

# SDNY Sentencing Ruling Is Boon For White Collar Defendants

By **Sarah Sulkowski** (March 28, 2025, 4:44 PM EDT)

White collar defense counsel frequently lament the so-called trial penalty — the often exorbitant additional sentencing exposure faced by defendants who decline to plead guilty and instead insist on their day in court.[1]

A 2015 study published in the Mississippi Law Journal found that federal defendants who go to trial "can expect a sixty-four percent longer sentence if convicted" than those who plead guilty.[2]

Small wonder, then, that more than 90% of federal defendants opt to enter guilty pleas rather than go to trial.[3]

One federal judge in the U.S. District Court for the Southern District of New York recently weighed in on the issue in dramatic fashion, announcing that the U.S. sentencing guidelines unconstitutionally penalize the right to a jury trial by imposing just such a trial penalty.



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On March 10, U.S. District Judge Jed S. Rakoff issued his opinion in *U.S. v. Tavberidze*.<sup>[4]</sup> In that opinion, Judge Rakoff announced that he will henceforth apply to all defendants the one-point offense level reduction prescribed by Section 3E1.1(b) of the sentencing guidelines. By its terms, Section 3E1.1(b) is available only to defendants who, in the prosecution's view, plead guilty early enough to spare the government the burden of trial preparation.<sup>[5]</sup>

The Tavberidze decision is a boon to white collar defense counsel, particularly if other courts deem its reasoning persuasive, because the deduction provided for in Section 3E1.1(b) can have a significant effect on a defendant's ultimate sentence.

By tailoring their arguments to guidelines concerns widely shared by federal judges, as described below, practitioners can maximize Tavberidze's impact in their own cases.

## Guidelines Section 3E1.1

Section 3E1.1, titled "Acceptance of Responsibility," provides, in relevant part:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is Level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

Thus, Section 3E1.1(b) authorizes a one-level decrease where:

- The defendant qualifies for a two-level decrease for acceptance of responsibility under Section 3E1.1(a);
- The defendant has a total offense level of at least 16 prior to the application of Section 3E1.1; and
- The government moves for the additional one-point decrease pursuant to Section 3E1.1(b), and confirms that the defendant indicated an intention to plead guilty early enough to spare the government the burden of preparing for trial.

Application Note 6 to Section 3E1.1 emphasizes that,

[i]n general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.[6]

### **Judge Rakoff's Ruling**

Judge Rakoff began his Tavberidze opinion by explaining that it is his typical practice, "where appropriate (as in cases involving a single crime or unified criminal activity where no mandatory minimum is involved)," to "try to mitigate the trial penalty" by "inform[ing] an accused that if he goes to trial and is convicted, the Court will not impose a greater sentence than if he pleads guilty to the same activity." [7]

In other words, Judge Rakoff already customarily deducts the three points provided for by Section 3E1.1 wherever he can, irrespective of whether a defendant elects to plead guilty or go to trial.

The Tavberidze opinion then takes aim directly at Section 3E1.1(b), opining that it "ought not even be included in the Guidelines calculation at all, because in reality it is an unconstitutional penalty imposed on a defendant for exercising his constitutional right to trial." [8] Judge Rakoff explains:

[W]hereas section 3E1.1(a) at least arguably justifies [its deduction of two points for acceptance of responsibility] as a reward for a defendant's demonstrating genuine remorse, the only ground given for imposing the additional penalty under 3E1.1(b) is that the defendant failed to save the Government from having to prepare for trial. This cannot possibly be an adequate ground for penalizing a defendant for the exercise of a constitutional right. Worse still, on this flimsy basis section 3E1.1(b) penalizes a defendant who just takes too long to decide whether he wants to assert his constitutional right to trial, even if he ultimately waives it. [9]

The Tavberidze opinion also notes the potentially significant consequences of Section 3E1.1(b)'s one-point penalty, which "can shift the Guidelines range by years, and even make the difference between a fixed-term and a life sentence" at the high end. [10]

Section 3E1.1(b) can also have a decisive effect at the low end on the choice between jail time, on the one hand, and home detention or probation, on the other. [11]

### **The Merits of Judge Rakoff's Approach**

The Tavberidze ruling is welcome news for white collar and other defendants who wish to exercise their rights to trial by jury — as well as for those who merely desire an opportunity to weigh their options without the pressure of an unduly accelerated plea deadline.

But will other courts follow suit?

The answer depends on which of two U.S. Supreme Court precedents is more apposite to the circumstances presented by Section 3E1.1(b): 1968's *U.S. v. Jackson*, [12] or 1978's *Corbett v. New Jersey*. [13]

In Jackson, the court invalidated a provision of the Federal Kidnapping Act that rendered a defendant eligible for the death penalty if he was found guilty by a jury at trial — but not if he entered a guilty plea — and made imposition of the death penalty mandatory if the trial jury recommended it.[14]

The Jackson court held that the threat of a mandatory death sentence as a consequence of insisting on a trial by jury unduly chilled defendants' exercise of their Sixth Amendment rights:

The question is not whether the chilling effect is "incidental" rather than intentional; the question is whether that effect is unnecessary, and therefore excessive. In this case the answer to that question is clear. The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial.[15]

Ten years after Jackson, the Supreme Court decided Corbitt, a Sixth Amendment challenge to a state statute that imposed different sentences for defendants who pled and those who went to trial on first-degree murder charges.

The statute at issue in Corbitt mandated a life sentence for a defendant convicted of first-degree murder at trial, but gave judges discretion whether to impose a life sentence or a sentence of up to 30 years for a defendant who pled nolo contendere to the same charge.[16]

The defendant in Corbitt argued that Jackson required invalidation of the statute.[17] The Corbitt court disagreed, holding that "not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." [18]

Because pleading guilty under the statute at issue in Corbitt did not ensure a defendant's safety from the maximum sentence — unlike the statute in Jackson, which did — and because "it is not forbidden to extend a proper degree of leniency in return for guilty pleas," the court upheld the New Jersey statute over Corbitt's challenge.[19]

Is Section 3E1.1(b) of the sentencing guidelines more akin to the statutory provision invalidated in Jackson, or the one upheld in Corbitt?

The answer may lie in the advisory nature of the sentencing guidelines after U.S. v. Booker, in which the Supreme Court held in 2005 that, under an advisory guidelines regime, a judge may constitutionally base a sentencing enhancement on facts not found by a jury, despite the constitutional right to have a jury find all facts that subject a defendant to an increased maximum sentence.[20]

After all, under Section 3E1.1(b) — as under the guidelines as a whole post-Booker — the sentencing court retains the discretion to impose any sentence it finds appropriate within the scope prescribed by Congress, whether within or outside the guidelines range.

Thus, like the statute approved in Corbitt, and in contrast with the one rejected in Jackson, Section 3E1.1(b) on its face does not mandate — or forbid — that a judge impose any sentence in particular.

Judge Rakoff appears to have anticipated this argument, as he offered several rebuttals. For one, he pointed out that Section 3E1.1(b) "penalizes the exercise" of a defendant's Sixth Amendment jury-trial right by pressuring the defendant "to plead guilty at the outset of his case, rather than after more deliberate investigation." [21]

However, although some federal courts have ruled that time pressure may indeed render a plea effectively involuntary,[22] most courts appear reluctant to invalidate pleas on this basis.[23]

More persuasively, Judge Rakoff points out that, even under a post-Booker advisory guidelines regime, a judge is required to begin the sentencing analysis by calculating the applicable guidelines range, and must then determine a defendant's final sentence by "consider[ing] the extent of the deviation [from the Guidelines range] and ensur[ing] that the justification is sufficiently compelling to support the degree of variance." [24]

In other words, the guidelines exert a so-called anchoring effect, inevitably affecting a court's final sentencing decision.

In 2013, U.S. Circuit Judge Guido Calabresi of the U.S. Court of Appeals for the Second Circuit aptly described such effects as follows in *U.S. v. Ingram*:

The so-called "anchoring effects" long described by cognitive scientists and behavioral economists ... show why the starting, guidelines-departure point matters, even when courts know they are not bound to that point. When people are given an initial numerical reference, even one they know is random, they tend (perhaps unwittingly) to 'anchor' their subsequent judgments — as to someone's age, a house's worth, how many cans of soup to buy, or even what sentence a defendant deserves — to the initial number given.[25]

Other courts have also expressed concern about such effects, including more than a few federal appellate courts. In *U.S. v. Navarro*, the U.S. Court of Appeals for the Seventh Circuit in 2015 reversed the lower court's judgment and remanded for resentencing upon a finding that "[t]he improper upper guidelines number offered by the government may well have anchored the district judge to an inflated sentencing range." [26]

The U.S. Courts of Appeals for the First,[27] Fourth,[28] Fifth,[29] Sixth,[30] and District of Columbia Circuits[31] have vacated and remanded for resentencing on similar grounds, as have various federal district courts.[32]

Thus, given the widespread judicial concern about the sentencing impact of inaccurate anchoring, Tavberidze's most significant contribution to the guidelines discourse may be in pointing out that Section 3E1.1(b) systematically and inevitably skews the sentencing calculus against a defendant who insists on exercising their Sixth Amendment right to a trial by jury.

Viewed through this lens, Section 3E1.1(b) begins to look much more like the statute struck down in *Jackson*, with its nearly automatic impact on such defendants, than like the statute upheld in *Corbitt*, which offered all defendants convicted on the same charge at least the possibility of equal sentences.

### **Guidance for Defense Counsel**

Tavberidze is sure to capture the attention of jurists and practitioners alike, and to prompt serious discussion of the relative merits of encouraging timely pleas and safeguarding fundamental rights.

Defense counsel seeking to persuade sentencing judges to follow Judge Rakoff's approach would be well advised to focus their arguments on the area of greatest demonstrated judicial concern: the predictable and unidirectional effect of the Section 3E1.1(b) trial penalty at sentencing.

Under the anchoring analysis — unlike the situation in *Corbitt*, where some individuals who pled guilty would receive the same life sentences as those who proceeded to trial — Section 3E1.1 ensures that those who exercise their Sixth Amendment right to a jury trial will always fare worse at sentencing than they would have if they had entered early guilty pleas.

Linking the Tavberidze approach to the federal courts' long-standing concern about erroneous anchoring offers the best opportunity to expand the impact of this groundbreaking ruling.

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[1] See, e.g., Nat'l Ass'n of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 10, 2018) ("The 'trial penalty' refers to

the substantial difference between the sentence offered in a plea offer prior to trial versus the sentence a defendant receives after trial. To avoid the penalty, accused persons must surrender many other fundamental rights which are essential to a fair justice system."), available at <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>; Walter I. Gonçalves, Jr., "How Much Time Am I Looking At?": Plea Bargains, Harsh Punishments, and Low Trial Rates in Southwest Border Districts, 59 Am Crim. L. Rev. 293, 299 & n.24 (2022) ("A trial penalty is punishment a court metes to a defendant for exercising his or her right to a jury trial.").

[2] Andrew Chongseh Kim, Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study, 84 Miss. L.J. 1195, 1202 (2015).

[3] United States Courts, Criminal Cases, available at <https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases#:~:text=The%defendant%20enters%20a%20plea,rather%20than%20go%20to%20trial.>

[4] Case No. 23-cr-585-03 (JSR) (S.D.N.Y.).


[5] *Id.*, Docket No. 143 (Mar. 10, 2025).

[6] U.S Sentencing Guidelines Manual ("U.S.S.G.") § 3E1.1 cmt. n.6 (U.S. Sentencing Comm'n 2024).

[7] Tavberidze, Docket No. 143, at 3 (footnote omitted).

[8] *Id.* at 4.

[9] *Id.* at 10.

[10] *Id.* at 10-11 (quotation marks omitted) (quoting *Longoria v. United States* , 141 S. Ct. 978, 979 (2021) (Mem.) (statement of Sotomayor, J., joined by Gorsuch, J., regarding denial of petition for writ of certiorari)).

[11] *Id.* at 11.

[12] 390 U.S. 570 (1968).

[13] 439 U.S. 212 (1978).

[14] 390 U.S. at 581 ("Under the Federal Kidnaping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die.").


[15] *Id.* at 582 (citations omitted).

[16] 439 U.S. at 214-15.

[17] *Id.* at 216-17.

[18] *Id.* at 218 (footnote omitted).

[19] *Id.* at 221-23.

[20] 543 U.S. 220, 223 (2005) (holding that mandatory Sentencing Guidelines violate a defendant's Sixth Amendment right to have a jury find facts that require a greater sentence than would otherwise apply, but advisory Guidelines do not) ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to different sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); see also *Apprendi v. United States* , 530 U.S. 466, 481 (2000) ("We should be clear that nothing . . . suggests that it is impermissible for judges to exercise discretion—taking into

consideration various factors relating both to offense and offender—in imposing judgment within the range prescribed by statute.”).

[21] Tavberidze, Docket No. 143, at 14.

[22] See, e.g., *United States v. Bruzón-Velázquez* [🔴](#), 475 F. Supp. 3d 86, 89-90 (D.P.R. 2020) (“Time pressure may be relevant to whether a defendant can withdraw a guilty plea. For example, a defendant may not have had sufficient time either to adequately discuss a plea with his attorney or to understand its contents well enough to enter it intelligently.”); *United States v. Jackson* [🔴](#), No. 02 CR. 756 (LMM), 2005 WL 323715, at \*2 (S.D.N.Y. Feb. 10, 2005) (“Here, the court must conclude that—because of perceived time pressure and defendant’s lack of focus—there is a significant question about the voluntariness of the original plea.”) (quotation marks and citation omitted).

[23] See, e.g., *United States v. Marrero-Rivera* [🔴](#), 124 F.3d 342, 350 (1st Cir. 1997) (“Finally, the strategic decision to plead guilty was not rendered involuntary by the anxieties and time pressures confronting Marrero. The unenviable position in which Marrero found himself is common among criminal defendants, and hardly exceptional enough to evince an overbearing of his will or to have precluded a rational assessment of the available options.”); *Miles v. Dorsey* [🔴](#), 61 F.3d 1459, 1469 (10th Cir. 1995) (“Although deadlines, mental anguish, depression, and stress are inevitable hallmarks or pretrial plea discussions, such factors considered individually or in aggregate do not establish that Petitioner’s plea was involuntary.”); *Topp v. Burt* [🔴](#), No. 08-cv-11748, 2011 WL 1157906, at \*9 (E.D. Mich. Mar. 28, 2011) (“With respect to the amount of time a defendant has to decide whether to accept or reject a plea, several courts have held that time constraints do not render involuntary a plea that the record otherwise demonstrates was entered into knowingly and voluntarily.”) (collecting cases).


[24] Tavberidze, Docket No. 143, at 12 (quotation marks omitted) (quoting *Peugh v. United States* [🔴](#), 569 U.S. 530, 541 (2013)).


[25] *United States v. Ingram* [🔴](#), 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) (footnote and citation omitted); see also Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 495 (2014) (“Anchoring is a cognitive bias that describes the human tendency to adjust judgments or assessments higher or lower based on previously disclosed external information—the ‘anchor.’ Studies demonstrate that decisionmakers tend to focus their attention on the anchor value and to adjust insufficiently to account for new information. . . . Amazingly, repeated studies show that the ‘anchor’ produces an effect on judgment or assessment even when the anchor is incomplete, inaccurate, irrelevant, implausible, or random.”) (quotation marks and footnotes omitted).


[26] 817 F.3d 494, 501 (7th Cir. 2015).


[27] *United States v. Alphas* [🔴](#), 785 F.3d 775, 780 (1st Cir. 2015) (“Although the court below imposed a sentence beneath the bottom of the GSR [Guidelines sentencing range], there is at least a possibility that the court would have imposed an event more lenient sentence had it started with a lower GSR. While the court stated that a lower GSR was ‘unlikely’ to result in a different sentence, we have recently reaffirmed that the possibility of a lesser sentence is enough to preclude a finding that an error in calculating the GSR is harmless.”) (citation omitted), superseded on other grounds by U.S.S.G. § 2B1.1 as amended (2015); see also *United States v. Rivera-Ortiz* [🔴](#), 14 F.4th 91, 102-03 (1st Cir. 2021) (“[The government] suggests that, even if the district court made a mistake in the loss calculation, any mistake was harmless, since the district court departed downward from the guidelines recommendation and imposed only a probationary sentence. But our precedents do not permit us to assume harmlessness in this fashion. There is still a reasonable possibility that the high guidelines range calculated by the district court had an anchoring effect and influenced its assessment of the appropriate punishment.”) (citing *Alphas*, 785 F.3d at 780).

[28] *Whiteside v. United States* [🔴](#), 748 F.3d 541, 551 (4th Cir. 2014) (“The Guidelines range, although advisory, retained its anchoring effect throughout Whiteside’s sentencing. It is just that the anchor was dropped in the wrong place.”), vacated on other grounds, 775 F.3d 180 (4th Cir. 2014) (en banc) (holding that habeas petition was untimely filed and thus issues were unreviewable).

[29] **United States v. Mecham** , 950 F.3d 257, 268 (5th Cir. 2020) ("[W]ithout more, a court's commonplace consideration of the statutory sentencing factors does not render a sentencing error harmless. We have found that to be the case even when the court imposes an out-of-Guidelines sentence. When the court imposes a sentence at the low end of the Guidelines, making it more likely the advisory range had an anchoring effect, a court's mere consideration of the § 3553(a) factors is an even weaker basis for finding harmlessness.") (citation omitted).

[30] **United States v. Cloud** , No. 22-3821, 2023 WL 10555163, at \*1 (6th Cir. Nov. 16, 2023) ("The recalculated Guidelines range serves as an 'anchor' on the sentencing proceeding. Where, as here, a potential resentencing is anchored in the wrong place, the district court has a limited perspective about whether a reduced sentence may be available and whether (or to what extent) a variance from the accurate Guidelines range is warranted.").

[31] **United States v. Green** , 996 F.3d 176, 186 (D.C. Cir. 2021) ("We agree with the government that the district court made clear, on the record, its intention to impose a sentence of more than 120 months. But it does not follow that the district court necessarily would have imposed a sentence of 144 months—and not some lower number of months between 120 and 144—had it understood that its sentence represented not a downward variance from the 151-to-188 month range it had incorrectly calculated but instead an upward variance from the actual 77-to-96 month range. To the contrary . . . the Guidelines range is presumed to have the kind of anchoring effect that might well have affected the district court's selection of a sentence above 120 months.").

[32] See, e.g., **United States v. Grupee** , 219 F. Supp. 3d 221, 227 (D. Mass. 2016) ("While there is authority that the Court need not resentence Grupee if the same sentence would have been imposed under either guideline range, by far the better practice is to afford a completely fresh resentencing whenever it is determined that the Guidelines have been improperly calculated. This makes sense . . . [because] there is an anchoring effect, a gravitational pull to the Guidelines.") (citations and footnote omitted); **United States v. Woods**, No. 17-CR-103-LJV, 2024 WL 3337819, at \*2 (W.D.N.Y. July 9, 2024) (accepting defendant's argument that his sentence should be reduced due to "anchoring effect on the ultimate sentencing decision" of prior Guidelines<sup>7</sup> range, which had since been retroactively lowered).