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Judge Rakoff's Sentencing Shot Across the Bow

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U.S. District Senior Judge Jed S. Rakoff of the Southern District of New York has long believed that a convicted federal criminal defendant who insists on a trial gets a raw deal at sentencing simply for having pleaded not guilty and exercised the constitutional right to a trial. In a world where guilty pleas have become the norm, and some 97% of defendants plead guilty, he has not been shy about saying that he wants to see the law changed to encourage more defendants to go to trial. (See "Why the Innocent Plead Guilty and the Guilty Go Free" Rakoff, J., Farrar, Straus and Giroux, 2021.)

Now, he has gone one step further: in *United States v. Tavberidze*, 23-cr-585-03 (JSR), Rakoff issued an opinion and follow-up order (2025 WL 748354 (Mar. 10, 2025) and 2025 WL 826917 (Mar. 14, 2025)) holding that U.S.S.G. § 3E1.1(b), the provision of the U.S. Sentencing Guidelines that awards a

Jed S. Rakoff at the New York City Bar Association's Benjamin N. Cardozo Lecture on Oct. 23, 2024

sentencing reduction of one guidelines point to a defendant who accepts responsibility for his offense and timely notifies the government that he intends to plead guilty, actually violates a defendant's Sixth Amendment right to trial and is therefore unconstitutional. In Rakoff's view, this provision imposes an unconstitutional burden, or "trial penalty," on a defendant who demands a trial, simply because preparing for and conducting that

trial might be time consuming and costly to the court and the government.

Rakoff's approach upends the conventional wisdom that it is the defendant who pleads guilty who gets a *benefit* from § 3E1.1(b), not the defendant who goes to trial who is unfairly penalized. The Sentencing Guidelines explicitly reward a defendant a two-point reduction in offense level under U.S.S.G. § 3E1.1(a) if he "clearly demonstrates acceptance of responsibility" for his crimes by pleading guilty. And he receives an additional one-point deduction under U.S.S.G. § 3E1.1(b) if he pleads guilty in a manner that saves the prosecutor the added burden of pretrial litigation. These added "sentencing breaks" for pleading defendants can indeed result in meaningful sentence reductions.

Significantly, the one-point reduction under U.S.S.G. § 3E1.1(b) requires a motion by the government. Rakoff, long troubled by the fact of too few trials, views the extra one-point reduction provided by U.S.S.G. § 3E1.1(b) as a benefit only to the government, not the pleading defendant.

Rakoff, importantly here, has long had an uncommon sentencing practice among district judges. Where appropriate, particularly in cases that do not involve mandatory minimum terms, he informs defendants *on the record at the outset of the case* that there will be no sentencing "penalty" if they go to trial and are convicted. Why? In part because—and he is, of course, correct—prosecutors often over indict in order to exact guilty pleas from defendants.

Following his longstanding practice, Rakoff told Tavberidze that he would suffer no sentencing enhancement for going to trial. So, Tavberidze may well have concluded that he had little to lose by electing to exercise his constitutional right. After Tavberidze was convicted by a jury, Rakoff issued a pre-sentence opinion in which he reaffirmed his promise to accord Tavberidze the two-point sentencing reduction—the same reduction the defendant would have received under § 3E1.1(a) had he pleaded guilty. The two-point reduction for "clearly demonstrate[d] acceptance of responsibility" under § 3E1.1(a), however, does not require a motion from the government. But then Rakoff said he would also give Tavberidze the additional one-point reduction under § 3E1.1(b), *even without a motion from the government* that is otherwise required, because he believed that this section is unconstitutional.

As Rakoff explained, § 3E1.1(b) violates a defendant's Sixth Amendment right to trial in at least two respects. First, the primary beneficiary of § 3E1.1(b) is the government, and a defendant who simply takes too long to decide whether to exercise his constitutional right to trial, or fails to save the government the expense of preparing for trial, is penalized by not receiving the one-point reduction. Even more problematic, in Rakoff's view, is the fact that it is the government—and not the trial judge—who gets to decide whether and to what extent the defendant has relieved the government of the expense and effort of preparing for trial. Ceding this discretion to the government, rather than to the trial judge, further amplifies the pressure on a defendant to

plead guilty, unfairly burdening the defendant's constitutional right.

The *Tavberidze* decision has earned kudos from the criminal defense bar—after all, every defense attorney in America would heartily agree with Rakoff: a criminal defendant should not be *punished* with a harsher sentence if, instead of pleading guilty, he exercises his Sixth Amendment right to trial. But many federal district judges see the "trial penalty" issue altogether differently. While these judges generally do impose more prison time on defendants who insist on a trial, they see defendants who plead guilty as receiving the benefit of a reduction, not the trial defendants as getting penalized with longer sentences.

One could imagine that many more defendants would have less reason to plead guilty if a significant number of other judges within the Second Circuit adopted Rakoff's protocol of telling defendants at the outset that they won't be sentenced more harshly simply because they exercise their Sixth Amendment right to trial. And if Rakoff's *Tavberidze* decision is affirmed by the circuit, and depending on how the court decides the case, it will theoretically mean that a significant number of trial defendants within the Second Circuit could be eligible for both the one-point and two-point reductions embodied in § 3E1.1 with no motion from the government.

It will be interesting to see what the circuit says about all this. In the meantime, expect all criminal defense lawyers whose clients are convicted at trial to cite Rakoff's ruling in *Tavberdize* in connection with sentencing.

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