No. ______________________

In the

Supreme Court of the United States of America

RACIEL LEON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Petition for Writ of Certiorari

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Question Presented

I. This Court has held that any provision whose purpose and effect are to "needlessly encourage" guilty pleas is "patently unconstitutional." Pursuant to the "acceptance-of-responsibility" sentencing guideline, the petitioner received, because he exercised his right to trial, a materially higher sentence than two equally culpable conspirators who pleaded guilty. Did the district court unconstitutionally penalize the petitioner for exercising his constitutional rights by predicating his higher sentence on his election to stand trial?

II. As the Department of Justice recognizes, a judge who is also a U.S. Sentencing Commissioner must recuse himself from cases bringing a significant challenge to the Federal Sentencing Guidelines. Although this case brought such a challenge, the Sentencing Commission's acting chair served as a judge on the panel, whose opinion ignored the petitioner's points and authorities. Did the judge-commissioner's failure to recuse himself deny the petitioner due process on appeal?

Interested Parties

These people have an interest in the outcome of this case by virtue of their position as United States Sentencing Commissioners:

Professor Rachel Barkow

Zachary Bolitho, *ex officio* member

The Hon. Charles Breyer, Senior District Court Judge

The Hon. William Pryor, Jr., Acting Chair, Circuit Court Judge

The Hon. Danny Reeves, District Court Judge

J. Patricia Wilson Smoot, *ex officio* member

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Statutory and other authority

Petition for Writ of Certiorari
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Raciel Leon respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in United States v. Raciel Leon, No. 17-11070, which affirmed the judgment of the United States District Court for the Southern District of Florida.

Opinion Below

The decision of the United States Court of Appeals for the Eleventh Circuit is appended to this Petition. Its order denying rehearing is appended as well.

Basis for Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291, which provides that courts of appeals shall have jurisdiction for all final decisions of United States district courts. The decision of the Court of Appeals for the Eleventh Circuit was entered on January 19, 2018. The petitioner timely petitioned the Eleventh Circuit for rehearing *en banc*. The Eleventh Circuit denied the petition for rehearing on March 19, 2018. This petition is timely filed.

Provisions of Law Involved

The provisions of law implicated in this appeal are appended.

Statement of the Case

Raciel Leon was indicted for participating in a large scheme to defraud Medicare. Specifically, Mr. Leon was charged with a dual-object conspiracy to commit health-care fraud and wire fraud in violation of 18 U.S.C. § 3149 and a multi-object conspiracy to defraud the United States and pay and receive kickbacks in violation of 18 U.S.C. § 371. Mr. Leon exercised his trial rights. The jury convicted him on both counts.

The Federal Sentencing Guidelines recommended a prison term of more than 10 years for Mr. Leon. Before sentencing, he objected to certain guidelines enhancements and also requested a variance from the recommended sentence. In support of his request for a variance, Mr. Leon argued that, because he stood trial, the guidelines prescribed a substantially longer sentence for him than two equally culpable conspirators who pleaded guilty had received. Specifically, Mr. Leon argued that Jesus Perez, who was sentenced to slightly less than 6 years in prison, and Ana Rumbaut, who was sentenced to 7½ years, bore equal responsibility for the schemes.[*]

At the sentencing hearing, the government agreed that Mr. Leon was "most similarly situated with" Ms. Rumbaut and Mr. Perez in terms of culpability. It nonetheless insisted that Mr. Leon's sentence be higher than theirs because he went to trial. Mr. Leon maintained that a longer sentence would be unreasonable: "But for [Mr. Leon] to get even, you know, more than 70 months, something like Jesus Perez got, that just wouldn't seem fair, Judge."

[*] Mr. Rumbaut and Mr. Perez would later have their sentences reduced for their "substantial assistance" to the prosecution but, while Mr. Leon's case was pending in the district court, neither of them had received any cooperation reduction.

In rebuttal, the government maintained that Mr. Leon deserved a much longer sentence, even though he was no more culpable than Mr. Perez. As the prosecutor explained, "If we were to use the sentencing guidelines, [Mr. Perez] would be where the defendant is now, at a level 32, which is 121 to 151 months, if he had not cooperated and got the three points for acceptance of responsibility." Mr. Leon's counsel immediately noted that Mr. Perez had not yet received any cooperation reduction: "Yes, sir. Just one thing. And I'm sure it was an honest mistake by the government. Jesus Perez got 70 months. He's got a Rule 35 pending. So he got that 70 months before. *That wasn't after cooperation.*"

The district court imposed a 10½-year prison sentence on Mr. Leon anyway. Specifically, it sentenced him to 126 months on the § 3149 conspiracy and to a concurrent 60 months on the § 371 conspiracy. The record thus shows that Mr. Leon received substantially more time in prison than his equally culpable conspirators solely because he "put[] the government to its burden of proof at trial," U.S.S.G. § 3E1.1 cmt.2, while they pleaded guilty.

On appeal, Mr. Leon named every member of the United States Sentencing Commission in his certificates of interested persons because the Department of Justice and some courts of appeals have held that judges who serve on the Sentencing Commission are conflicted from adjudicating substantial challenges to the guidelines system. An Eleventh Circuit judge was then and is now the chair of the Sentencing Commission. Despite Mr. Leon having named this judge as an interested person, the judge-commissioner participated without explanation on the panel that rejected Mr. Leon's appeal. Mr. Leon did not know that the judge-commissioner was a member of his panel until the opinion issued because the

Eleventh Circuit discloses the panel composition to litigants only when oral argument is ordered or the appeal is decided. The court did not hear argument in this case.

On the merits, Mr. Leon showed that the district court understood his argument that it was unreasonable and unfair to punish him for deciding to stand trial. His brief identified the guidelines' acceptance-of-responsibility provision, U.S.S.G. § 3E1.1, as the cause of the unconstitutional disparity. It explained that the Eleventh Circuit had not examined that provision since the Commission substantially revised it in 1990. The brief further explained that the new § 3E1.1 differs from its precursor in two constitutionally significant ways. First, it creates a significantly larger penalty for exercising the right to trial than the original version. Second, it expressly conditions that penalty on the defendant's election to "put[] the government to its burden of proof at trial." U.S.S.G. § 3E1.1 cmt. 2.

Mr. Leon's principal authority for his argument was this Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968), which held that any provision of law that "needlessly encourages" guilty pleas is "patently unconstitutional." No court has ever examined the acceptance-of-responsibility guideline in light of *Jackson*. In this case, neither the government nor the court of appeals so much as mentioned *Jackson*, even though it was Mr. Leon's principal authority.

The government thus made no effort to distinguish *Jackson* or to rebut its controlling application to this case. Its response acknowledged that Mr. Perez's sentence before any cooperation reduction was 70 months and Ms. Rumbaut's was 90 months, while Mr. Leon's was 126 months. It argued that the court of appeals could review only for plain error because Mr. Leon did not specifically mention the Due Process Clause at sentencing. Because the government never mentioned *Jackson*, it did not explain why that decision's rationale and holding failed to establish that the district court plainly erred in penalizing Mr. Leon for exercising his trial rights.

Mr. Leon replied that his argument was preserved because the claim that a disproportionate sentence is unreasonable is identical, under these circumstances, with the claim that it violates due process; his briefs merely marshaled additional support for the same argument. Alternatively, he maintained that he met the plain-error standard because *Jackson* established that any legal provision designed to discourage defendants from exercising their trial rights is "patently unconstitutional."

The Eleventh Circuit affirmed without mentioning *Jackson*. Its opinion did not explain why plain-error review applied or why Mr. Leon did not meet his burden under that standard. Even though it was undisputed that Mr. Leon was similarly situated to two other conspirators, the panel inexplicably asserted that he was not. Instead of considering the new version of § 3E1.1 in light of *Jackson*, the panel applied Eleventh Circuit precedents decided before the Commission substantially revised the acceptance-of-responsibility guideline. It applied these inapposite cases even though Mr. Leon had expressly pointed out in his brief that the 1990 revision to § 3E1.1 had abrogated them.

Mr. Leon timely sought rehearing on two grounds. First, he argued that the chair of the Sentencing Commission was required to recuse himself because this case raised a substantial constitutional challenge to the guidelines system. The Department of Justice and some courts of appeals have determined that a judge-commissioner must recuse himself from participation in such cases. The judge-commissioner's participation in this case tainted Mr.

Leon's appeal, depriving him of due process of law. Second, Mr. Leon argued that the panel had ignored his points and authorities while applying outdated, inapposite precedents, denying him both due process and equal protection of law on appeal.

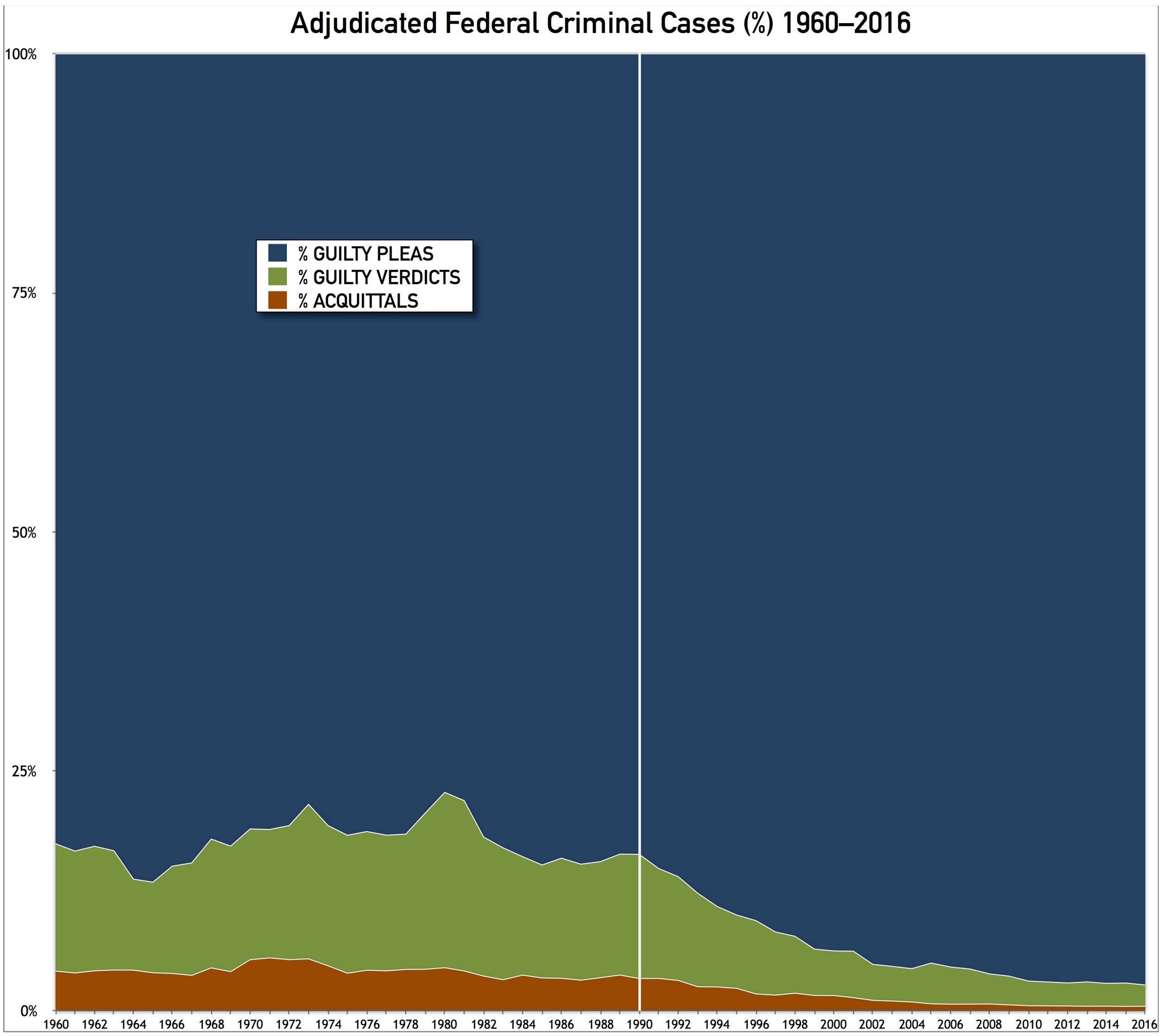
The Eleventh Circuit denied rehearing without explanation.

Reasons for Allowance of the Writ

I. The acceptance-of-responsibility sentencing guideline has caused a drastic drop in the number of federal criminal trials, yielding a significant number of unreliable convictions and posing an unprecedented threat to our adversarial system of justice.

In 2016, only 1,853 federal criminal defendants stood trial. Because some were tried jointly, the number of federal criminal jury trials was actually even lower. Criminal trials have become so uncommon in federal court that the media wonder why this "hallowed American right" no longer exists. *See* Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. Times (7 Aug 2016). The right to a jury trial is so seldom exercised in federal court because the euphemistically named "acceptance-of-responsibility" sentencing guideline essentially guarantees that a defendant who is convicted at trial will be punished for "put[ting] the government to its burden of proof at trial ... ." U.S.S.G. § 3E1.1 cmt. 2.

This case deserves this Court's attention because, as the federal judiciary's own statistics show, the acceptance-of-responsibility guideline is destroying our adversarial system of criminal justice. By exerting tremendous pressure on defendants to plead guilty, this provision relieves the government of its burden of proof in nearly all cases and causes a significant number of people to plead guilty falsely. For the nearly three decades between 1960 and 1987, the year the guidelines went into effect, the percentage of federal defendants who stood trial was always between about 15% and 20%, evidencing a healthy adversarial system. In the three decades since 1988, the percentage of federal defendants standing trial dropped every year. After 1990, when the Commission revised the acceptance-of-responsibility guideline to expressly punish standing trial, that percentage went into free-fall. In 2016, a whopping 97.36% of defendants pleaded guilty. A mere 2.64% stood trial. Mass self-incrimination and mass incarceration are the hallmarks of an inquisitorial state.



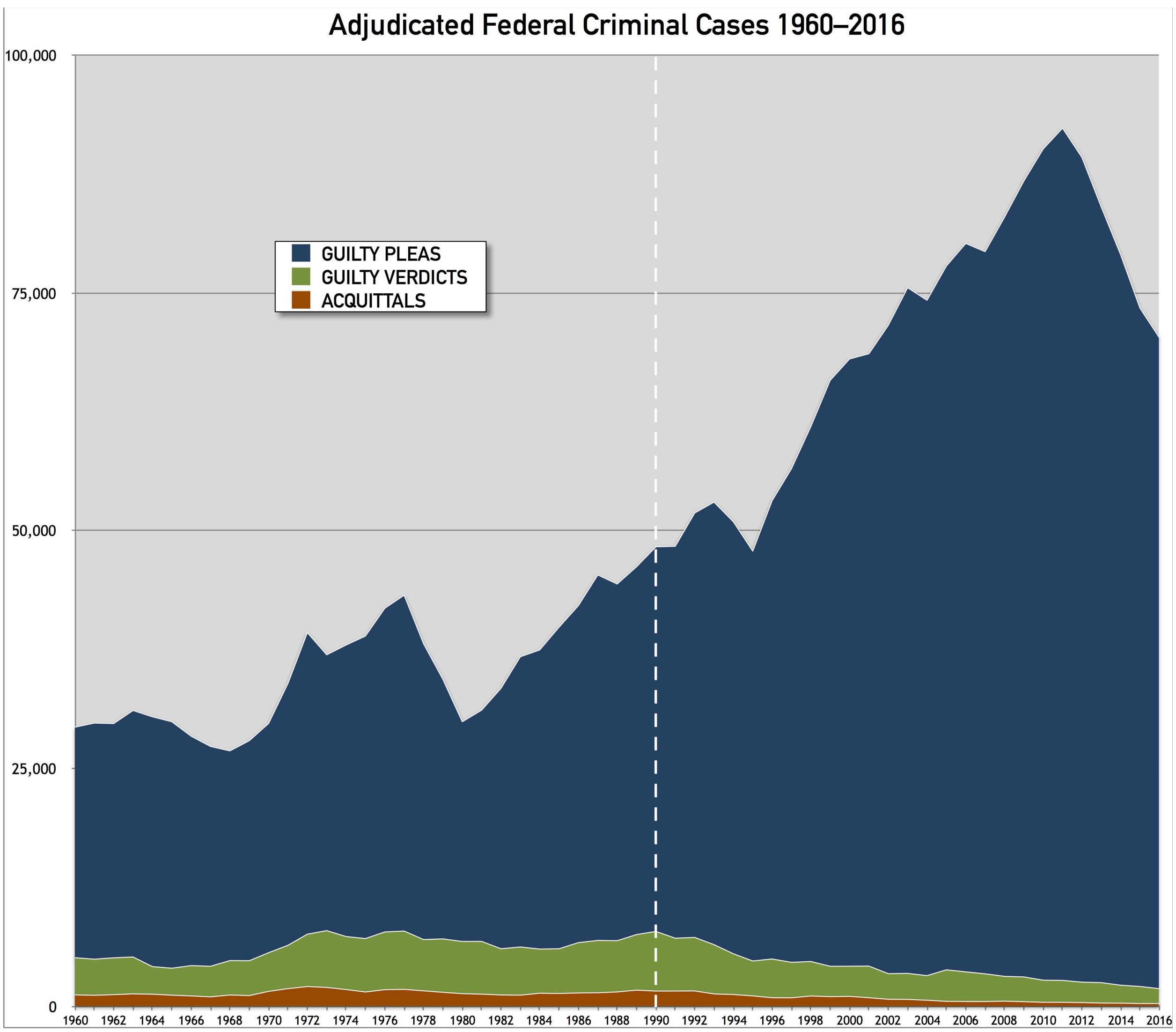
Until 1990, when the acceptance-of-responsibility guideline was amended, the provision increased a defendant's sentence by about 25 percent. The Sentencing Commission as well as the courts maintained that the higher sentence could not be imposed *solely* because a defendant refused to plead guilty. *See, e.g.*, *United States v. Jones*, 934 F.2d 1199, 1200 (CA11 1991) (stating that "a district court may not refuse to grant a reduction under section 3E1.1 solely because a defendant has chosen to proceed to trial"). After 1990, the trial penalty increased to nearly 40% in most cases (as the table at right shows) and the Commission expressly instructed that a defendant who "puts the government to its burden of proof at trial" ordinarily must be given the higher sentence. U.S.S.G. § 3E1.1 cmt. 2.

TRIAL PENALTY (LOW END)

	I	II	III	IV	V	VI
1					∞	∞
2					∞	500.00%
3			∞	∞	200.00%	200.00%
4			∞	200.00%	125.00%	100.00%
5			300.00%	100.00%	100.00%	66.67%
6		∞	200.00%	66.67%	66.67%	50.00%
7	∞	∞	100.00%	50.00%	50.00%	40.00%
8	∞	100.00%	66.67%	50.00%	40.00%	33.33%
9	100.00%	66.67%	50.00%	50.00%	33.33%	28.57%
10	66.67%	50.00%	50.00%	40.00%	28.57%	25.00%
11	50.00%	50.00%	50.00%	33.33%	25.00%	22.22%
12	50.00%	50.00%	40.00%	28.57%	22.22%	23.33%
13	75.00%	60.00%	50.00%	37.50%	36.67%	39.39%
14	60.00%	50.00%	42.86%	37.04%	39.39%	37.84%
15	50.00%	42.86%	37.50%	36.67%	37.84%	39.02%
16	42.86%	37.50%	37.04%	39.39%	39.02%	36.96%
17	37.50%	37.04%	36.67%	37.84%	36.96%	37.25%
18	37.04%	36.67%	39.39%	39.02%	37.25%	35.09%
19	36.67%	39.39%	37.84%	36.96%	35.09%	33.33%
20	39.39%	37.84%	39.02%	37.25%	33.33%	31.43%
21	37.84%	39.02%	36.96%	35.09%	31.43%	29.87%
22	39.02%	36.96%	37.25%	33.33%	29.87%	30.95%
23	36.96%	37.25%	36.84%	31.43%	30.95%	30.43%
24	37.25%	36.84%	38.10%	29.87%	30.43%	30.00%
25	36.84%	38.10%	38.57%	30.95%	30.00%	27.27%
26	38.10%	38.57%	38.46%	31.52%	27.27%	25.83%
27	38.57%	38.46%	39.08%	35.00%	25.83%	29.23%
28	38.46%	39.08%	39.18%	37.27%	29.23%	34.29%
29	39.08%	39.18%	39.81%	38.84%	34.29%	39.07%
30	39.18%	39.81%	38.84%	39.26%	39.07%	39.88%
31	39.81%	38.84%	39.26%	39.07%	39.88%	39.36%
32	38.84%	39.26%	39.07%	39.88%	39.36%	39.05%
33	39.26%	39.07%	39.88%	39.36%	39.05%	37.87%
34	39.07%	39.88%	39.36%	39.05%	37.87%	37.40%
35	39.88%	39.36%	39.05%	37.87%	37.40%	23.29%
36	39.36%	39.05%	37.87%	37.40%	23.29%	11.11%
37	39.05%	37.87%	37.40%	23.29%	11.11%	
38	37.87%	37.40%	23.29%	11.11%		
39	37.40%	23.29%	11.11%			
40						
41						
42						
43						

(green)	No increase at low end
∞	Prison term recommended rather than probation term
(pale yellow)	De minimis penalty for exercising trial right

Imposing this inordinate burden on the "right" to trial pressures even innocent people to declare themselves guilty. From 1977 to 1986, there were 13,975 acquittals among the 440,698 defendants prosecuted. The number for the preceding decade (from 1967 to 1976) was comparable — 15,815 acquittals of 422,040 prosecutions. From 2007 to 2016, the government prosecuted 907,583 people and nearly all of them pleaded guilty. If our adversarial system had endured, we would expect there to have been about 28,780 acquittals. But there were only 4,014 acquittals in that ten-year span — more than 24,000 or 86% fewer than expected.



The meager number of acquittals does not mean that everyone the government indicts is guilty. Rather, there are so few acquittals only because there are so few trials. In each year from 1960 to 1990, the ratio of federal prosecutions to trials varied between 5:1 and 8:1. After 1990, the ratio immediately began to climb rapidly. In 2000, there was one trial for every 20 prosecutions. Today the ratio of prosecutions to trials is more than 40:1. That is compelling evidence that, even as federal courts continue to profess that "our Constitution establishes an adversarial system" of justice, *Schmidt v. Foster*, 891 F.3d 302, 311 (CA7 2018), our system is in reality no longer adversarial in any meaningful sense.

There is not a more pressing national legal issue than the constitutionality of a provision that substantially burdens the right to a jury trial. "[T]rial by jury in criminal cases is fundamental to the American scheme of justice." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). By transforming the federal system into one where self-incrimination is routine, U.S.S.G. § 3E1.1 renders this Court's rulings concerning trial rights academic. For example, *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny have no application in over 97% of cases because no witness is ever called to testify. Likewise, *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny are essentially irrelevant because juries are selected in only a negligible number of cases. Innumerable other decisions dealing with trial rights are also now little more than law review articles. *See, e.g.*, *Barber v. Page*, 390 U.S. 719 (1968); *Allen v. United States*, 164 U.S. 492 (1896). Most importantly, the right to obligate the government to "prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which the defendant is charged,'" *Smith v. United States*, 568 U.S. 106, 110 (2013) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)), exists only in theory.

Because federal precedents regarding trial rights are entirely irrelevant to our new inquisitorial system, no active lawyers or judges have any reason to read them. This means that in a few more years, there will be no judges, prosecutors, or defense attorneys with deep knowledge of, much less experience with, the Constitution's adversarial system of justice. Instead, they will all be well versed in an inquisitorial system where it is practically a given that an indictment is tantamount to guilt and the only thing to be decided is the sentence. Incredibly, *The New York Times* reported in August 2016 that a federal judge in New York City presided over only *one* federal criminal trial during his four years on the bench. *See* Weiser, *supra*, Appendix at A-10.

This Court has no more important duty than ensuring that the government remains obligated to prove its accusations to a jury in every case: "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). By conditioning the right to trial, with all its attendant safeguards, on exposure to a substantially greater sentence, the Sentencing Commission effectively presumes that the government's allegations are true. Our system's major premise is that what is true is best determined through a jury trial: "Our Constitution and the common-law traditions it entrenches ... do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). Pressuring defendants to declare themselves guilty at the risk of substantially greater punishment is the gravest possible threat to that system because it effectively equates an indictment with guilt. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and *its enforcement lies at the foundation of the administration of our criminal law*." *Coffin v. United States*, 156 U.S. 432, 453 (1895) (emphasis added).

Certiorari should be granted in this case because the record leaves no doubt that Mr. Leon was punished for exercising his trial rights. At the sentencing hearing, the prosecutor agreed that Mr. Leon was no more culpable than two conspirators who pleaded guilty. Neither the prosecutor nor the district judge, however, could not imagine that Mr. Leon would get a sentence commensurate to theirs because he exercised his trial right. Mr. Leon's lawyer explained that this was fundamentally unfair. Nonetheless, the district judge mechanically followed the guidelines. Punishing the exercise of the right to trial is now routine in federal court.

Additionally, neither the government nor the Eleventh Circuit has been able to explain how Mr. Leon's 10½-year sentence can be reconciled with *United States v. Jackson*, 390 U.S. 570 (1968). *Jackson* invalidated, on Fifth and Sixth Amendment grounds, a provision of a federal statute authorizing the execution of kidnappers convicted by a jury but not those convicted by bench trial or guilty plea. *Id.* at 572, 581. *Jackson* reasoned that "the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them." *Id.* at 583 (emphases original). The opinion's elaboration on this point squarely applies to today's acceptance-of-responsibility guideline:

> The inevitable effect of any such provision is of course 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. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by

> penalizing those who choose to exercise them, then it would be patently unconstitutional.

Id. at 581.

The acceptance-of-responsibility provision, in fact, has no other purpose or effect other than to discourage defendants exercising their trial rights and is therefore "patently unconstitutional." It has no legal pedigree whatsoever. From the beginning, its purpose has been to encourage defendants to forego trial and plead guilty. Justice Breyer, when he was a member of the original Sentencing Commission, explained that the Commission punted on the inherent and obvious constitutional problem with that provision:

> [T]o explicitly write a reduction into the Guidelines based on a guilty plea is to explicitly tell a defendant that a guilty plea means a lower sentence and that insistence upon a jury trial means a higher sentence.
>
> ... The Guidelines' solution to this problem is to provide a two-level discount (amounting to approximately twenty to thirty percent) for what the Guidelines call "acceptance of responsibility." The Guidelines are vague regarding the precise meaning of "acceptance of responsibility."

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28 (1988).

Unlike the original, the post-1990 version of the provision is no longer vague. It imposes a much higher trial penalty and expressly predicates that penalty on a defendant exercising his supposed right to a trial. As the authoritative commentary states: "This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1 cmt.2.

Contrary to the Eleventh Circuit's opinion in this case, *Jackson*'s reasoning and holding mean that, viewed from the perspective of a defendant deciding whether to plead guilty, it can not plausibly be maintained that the acceptance-of-responsibility provision is a reward rather than a punishment. It is a cost imposed on the exercise of the right to trial. This Court recently reaffirmed that the only perspective that matters in evaluating whether the decision to stand trial or plead guilty has been burdened is the accused's. *Lee v. United States*, 137 S.Ct. 1958, 1966 (2017) ("The decision whether to plead guilty ... involves assessing the respective consequences of a conviction after trial and by plea.").

This Court's immediate intervention is necessary to keep the adversarial system of justice from falling into desuetude. The acceptance-of-responsibility provision has worked a nearly total transformation of the federal criminal justice system into an inquisitorial one where an indictment establishes a presumption of guilt. In this system, testing the government's evidence is viewed as a censurable waste of time rather than as the best way to ensure accurate verdicts. This is an unreliable and unjust system. The writ should issue.

II. The Eleventh Circuit denied Mr. Leon due process on appeal because the panel included the acting chair of the U.S. Sentencing Commission, who was required to recuse himself from Mr. Leon's challenge to a key guidelines provision.

Mr. Leon's panel included a judge who was (and is) serving as chair of the U.S. Sentencing Commission. This judge-commissioner declined to recuse himself without explanation even though Mr. Leon duly listed him, as well as his fellow commissioners, as a person with an interest in the outcome of the appeal. No explanation was given for the failure to recuse, and the Eleventh Circuit denied rehearing despite Mr. Leon's argument that recusal was legally required.

Shortly after the Federal Sentencing Guidelines went into effect, then-Judge and Sentencing Commissioner Stephen Breyer requested briefing on whether a judge-commissioner must recuse from cases challenging the guidelines. *United States v. Wright*, 873 F.2d 437, 446 (CA1 1989) (Breyer, J.). Justice Breyer ultimately agreed with the Department of Justice that a judge-commissioner must recuse "where there is a substantial challenge, whether constitutional or not, mounted against the existence of the Guidelines system and hence of the Sentencing Commission itself." *Id.* at 447. Other courts agree that a judge-commissioner must recuse from cases that "'involve a serious legal challenge to the Guidelines themselves.'" *United States v. Glick*, 946 F.2d 335, 336 (CA4 1991); *see also United States v. Frank*, 864 F.2d 992, 1016 (CA3 1988) ("We recognize that in some cases recusal of one or more judicial members of the Commission might be required."); *In re United States*, 60 F.3d 729, 731 (CA11 1995) (describing an unpublished opinion holding that a judge-commissioner "should have recused herself from deciding challenges to the United States Sentencing Commission and Guidelines—because she is a member of the United States Sentencing Commission—to avoid the appearance of impropriety").

Recusal was required in this case because, as the Department of Justice and Justice Breyer agreed in *Wright*, no Sentencing Commissioner could be expected to preside over a substantial guidelines challenge disinterestedly. This Court recently held that a judge must recuse himself whenever "there is an unconstitutional 'potential for bias.'" *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (2016) (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)). Such a potential for bias exists whenever, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883–84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). A judge's service on the Commission, let alone his chairmanship of it, predisposes that judge to view the Commission's work as constitutional. A judge is not likely to disinterestedly consider whether he has been expending significant time and energy on a "patently unconstitutional" legal project.

The challenge brought in this case was substantial because the acceptance-of-responsibility provision is a critical part of the guidelines' inquisitorial system. The original Commission considered it essential because of the perceived need to encourage guilty pleas. *See* Breyer, *supra*, 17 HOFSTRA L. REV. at 28. Entertaining a challenge to a critical guideline provision conflicts with a sentencing commissioner's duties, as the DOJ and several courts of appeals have determined.

The judge-commissioner's participation alone deprived Mr. Leon of due process. If one member of a multi-judge appellate panel has a conflict, the decision is tainted by structural error and vacatur is required—"even if the judge in question did not cast a deciding vote." *Williams*, 136 S.Ct. at 1909. "[I]t does not matter whether the disqualified judge's vote was necessary to the disposition of the case." *Id.* Because "[t]he deliberations of an appellate panel ... are confidential," "it is neither possible nor productive to inquire whether the jurist in question might have influenced" the outcome. *Id.* "The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party." *Id.*

Even if the error were not structural, the record shows that the judge-commissioner's failure to recuse can not be considered harmless in the circumstances of this case. The panel opinion made three errors that violated Mr. Leon's rights to due process and equal protection by denying him an "adequate and effective" appeal. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956).

First, the panel asserted, contrary to the parties' positions, that "Leon was not similarly situated to his coconspirators who pleaded guilty and cooperated with the government by testifying at Leon's trial." Opinion, Appendix at A-6. In fact, it was undisputed on appeal that Mr. Leon was no more culpable than the other conspirators or that they received much shorter sentences than he did before any cooperation reduction. Unlike the panel opinion, the government's brief to the Eleventh Circuit did not attribute the disparity to the other conspirators' irrelevant cooperation reductions. Instead, it tried to justify the disparity by asserting that "Leon did not deserve the [acceptance-of-responsibility] reduction both because he went to trial *and* because he did not provide a statement accepting responsibility." However, the guideline does not require any such statement. The acceptance-of-responsibility provision makes clear that standing trial means a higher sentence and waiving trial means a lower one. Under the provision, Mr. Leon could not be denied the reduction for not submitting a statement.

Second, the panel asserted that "Leon cites no precedent establishing that the guideline allowing a reduction for acceptance of responsibility ... is unconstitutional." *Id.* at A-7. In fact, Mr. Leon cited two binding cases, whose application the government never rebutted. Mr. Leon's initial brief relied extensively on this Court's decision in *United States v. Jackson*, *supra*. His reply to the government's claim that the error was not preserved argued that *Jackson* as well as *United States v. Jones,* 934 F.2d 1199 (CA11 1991), rendered the sentencing error in this case plain. Mr. Leon also pointed out that the government's brief did not so much as mention *Jackson*. Thus, its controlling effect was never rebutted.

Third, the panel relied, with no analysis, on precedents that Mr. Leon had specifically demonstrated were abrogated by the Sentencing Commission's amendment of the pertinent guideline. Specifically, the panel decision relied on two cases—*United States v. Henry*, 883 F.2d 1010 (CA11 1989), and *United States v. Jones*, 934 F.2d 1199 (CA11 1991)—that Mr. Leon's initial brief had explained were decided under the pre-1990, original version of the acceptance-of-responsibility guideline. Opinion at A-7. The Eleventh Circuit nonetheless applied these abrogated decisions without explanation or analysis.

This Court's intervention is necessary because this error is likely to recur. The judge-commissioner is still the acting chair of the Commission. The Eleventh Circuit has no mechanism for averting this error, and it keeps litigants in the dark regarding the composition of appellate panels unless and until oral argument is scheduled. *Compare Wright*, 873 F.2d at 447 (Breyer, J.) (creating a procedure for parties in similar cases to move for Judge Breyer's recusal). In addition, the Commission is required to include active judges:

> The Sentencing Commission unquestionably is a peculiar institution within the framework of our Government. Although placed by the Act in the Judicial Branch, it is not a court and does not exercise judicial power. Rather, the Commission is an "independent" body comprised of seven voting members including at least three federal judges, entrusted by Congress with the primary task of promulgating sentencing guidelines.

Mistretta v. United States, 488 U.S. 361, 384–85 (1989) (citing 28 U.S.C. § 991(a)).

WHEREFORE this Court should grant this petition for a writ of certiorari to the Court of Appeals for the Eleventh Circuit both to restore the jury trial as the most reliable method for ascertaining guilt and to prevent judges serving on the U.S. Sentencing Commission from distorting the law by adjudicating substantial challenges to the guidelines system.

Respectfully submitted,

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