states that a plea of guilty does not entitle the defendant to a reduction. Third, the Sentencing Commission has recently amended section 3E1.1 to prevent the provision from being used in a way that penalizes the defendant for exercising his or her Fifth Amendment protection against self-incrimination.

5. The requirement that judges engage in differential sentencing

The panel also asserted that the "interest in preserving prosecutorial and judicial resources through lesser sentences requires that judges engage in differential sentencing." The panel posited that differential sentencing is the only way to make guilty pleas attractive to defendants. To demonstrate its proposition, the panel presented the defendant's decision to plead guilty in economic terms. The panel reasoned that defendants weigh the expected severity of a sentence issued in response to a guilty plea against the expected severity of a sentence issued upon a guilty verdict. The panel suggested that the possibility of acquittal is not, by itself, a sufficient

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237. U.S.S.G., supra note 9, § 3E1.1, comment. (n.1).
238. U.S.S.G., supra note 9, § 3E1.1, comment. (n.3) (stating that guilty plea prior to trial combined with truthful admission of involvement in offense will satisfy acceptance of responsibility requirement unless it is outweighed by other inconsistent conduct by defendant).
239. See Amendments to the Sentencing Guidelines, 57 Fed. Reg. at 20,157 (explaining that original version of § 3E1.1 caused confusion in that courts required defendant to accept responsibility for all conduct related to offense charged rather than merely for charged conduct). Pursuant to 28 U.S.C. § 994(p) (1988), the amendments to § 3E1.1 became law on November 1, 1992 because Congress did not take any action to the contrary. The new commentary provides:

Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility . . . .

U.S.S.G., supra note 9, § 3E1.1, comment. (n.1)(a).

Prior to adoption of the amendment, the circuits disagreed over the question of the constitutionality of considering uncharged conduct for reductions in sentence for acceptance of responsibility. Compare United States v. Gordon, 895 F.2d 932, 936-37 (4th Cir.) (finding that for § 3E1.1 to apply, defendant must accept responsibility for all conduct, not merely charged conduct), cert. denied, 498 U.S. 846 (1990) with United States v. Perez-Franco, 873 F.2d 455, 463 (1st Cir. 1989) (reading § 3E1.1 as requiring that defendant need only accept responsibility for charged conduct to which he pleads guilty).

241. See id. (reasoning that guilty plea will be attractive only if accused believes possible sentence after guilty plea is less than possible sentence after trial by considering average sentences and acquittal rates).
242. Id.
243. Id.
incentive for defendants to plead guilty. Thus, judges must either raise the cost of going to trial by increasing the post-verdict sentence or provide a greater sentence reduction for those who plead guilty.

While the panel cited authority that suggests that judges engage in this kind of economic calculus when making sentencing determinations, it provided no empirical evidence to demonstrate that defendants make determinations based on the same model. Indeed, in a system of determinate sentencing such as that provided by the Sentencing Guidelines, the prosecutor holds more discretion than the defendant to engage in plea bargaining. The burden of reducing the strain on judicial resources therefore rests largely on the prosecutor. Where, as in Jones, the prosecutor refuses to plea bargain, the sentencing judge should not punish the defendant for contributing to the inefficiency of the judicial system. Such penalties treat defendants “merely as a means subservient to the purposes” of clearing crowded court dockets.

C. The En Banc Opinion

1. The judge’s order as a denial of a benefit

In sharp contrast to the panel, a majority of the D.C. Circuit,

244. Id.
245. See id. (illustrating proposition with example that, if all defendants convicted of same crime were sentenced to 10 years and one-quarter were acquitted, expected value of going to trial would be 7.5 years, and positing that defendants would not plead guilty if they thought guilty plea would result in sentence longer than 7.5 years).
246. See id. at 938 n.6 (describing plea bargaining as market system where negotiated pleas set price of crime relative to expectations such as expected level of sentence if case proceeds to trial) (citing Douglas A. Smith, The Plea Bargaining Controversy, 77 J. CRIM. L. & CRIMINOLOGY 949, 959-60 (1986)).
248. Jones, 973 F.2d at 932.
249. See Brief for Appellant for Rehearing En Banc at 7 n.4, United States v. Jones, 973 F.2d 928 (D.C. Cir. 1992) (No. 91-3025) (arguing that judges should avoid engaging in differential sentencing where government refused to enter into plea negotiations to conserve prosecutorial and judicial resources), aff’d, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994). The defendant did not challenge the practice of plea bargaining, only the court’s conclusion that judges must engage in differential sentencing in order to preserve the practice of plea bargaining. Id.
250. KANT, supra note 25, at 195.
sitting en banc in *United States v. Jones*, characterized the six-month differential that Jones received for going to trial as a denial of the full benefit allowed under the Sentencing Guidelines. In order to establish that the differential constituted a denial of a benefit, the en banc court quoted at length from the sentencing transcript.

The transcript reveals that the en banc court was partially correct in its account of Judge Jackson's order. It is true that the trial judge first inquired as to whether the defendant was due the "full credit" allowed under the Guidelines. It also was reasonable for the judge to conclude that the defendant's admission of guilt constituted a "meager basis" upon which to give full credit. As the en banc court correctly noted, the judge gave the defendant the "major portion" of the "benefit" for acceptance of responsibility, but imposed a sentence that was six months longer than that available if full credit had been granted for acceptance of responsibility.

Nevertheless, the en banc court mischaracterized the sentencing order as a denial of a full benefit. The trial judge had explicitly linked the defendant's decision to go to trial to the six-month "additional" prison term.

The en banc court's interpretation allowed it to avoid the constitutional question of whether a judge may increase a sentence for failure to plead guilty. When the trial judge had asked for guidance on this specific question, the panel opinion responded to the judge's request by undertaking a thorough examination of the constitutional issues associated with a sentence enhancement. The en banc

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252. See *United States v. Jones*, 997 F.2d 1475, 1477 (D.C. Cir. 1993) (en banc) (asserting that sentencing transcript makes clear that judge was not enhancing defendant's punishment), cert. denied, 126 L. Ed. 2d 704 (1994).
253. Id. at 1475-77.
255. Id. at 3.
256. *Jones*, 997 F.2d at 1477 (quoting Sentencing Transcript at 13, *Jones* (No. 90-240)).
257. See Sentencing Transcript at 13, *Jones* (No. 90-240) (expressing discomfort with imposing minimum Guideline sentence because defendant who pled guilty could receive same sentence).
258. *Jones*, 997 F.2d at 1477 (asserting sentencing transcript's clarity regarding judge's partial denial of full benefit for acceptance of responsibility).
259. See Sentencing Transcript at 13, *Jones* (No. 90-240) (stating that "because ... the case did go to trial, I am going to add an additional six months to the Guideline sentence").
260. *Jones*, 997 F.2d at 1488 (Wald, J., dissenting) (asserting that court went "out of its way" to "avoid a troublesome constitutional conflict").
261. See Sentencing Transcript at 13, *Jones* (No. 90-240) ("I would like to have some thought given to the considerations I've articulated here today."); see also *Jones*, 997 F.2d at 1480 (Mikva, C.J., dissenting) (declaring that court "ought not fudge" when "an Article Three trial judge" calls for validation or invalidation of sentence in criminal case).
262. See *United States v. Jones*, 973 F.2d 928, 932-38 (D.C. Cir. 1992) (analyzing constitutional issues raised by applying precedent from other circuits and Supreme Court decisions), aff'd, 997 F.2d 1475 (D.C. Cir. 1993) (en banc), cert. denied, 126 L. Ed. 2d 704 (1994); see also supra...
court's characterization avoids such an analysis and further evades a discussion of the policy goals underlying plea bargaining.\textsuperscript{263} The following analysis, however, reveals that such issues are unavoidable, regardless of how the sentence is characterized.

2. Grants of leniency to defendants who plead guilty require withholding of leniency to those who do not

Having characterized the sentence as a denial of a benefit as opposed to a penalty, the en banc court upheld such a denial on the grounds that the granting of leniency to defendants who plead guilty requires the withholding of leniency from those who do not.\textsuperscript{264} The court identified the constitutional precedent that allows judges to show leniency to defendants who accept responsibility for their crimes.\textsuperscript{265} The court reasoned that the "whole notion of showing leniency to some deserving defendants" requires the withholding of leniency from less deserving individuals.\textsuperscript{266} In determining when to withhold leniency, the court asserted that, "[i]n the absence of . . . a 'Remorse-o-meter,'" a sentencing judge should look to objective conduct such as a guilty plea.\textsuperscript{267} In support of its conclusion that the failure to plead guilty requires the withholding of leniency, the court cited commentary accompanying the 1990 version of section 3E1.1 that advised against giving credit for acceptance of responsibility where a defendant has not pled guilty.\textsuperscript{268}

The court's assertion that there is a corollary between a reward and a denial of a reward appears true on its face. A reward is, by definition, available only to those who deserve it.\textsuperscript{269} In the context of sentencing, however, ascertaining whether a defendant is deserving involves the consideration of a number of factors, only one of which is the decision to plead guilty.\textsuperscript{270} Thus, if a corollary existed, section 3E1.1 would mandate an automatic reduction for pleading guilty and an automatic denial of that reduction for exercising the right to trial.

\textsuperscript{161-251} and accompanying text (presenting panel's analysis of constitutional issues).

\textsuperscript{263} See Jones, 997 F.2d at 1478 (stating that court need not address question of systemic benefit of reducing number of trials).

\textsuperscript{264} Id.

\textsuperscript{265} See id.

\textsuperscript{266} Id. (citing United States v. Wilson, 506 F.2d 1252, 1259-60 (7th Cir. 1974)).

\textsuperscript{267} Id.

\textsuperscript{268} Id. at 1478 & n.2; see 1991 U.S.S.G., supra note 10, § 3E1.1 comment. (n.2) (stating that "adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial").

\textsuperscript{269} See WEBSTER'S \textsc{THIRD} NEW \textsc{INTERNATIONAL} DICTIONARY at 1945 (1986) (defining "reward" as "something that is given in return for good or evil done or received").

\textsuperscript{270} See U.S.S.G., supra note 9, § 3E1.1, comment. (n.1) (listing factors that judge may consider as evidence of acceptance of responsibility).
Section 3E1.1 mandates neither. Indeed, as noted by Judge Wald in her dissent, there is evidence that the Sentencing Commission intentionally omitted such an automatic reduction in order to avoid the "constitutional dilemma of appearing to inflict a fixed penalty on defendants insisting upon a trial." As was indicated previously, the case law also has precluded judges from denying defendants a benefit solely for pleading guilty.

3. Judicial discretion to grant a partial benefit for acceptance of responsibility under the Guidelines

The en banc court also upheld the judge’s purported denial of leniency on the grounds that the sentence was well below the mandatory minimum for the defendant’s offense, even though it was six months longer than it would have been had the judge granted full credit for accepting responsibility. The court noted that the presumptive sentencing range for the defendant’s offense was 151-188 months. The court identified 151 months as the baseline for the defendant’s sentence. Thus, the court reasoned, any sentence below the baseline of 151 months could not properly be characterized as an enhanced sentence. According to the court, the trial judge merely gave the defendant four-fifths of the full credit available under the Guidelines for accepting responsibility.

The court’s conclusion that the judge had the discretion to grant such a partial benefit is flawed. Judge Jackson did not have discretion under the Guidelines to impose a sentence that was

271. Compare U.S.S.G., supra note 9, § 3E1.1 comment. (n.3) (explaining that guilty plea does not automatically entitle defendant to adjustment) with U.S.S.G., supra note 9, § 3E1.1 comment. (n.2) (stating that trial conviction does not automatically preclude sentence adjustment, but that it is rare situation where defendant clearly demonstrates acceptance of responsibility after exercising right to trial).


273. See supra note 234 and accompanying text (presenting cases where court looked with disfavor upon denial of benefit for sole reason that defendant went to trial).

274. See United States v. Sitton, 968 F.2d 947, 962-63 (9th Cir. 1992) (remaning to district court to make additional findings as to reasons for denying benefit of acceptance of responsibility reduction), cert. denied, 113 S. Ct. 478, and cert. denied, 113 S. Ct. 1306 (1993); see also supra note 235 and accompanying text (discussing Sitton).

275. See Jones, 997 F.2d at 1478-79 (explaining view that defendant’s sentence was not impermissible burden on constitutional right to trial).

276. Id. at 1478.

277. Id. at 1479.

278. Id.

279. Id.

280. See id. at 1479-80 (rejecting appellant’s argument that Guidelines do not permit grant of partial credit).
between the mandatory minimum and the full credit for acceptance of responsibility merely because he believed the mandatory minimum of 151 months to be "barbaric." Given this sentiment, the judge had only two choices: to sentence the defendant to the minimum of 151 months or to grant the two-level reduction for acceptance of responsibility, whereby the defendant would serve 121 months. The Guidelines contain no provision for partial credit for acceptance of responsibility.

Such a partial credit was held invalid in United States v. Valencia. In Valencia, the Fifth Circuit ruled that a judge could not grant a one-level reduction in sentence for acceptance of responsibility. The court expressed concern that, by permitting a one-level reduction, it would allow trial judges to "straddle the fence in close cases without explicitly finding whether the defendant did or did not accept responsibility." The rule adopted by the court in Jones has even more deleterious effects than the outcome ultimately rejected in Valencia. This is true because Jones allows judges both to straddle the fence regarding acceptance of responsibility and to consider against the defendant the exercise of a constitutional right.

III. Recommendations

Ultimately, as indicated by the foregoing analysis of the en banc and panel opinions, the distinction between sentence enhancement and denial of a benefit is irrelevant. Concerns of constitutional magnitude arise, as Judge Wald rightly noted in her dissent to the en banc opinion, whenever a judge considers, for purposes of sentencing, the exercise of a constitutional right against a defendant. The Jones case, therefore, highlights the need for Congress, through the Sentencing Commission, to clarify the boundaries within which a judge may make sentencing determinations based on a defendant's decision to go to trial.

The Sentencing Commission should consider proposing amend-

282. But see Jones, 997 F.2d at 1479 (reasoning that reliance on judge's observations is not relevant under Guidelines).
283. See U.S.S.G., supra note 9, § 3E1.1 & comment.
284. 957 F.2d 153 (5th Cir. 1992).
286. Id. But see Jones, 997 F.2d at 1479 (distinguishing Valencia in part because that court did not address concern that judge is barred from considering "belated and limited character" of acceptance of responsibility when sentencing within adjusted Guidelines range).
287. See Jones, 997 F.2d at 1484 (Wald, J., dissenting) (asserting that judges are prohibited from counting choice to go to trial as negative evidence of acceptance of responsibility either in enhancing sentence or denying credit).
ments for congressional enactment that would prevent judges from burdening the exercise of the right to trial at sentencing. Two avenues exist for sentencing reform, and the Commission should consider both. First, the Commission should propose an amendment to section 3E1.1 to prohibit judges from imposing enhanced sentences or denying the benefit of a sentencing reduction for the sole reason that a defendant pled guilty.

Through such an amendment the Commission has an opportunity to establish a bright-line rule prohibiting judges from using the decision to go to trial as negative evidence against the defendant when considering sentencing. At the same time, the Commission has an occasion to establish a rule that affirms the longstanding practice of evaluating a defendant's decision to plead guilty as positive evidence in the defendant's favor. Such a practice is valuable because it encourages plea bargaining in a way that benefits both the defendant and society. This mutual benefit is better suited to the notion of plea bargain-as-contract than is the practice of weighing the exercise of a constitutional right against a defendant.

Nevertheless, one argument against establishing a bright-line rule that prohibits judges from weighing the decision to go to trial against a defendant is that judges would find their discretion unreasonably constrained by such a rule. For example, it is possible to argue that under such a rule, a judge could not deny a reduction if the only evidence of failure to accept responsibility were the decision to go to trial. Requiring defendants to offer and judges to accept additional evidence suggesting contrition, however, is not unreasonable given the importance of preserving constitutional rights.

Another objection to a bright-line rule prohibiting judges from considering the exercise of a constitutional right is the possibility that such a prohibition would "ensure a lack of candor in sentencing."

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291. See Jones, 997 F.2d at 1487 (Wald, J., dissenting) (arguing that, if defendant offers other timely affirmative evidence of acceptance of responsibility, decision to exercise right to trial should not be counted against him).

292. Supplemental Brief for Appellee at 28-29, Jones (No. 91-3025).
Judges, however, would be more likely to be wary of revealing their motives under the rule adopted in Jones. The decision encourages judges to portray what is actually an enhancement for going to trial as a denial of a full benefit.293

If Congress or the Commission allows the Jones decision to stand, it is likely that other circuits, also facing tremendous strains on judicial resources, would allow their judges to establish sentence enhancement schemes.294 Such sentencing practices would chill the exercise of the constitutional right to trial and lead to an increase in false guilty pleas. Allowing judges to encourage pleas of guilty through sentence enhancements would also cause defendants to question the neutrality of judges at trial.

Under some circumstances, a limited burdening of the right to trial in order to reduce the strain on prosecutorial and judicial resources is permissible, especially where the defendant stands to gain from the scheme. Such a scheme, however, is best developed by the Sentencing Commission or Congress, not by the courts. The Jones decision demonstrates the danger posed to constitutional rights if courts are allowed to encourage guilty pleas. The decision permits judges to take unilateral action to reduce crowded dockets by encouraging guilty pleas through differential sentencing. Such unilateral judicial action, though, conflicts with the policy of some prosecutors to abstain from plea negotiations. The Jones decision thus resolves what is essentially a policy conflict between the judicial and executive branches of government by penalizing the defendant. Such a resolution ultimately bears too high a cost because of its potential to chill the exercise of the constitutional right to trial.

Second, Congress or the Sentencing Commission should reform the Guidelines' mandatory minima. Currently, the mandatory minima for many offenses, particularly certain drug offenses, are excessive.295 There is evidence that the excessive penalties reduce the frequency of guilty pleas.296 Given the prospect of lengthy mandatory sentenc-

293. See Jones, 997 F.2d at 1487 (Wald, J., dissenting) (asserting that prohibiting judges from weighing exercise of constitutional rights “more faithfully preserves the constitutional neutrality of the Guidelines scheme”).
296. Id. The Federal Courts Study Committee reported:

[Lengthy mandatory minimum sentences] seriously frustrate the normal and salutary process of pretrial settlements in criminal cases. Even defendants who have little doubt
es, defendants have little incentive to plead guilty, especially where
the available reduction for pleading guilty is disproportionately small
when compared to the mandatory minimum sentence. Through the
elimination of excessive sentences, defendants would have more
incentive to plead guilty, prosecutors would gain a greater advantage
in plea negotiations, and courts would benefit from a decreased
burden on their dockets. Most important, all these benefits would be
achieved without chilling the exercise of a constitutional right.

CONCLUSION

By allowing judges to weigh the decision to go to trial as the sole
evidence of failure to accept responsibility, the D.C. Circuit in United
States v. Jones establishes a dangerous precedent that will undoubtedly
chill the exercise of the right to trial. Explicitly in its panel opinion
and implicitly in its en banc opinion, the court demonstrates a
legitimate concern for the conservation of judicial resources. The
zealousness with which the court attended to this concern, however,
led to an infringement of an individual's constitutional rights.
Furthermore, the court evidences little regard for the distinct roles of
the judicial, executive, and legislative branches in an adversarial
system of criminal justice. The questions the court raises concerning
the extent to which judges may burden the right to trial merit
consideration. Ultimately, it is possible to preserve both the constitu-
tional right to trial and scarce judicial resources by prohibiting judges
from weighing the decision to go to trial as the sole evidence of
failure to accept responsibility while permitting leniency toward those
who plead guilty.

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Id.; see also Petition For Writ of Certiorari at 23-26, United States v. Jones, 126 L. Ed. 2d 704
(1994) (arguing that excessive mandatory minimum sentences have caused decline in plea
bargaining).