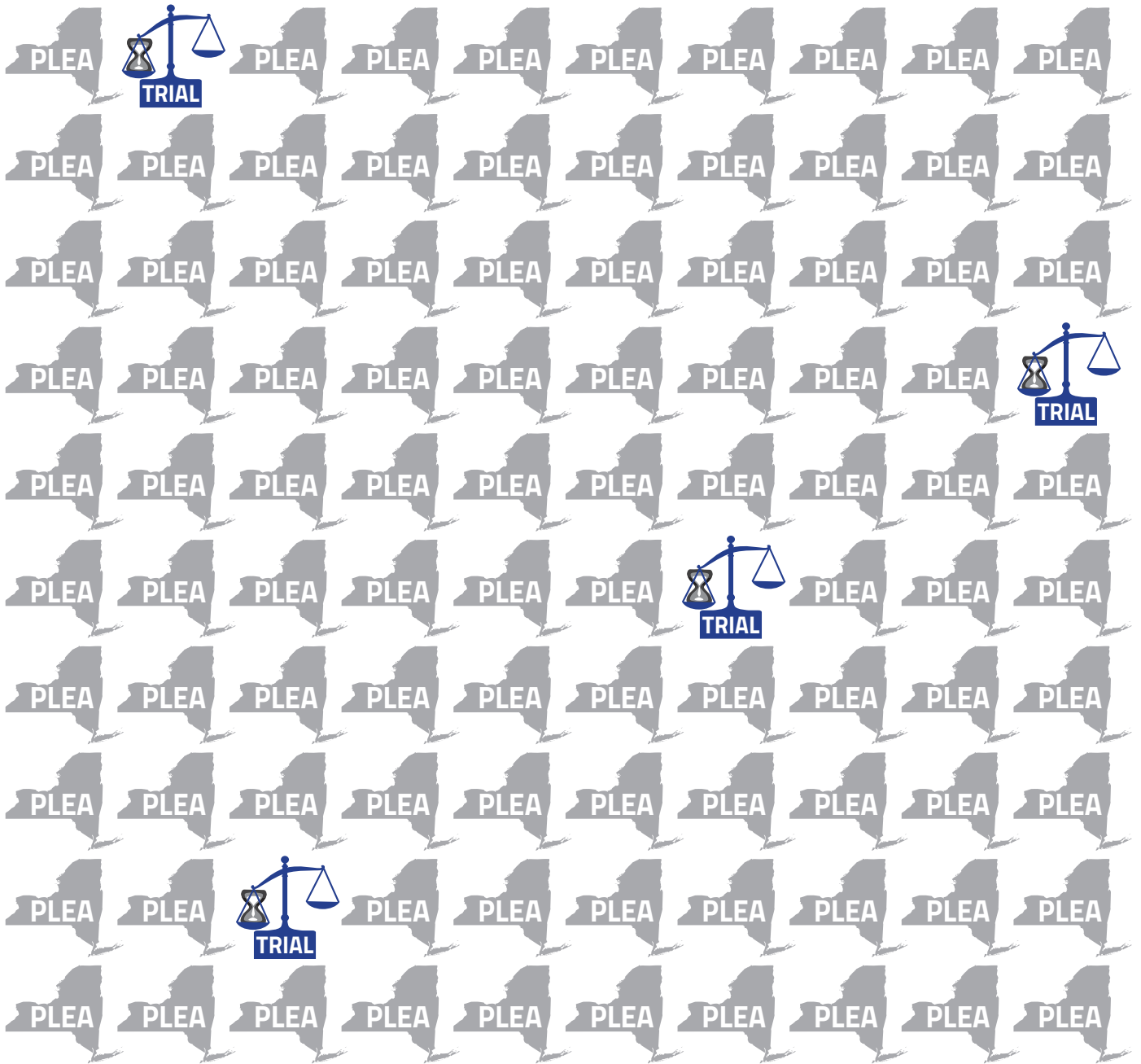


THE NEW YORK STATE TRIAL PENALTY:

The Constitutional Right to Trial Under Attack



NATIONAL
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DEFENSE LAWYERS



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ABOUT THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

New York State Association of Criminal Defense Lawyers (NYSACDL) is a statewide organization of criminal defense attorneys, representing over 1,000 private attorneys and public defenders who practice in courthouses in all parts of New York State. We are the New York State affiliate of the National Association of Criminal Defense Lawyers, a professional bar association founded in 1958 that has over 40,000 affiliated members nationally.

NYSACDL is dedicated to protecting the rights of criminal defendants through a strong, unified, and well-trained criminal defense bar. Our guiding principle is that vigorous defense is the strongest bulwark against error and injustice in the criminal justice system. In an era when the United States has the highest incarceration rate in the world, we expand on the question most often posed to our members and ask “how can we defend those people most effectively?” This dedication is demonstrated through frequent and timely education programs, a strong advocacy program in New York working for our profession and those we serve, the regular publication of our *Atticus* magazine, an active and vibrant member listserv, involvement in important *Amicus Curiae* briefs, and numerous special projects.



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ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NACDL FOUNDATION FOR CRIMINAL JUSTICE

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL envisions a society where all individuals receive fair, rational, and humane treatment within the criminal legal system.

NACDL's mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal justice system, and redressing systemic racism, and ensuring that its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level.

NACDL members — and its 90 state, local and international affiliates — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to promoting fairness in America's criminal legal system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and practices.

In 2018, NACDL published a groundbreaking report on the federal trial penalty — *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (<https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>). Curtailment of the trial penalty is a core advocacy objective for NACDL. NACDL recognizes that the trial penalty is one of the most serious problems in the nation's criminal legal system, one that perpetuates injustice and disparity.

The NACDL Foundation for Criminal Justice (NFCJ) is a 501(c)(3) charitable non-profit organized to preserve and promote the core values of the American criminal legal system guaranteed by the Constitution — among them access to effective counsel, due process, freedom from unreasonable search and seizure, the right to a jury trial, and fair sentencing. The NFCJ supports NACDL's efforts to promote its mission through resources education, training and advocacy tools for the public, the nation's criminal defense bar, and the clients they serve.



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FOREWORD

Both the United States Constitution and the New York State Constitution guarantee those accused of a crime the right to a trial at which the state must prove guilt beyond a reasonable doubt. But in the modern criminal legal system, trials have become a scarcity. Recent data shows that in New York State 99 percent of misdemeanor charges and 94 percent of felony charges are resolved by a guilty plea. New York is by no means an aberration. Across the country criminal trials are vanishing at an alarming rate. A principal cause of this phenomenon is the simple fact that in virtually every jurisdiction people plead guilty to avoid significantly greater punishment, having nothing to do with their guilt or innocence. If they contest the charge against them, litigate the legality of evidence that will be offered, or insist upon a trial, they will receive a much harsher sentence. This trial penalty has fundamentally transformed the criminal legal system into a plea system in which trials are nearly extinct.

This development is neither congruent with the principles upon which the nation was founded nor is it conducive to a healthy justice system. Nowhere is the right to a jury trial more sacred than in New York State. Decades before the revolution, the importance of the jury trial was forever woven into the fabric of American ideals in the trial of John Peter Zenger. Zenger's vindication by a jury on a charge of seditious libel in 1735 has been characterized as the spark that ignited the fire of the American revolution. An American founder Gouverneur Morris later wrote, "The trial of Zenger in 1735 was the germ of American Freedom, the morning star of liberty that subsequently revolutionized America."ⁱ The Framers of the United State Constitution considered the right to a jury trial as important as the right to vote. John Adams wrote that "[r]epresentative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds."ⁱⁱ This bold statement reflected the consensus view of the Framers that trials not only afford a protection for the accused, but they protect everyone in society by promoting transparency and citizen participation when the government invokes the awesome power to prosecute.

The current plea system, which has overtaken the criminal process, is anything but transparent and rarely involves public trials. The ever-increasing size and scope of the criminal legal system has been accompanied by laws, policies, and practices that have shifted the historic authority of judges to fashion appropriate sentences to prosecutors who wield extraordinary power to determine the magnitude of criminal sentences through their unfettered charging power. Mandatory minimums sentences, sentencing enhancements, and charge selection provide the prosecutor with the leverage to extract guilty pleas under the threat of vastly increased punishment upon those who assert their rights. This leverage is available from the first appearance, when the threat that a person will be unable to afford bail can be used to induce an early guilty plea, throughout the entire process, where, at each step of the way, waivers of various rights are the price of a reduced sentence. In this way, guilty pleas operate to foreclose litigation that may expose unlawful government action or police misconduct.

i Quoted in "John Peter Zenger" by Livingston Rutherford (NY 1941).

ii The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000).

Of course, sheer volume also places enormous pressure upon judges and defense counsel, as well as prosecutors, to process cases as quickly as possible. Judges' rightful concern that every case be heard and a woeful underfunding of the defense function have transformed many courts into guilty plea conveyor belts. While there is no doubt some value in promoting efficiency and early case disposition, it is a great concern when that objective overtakes the larger purposes of the justice system. When punishment is significantly enhanced merely because an individual asserts fundamental rights, it makes a mockery of the notion of proportional, individualized justice.

This report issued by the New York State Association of Criminal Defense Lawyers in collaboration with the National Association of Criminal Defense Lawyers appropriately shines a light on the nature and breadth of the trial penalty in New York State. All stakeholders and policy makers should take note of the defense bar's concerns and consider seriously the principles and proposed reforms. The data and the compelling stories recounted in this report should provoke informed debate over the nature and extent of the trial penalty and prompt a reconsideration of whether the palpable erosion of the right to trial is an acceptable feature of the modern criminal legal system.

Honorable Jonathan Lippman

(Ret.) Chief Judge of New York

Of Counsel, Latham & Watkins

ACKNOWLEDGEMENTS

This report is the final product of a remarkable collaboration of defense organizations, community groups, individual attorneys and other justice system practitioners who gave generously of their time, insight, and energy.

First and foremost, NYSACDL thanks the Trial Penalty Task Force Members who lent their extraordinary experience to this project: Mike Baker, Christopher Boyle, Rebecca Brown, Lori Cohen, Elizabeth Fischer, Timothy Hoover, William Leahy, Christopher Madiou, Grainne O’Neill, Jill Paperno, Nate Pysno, Martha Rayner, Norman L. Reimer, Tim Rountree, Donald Salzman, and Jocelyn Strauber. The Task Force, in turn, is grateful to NYSACDL Past Presidents Tim Hoover and Lori Cohen for their enthusiastic support of this project and their participation on the Task Force, as well as NYSACDL Executive Director Jennifer L. Van Ort.

NYSACDL sincerely thanks the team of attorneys at Skadden, Arps, Slate, Meagher & Flom LLP, who devoted countless hours to researching and drafting this report. The Skadden team of attorneys, led by Esther Bloustein, Elisa Klein, Jocelyn Strauber, and Donald Salzman, also included Pamela Amaechi, Anthony Balzano, Joseph Ben-Maimon, Dewey Bennett, Rahul Bhasin, Samuel Bieler, Chloe Bootstaylor, Stephanie Cannuli, Caitlyn Cheleden, Ella Cohen, Carson Denny, Warren Feldman, Shelli Gimelstein, Keema Givens, Kent Hiebel, Kindall Jackson, Adam Kochman, Elizabeth Kraus, Zachary Leibowitz, Seth LeMaster, Brendan Lum, Sonya Mitchell, Aaron Murphy, Mackenzie Newman, Alexander Patrick, Morgan Petkovich, Christina Phan, Scott Rabinowitz, Kendra Rosario, Kara Roseen, Matthew Rosenthal, Mary Ross, Ryan Rott, Martin Rowe, Joshua Schoch, Julia Timerman, Peter Varlan, and Sahng-Ah Yoo.

NYSACDL also wishes to extend its thanks to the New York Legal Aid Society (LAS), Neighborhood Defender Services (NDS), and New York County Defender Services (NYCDS) for their help collecting and analyzing the data used in this report. In particular, NYSACDL wishes to thank LAS’s Tim Rountree, NDS’s Elizabeth Fischer, and NYCDS’s Chris Boyle, Willem Van Der Mei, and Celia Joyce for their assistance in the data collection and analysis process.

This report would not have been possible without the generous participation of the many lawyers and their clients who contributed their experiences with the trial penalty in New York State. NYSACDL is grateful to everyone who was willing to share their stories and respond to its survey.

Finally, NYSACDL wishes to thank the National Association of Criminal Defense Lawyers (NACDL) for inspiration and support in making this project a reality. It epitomizes the quintessential example of productive collaboration between the national organization and a state affiliate. Numerous members of the NACDL team contributed to this project at various phases, including NACDL’s Director of Economic Crime and Procedural Justice Nate Pysno, who served on the task force, and NACDL Executive Director Norman L. Reimer, who has been a tireless advocate to rein in the trial penalty, served on the Task Force, and supported this project at every stage.

Susan J. Walsh

Chair

Trial Penalty Task Force

EXECUTIVE SUMMARY

Over the past three decades, the number of criminal trials in New York State has steadily declined, and guilty pleas have become the principal mechanism of convictions. The decline in trials and rise in guilty pleas severely weakens the integrity of the justice system. Trials and pretrial motion practice provide a critical check on law enforcement overreach and abuse and assures public transparency in the administration of justice. Guilty pleas not only allow prosecutors to avoid proving their case before a jury of the defendant's peers, but also to avoid legal and constitutional challenges to law enforcement methods of investigation. Defendants who plead guilty generally are required to waive appellate review, foreclosing another avenue of legal challenge to their convictions and sentences.



The decline in trials and rise in guilty pleas severely weakens the integrity of the justice system. Trials and pretrial motion practice provide a critical check on law enforcement overreach and abuse and assures public transparency in the administration of justice.

This report from the Trial Penalty Task Force of the New York State Association of Criminal Defense Lawyers (NYSACDL) explores a key reason for the decline in trials: the trial penalty. Criminal defendants face a trial penalty when they receive a sentence after trial that is substantially greater than the plea offer they received before trial. Faced with the prospect of a longer, and perhaps substantially longer sentence, defendants are understandably reluctant to take their case to trial. Furthermore, plea offers often are made in a manner that discourages pretrial motion practice, and even encourages defendants to waive their right to be indicted by a grand jury and to receive discovery.

To understand this troubling phenomenon, NYSACDL developed and launched a survey of New York State criminal justice practitioners. More than three hundred criminal defense attorneys from across New York State responded, sharing their personal experiences and observations of the impact of the trial penalty and stories of clients who experienced it firsthand. NYSACDL conducted a statistical analysis of criminal convictions in New York State assembling a sample of 79 cases from Manhattan criminal defense organizations with plea and conviction information to investigate whether there was a trial penalty in New York State and the impact of any such penalty.

Key Findings

- ◆ **New York State has a trial penalty:** 94% of practitioners agreed that the trial penalty plays a role in criminal practice in their county.
- ◆ **The trial penalty manifests in numerous ways:** While longer sentences are part of the trial penalty, they are not the only part. To obtain favorable pleas, defendants are also forced to waive various appellate rights and the ability to challenge the government's case through motion practice.

- ◆ **Numerous factors drive the trial penalty:** The trial penalty is driven by a broad range of different factors. Prosecutorial practices such as aggressive charging, judicial pressure to plead guilty, and the prospect of severe criminal penalties, sentencing enhancements and mandatory minimums should a defendant proceed to trial are significant contributors. Defense counsels' excessive caseloads also contribute to the pressure on defendants take pleas and forgo exercising their statutory and constitutional rights.
- ◆ **Data confirms the existence of a trial penalty:** Data analysis supported practitioners' insights. In 66% of cases, defendants in the sample experienced a trial penalty. The data also shows increased plea offers are associated with increased eventual sentences. For example, a plea offer of five years was associated, after conviction at trial, with a sentence of 7.5 years and a 20 year offer would be associated with a 28 year sentence.

Throughout, the report also highlights stories of the trial penalty in action. In one drastic example, a defendant was offered a plea to 10 years just five minutes before the jury convicted him. Once convicted, his sentence was 40 years.

Based on these findings, the Task Force developed a set of 10 principles and 15 policy recommendations to mitigate the effect of the trial penalty and restore the criminal trial's central role in the justice system. Three key elements of these principles and recommendations are:

- 1. Reducing defendants' exposure to severe and disproportionate sentences:** Eliminate mandatory minimums; reduce the kinds of conduct subject to criminal penalty; and provide second-look statutes, compassionate release legislation, and an expanded clemency process that ensures that sentences remain proportionate while offering safety valves for older and sicker defendants or those with other extraordinary circumstances.
- 2. Protecting defendants who exercise their rights:** Prevent judges and prosecutors from penalizing defendants with longer sentences solely based on their decision to go to trial or challenge the government's case through pretrial motion practice; and prohibit conditioning pleas on the waiver of constitutional or statutory rights and ensure that criminal defense organizations have the resources to provide a zealous defense.
- 3. Using data to drive reform:** Do not evaluate judges or condition judicial assignments on pretrial disposition quotas, hearing and trial volumes, or other disposition rates; and collect data on plea offers and sentencing dispositions to explore more about how the trial penalty operates in New York State.



Plea offers often are made in a manner that discourages pretrial motion practice, and even encourages defendants to waive their right to be indicted by a grand jury and to receive discovery.

Principles and Recommendations

Principles

1. The trial penalty — the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial — undermines the integrity of the criminal justice system.
2. No one should be punished for exercising her or his rights, including seeking pretrial release and discovery, investigating a case, challenging law enforcement conduct, and filing or litigating pretrial statutory and constitutional motions.
3. The decline of criminal trials erodes the oversight function of the jury thereby muting the voice of lay people in the criminal justice system and also undercuts the role of appellate courts in supervising the work of trial courts.
4. The decline of criminal trials — and attendant waivers of the right to appeal and the right to challenge unconstitutional police action — undermines the oversight ability of courts and juries to ensure law enforcement accountability.
5. The decline of criminal trials tends to encourage longer sentences thereby contributing to mass incarceration, including mass incarceration of people of color and the poor.
6. Trials protect the presumption of innocence and encourage the government to charge cases based on sufficient, legally obtained evidence to satisfy the reasonable doubt standard.
7. The decline of criminal trials impacts the quality of prosecutorial decision-making, defense advocacy and judicial supervision.
8. The trial penalty creates a coercive effect which profoundly undermines the integrity of the plea bargaining process.
9. Mandatory minimum sentences undermine the integrity of plea bargaining by creating a coercive effect and undermine the integrity of the sentencing process by eliminating case-by-case individualized evaluation.
10. Neither prosecutors nor judges should be permitted to use mandatory minimum sentences to retaliate against a defendant for the decision to go to trial or challenge evidence.

Policy Recommendations

- 1.** Mandatory minimum sentencing statutes should be repealed or subject to a judicial safety valve in cases where the court determines the individual circumstances justify a sentence below the mandatory minimum.
- 2.** A judicial second-look statute should be enacted to enable a court to review lengthy sentences after substantial service thereof to ensure that the sentences are proportionate over time.¹
- 3.** Prosecutors should be prohibited from conditioning plea offers on a waiver of statutory or constitutional rights necessary for a defendant to make an informed decision on whether to plead guilty. These rights include a defendant’s right to seek pretrial release or discovery, the right to investigate their case, or litigate pretrial motions.
- 4.** NYCPL § 220.10(5) should be repealed because it limits the ability to resolve a case by pleading guilty to a lesser charge.
- 5.** The Code of Judicial Conduct should include an express prohibition against retaliatory or vindictive sentences for a defendant who has rejected a pretrial plea offer and proceeded to trial.
- 6.** Procedures should be adopted to ensure that defendants are not punished with substantially longer sentences for exercising their right to trial or related constitutional rights. Posttrial sentences should not disproportionately increase the pretrial plea offer solely because the defendant has elected to proceed to trial.
- 7.** Judicial or prosecutorial policies which prohibit pretrial plea dispositions on trial-ready cases should be prohibited.
- 8.** It should be unethical for a prosecutor to seek a higher sentence compared to the pretrial offer based on the defendant litigating his or her statutory or constitutional rights, including the right to trial.
- 9.** Judicial pretrial disposition quotas should not be used as a metric by which judicial or systemic performance is evaluated. Judicial performance should not be assessed by reference to disposition rates nor should any judicial assignment determination hinge on the percentage of cases in a judge’s docket in which evidentiary hearings or trials are conducted.
- 10.** NYCPL § 710.70 should be amended to read “shall” instead of “may” to effectuate the legislative intent to preserve issues in suppression motions for appeal even after a guilty plea and preserve appellate review of pretrial decisions on motions.



In one drastic example, a defendant was offered a plea to 10 years just five minutes before the jury convicted him. Once convicted, his sentence was 40 years.

- 11.** Courts, prosecutors, and public defenders should collect information on plea offers and trial outcomes. Agencies involved in criminal cases should collect data on at least (1) the best plea offered; (2) the final plea offered; and, if applicable, (3) any final sentence. Together, these three data points would give more insight into how the trial penalty operates in New York.
- 12.** Compassionate release legislation should be enacted to provide an avenue to seek a judicial order granting early release based upon advanced age, illness, or extraordinary circumstances.
- 13.** The clemency process should be reformed to expand eligibility by reducing the requisite period of time that must be served and to provide for opportunities for commutation based upon the recommendation of an independent panel comprised of various system stakeholders, as well as public health and community representatives. There should be no bar to people who plead guilty from seeking relief under a freestanding claim of actual innocence pursuant to NYCPL § 440.10(1)(h).
- 14.** The judicial, prosecutorial, and defense functions should be funded at a level sufficient to ensure that the disposition of cases is driven solely by the interests of the defendant, the public, and justice and not by a need to triage limited resources.
- 15.** Criminalization of disfavored social or personal behavior should be discouraged to relieve the burden on criminal court dockets.

INTRODUCTION

In the past three decades, criminal trials have significantly decreased in New York while guilty pleas have increased. Criminal defendants who plead guilty in New York State almost always are required to waive their fundamental rights as a condition of their guilty pleas — not only their right to a trial but also to discovery and a meaningful opportunity to investigate; their Fourth, Fifth and Sixth Amendment rights to challenge unlawfully obtained evidence; and even the right to appeal. These rights are crucial to the accused but also serve as a necessary check on law enforcement and prosecutorial overreach and abuse. It is therefore critical to explore the extent to which a pretrial resolution may be employed not solely to reward an accused person for early acknowledgment of guilt but rather to effectively coerce a waiver of fundamental rights. It is also important to understand how such waivers harm the general public: trials not only protect the accused but also shine a spotlight on government overreach and constitutional abuse that might otherwise go undetected. With fewer consequences for overreach and abuse, it becomes more difficult to prevent such violations or convince law enforcement to take the steps necessary to prevent such abuse.



Criminal defendants who plead guilty in New York state almost always are required to waive their fundamental rights as a condition of their guilty pleas — not only their right to a trial but also to discovery and a meaningful opportunity to investigate; their Fourth, Fifth and Sixth Amendment rights to challenge unlawfully obtained evidence; and even the right to appeal. These rights are crucial to the accused but also serve as a necessary check on law enforcement and prosecutorial overreach and abuse.

A major reason such trials are disappearing from U.S. courtrooms is the trial penalty.ⁱⁱⁱ This most often refers to the significant difference between a pretrial sentence offer and the posttrial sentence imposed as a consequence of exercising the fundamental right to trial. The trial penalty puts overwhelming pressure on defendants to plead guilty in exchange for a lower sentence — or, as the practice is commonly known, to “plea bargain,” a term that suggests, often inaccurately, that a defendant is getting some kind of unearned benefit, rather than a sentence proffered by a public servant that accurately reflects both the severity of the defendant’s conduct and the strength of the state’s case.

As noted, defendants who take a plea to a reduced sentence lose not only their constitutional right to trial but also a host of other critical rights, with significant consequences not only for the individual who pleads guilty but also for the general public. While pleas to lesser sentences may save the government the time and expense of a trial and can result in shorter sentences, the severe posttrial penalties for those who refuse a pretrial resolution punish the exercise of fundamental constitutional rights and encourage even the innocent to plead guilty rather than risk challenging the government’s case pretrial, at trial and on appeal.

iii Some use the equivalent term “trial tax.”

This report of the New York State Association of Criminal Defense Lawyers (NYSACDL) and the National Association of Criminal Defense Lawyers (NACDL) explores the trial penalty in New York. In February 2019, the Trial Penalty Task Force of the NYSACDL adopted a “Scope of the Problem” statement identifying concerns with respect to the impact of the trial penalty on the justice system. This report explores those concerns on the basis of surveys of the criminal defense community, practitioner interviews and analysis of data on case processing, convictions and guilty plea practices.^{iv}



Resolving cases through pleas is so common that all participants in the process accept it as inevitable in criminal cases. Yet there is a growing national consensus that the resulting trial penalty phenomenon must be addressed because it threatens to erode the crucial role that jury trials are meant to play in our criminal justice system.

The report begins by reviewing guilty pleas and the dominant role they play in securing convictions in New York State. It then explores the factors that contribute to the trial penalty, drawing on practitioner interviews and survey results. Then, with the limited data available, the report seeks to quantify the impact of the trial penalty, using data from two New York State defense organizations to explore how much additional time is served by those who choose to exercise their constitutional right to trial. The report concludes with recommendations and principles intended to mitigate the trial penalty and promote the fairer administration of criminal justice in New York State. Throughout, the report provides case studies of the trial penalty in action: individuals charged in criminal cases who are pressured to waive their rights or are subjected to excessive penalties for exercising them.

The Trial Penalty: Research and Background

Resolving cases through pleas is so common that all participants in the process accept it as inevitable in criminal cases. Yet there is a growing national consensus that the resulting trial penalty phenomenon must be addressed because it threatens to erode the crucial role that jury trials are meant to play in our criminal justice system. In 2013, Human Rights Watch (HRW) published “An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty,” which analyzed the trial penalty in federal drug cases. The report found that the “average sentence of federal drug offenders convicted after trial was three times higher (16 years) than that received after a guilty plea (five years and four months).”² HRW attributed these harsh penalties and the overall disappearance of trials to the essentially unchecked discretion of prosecutors during the charging and plea offer phases and to “egregiously severe sentencing laws.”³ The threat of such severe penalties after trial inevitably pressures criminal defendants to take pleas,⁴ which has led to the virtual disappearance of criminal jury trials.⁵ As one prosecutor bluntly stated: “The key function of the trial penalty is to encourage pleas.”⁶ According to HRW, “this historically low rate of trials reflects an unbalanced and unhealthy criminal justice system.”⁷

In July 2018, the National Association of Criminal Defense Lawyers (NACDL) identified similar issues in its report “The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It.”

^{iv} A copy of this Scope of the Trial Penalty Statement is included as Appendix 1.

The report found that federal criminal defendants — even those who were actually innocent — were frequently coerced into pleading guilty because the potential penalty associated with exercising their constitutional right to trial was simply too great.⁸ According to the report, as of 2018, a trial “now occurs in less than 3% of state and federal criminal cases.”⁹ NACDL found that additional factors contributed to the disappearance of the trial, including prosecutorial discretion, informational inequalities between prosecutors and defendants,¹⁰ rigid federal Sentencing Guidelines and an inability or unwillingness on the part of judges to exercise their discretion at sentencing.¹¹ While the promise of a lesser sentence is a potentially appropriate aspect of the plea negotiation process, “the gap between post-trial and post-plea sentences can be so wide” that it acts as an “overwhelming influence in a defendant’s consideration of a plea deal.”¹² The report also noted that the immense pressure to plead allows prosecutors to convince criminal defendants to agree to “all-or-nothing agreements,” which waive important rights like the ability to challenge the legality of the evidence obtained against them.¹³

Research has also confirmed that defendants’ fear of a lengthier sentence posttrial is well founded. One study, based on all federal criminal cases from 2006 to 2008, found that those who exercised their right to trial received sentences that were 64% longer than similarly situated individuals who pled guilty prior to trial.¹⁴ Accordingly, the study found that because trials pose significant risks of materially longer sentences, defendants are dissuaded from putting the government to its proof, and as a result, prosecutors can “adjudicate both criminal culpability and the magnitude of any punishment largely unfettered by concerns about the likelihood that the defendant might be found not guilty at trial.”¹⁵ These and other studies¹⁶ paint a Kafkaesque portrait of the plea “negotiation” process for criminal defendants, particularly for those who are innocent but nonetheless choose to plead guilty to avoid the potential of a disproportionate sentence after trial should they be convicted.¹⁷

The critiques of these aspects of guilty plea resolutions are bipartisan. In 2019, the Federal Sentencing Reporter journal dedicated a double issue to the trial penalty. Critiques of the practice came in from all quarters including the ACLU,¹⁸ Right on Crime,¹⁹ the Cato Institute,²⁰ Families Against Mandatory Minimums,²¹ The Charles Koch Institute²² and Americans for Prosperity.²³



One study, based on all federal criminal cases from 2006 to 2008, found that those who exercised their right to trial received sentences that were 64% longer than similarly situated individuals who pled guilty prior to trial.¹⁴

Concerns about the trial penalty are not limited to academics and other observers of our criminal justice system. In 2017, Judge Joseph Goodwin of the U.S. District Court for the Southern District of West Virginia rejected a plea in an otherwise routine drug case, stating that:

secrecy surrounding plea bargains in heroin and opioid cases frequently undermines respect for the law and deterrence of crime. The bright light of the jury trial deters crime, enhances respect for the law, educates the public, and reinforces their sense of safety much more than a contract entered into in the shadows of a private meeting in the prosecutor’s office.²⁴

The Fourth Circuit upheld this decision in 2019, though it noted that the court might have abused its discretion had it rejected the plea based primarily on the government’s frequent use of the practice.²⁵ Judge Goodwin rejected another plea on similar grounds in 2018.²⁶ He is not alone: in 2014, Judge Jed Rakoff of the U.S. District Court for the Southern District of New York wrote that “[t]he Supreme Court’s suggestion that a plea bargain is a fair and voluntary contractual arrangement between two relatively equal parties is a total myth: it is much more like a ‘contract of adhesion’ in which one party can effectively force its will on the other party.”²⁷



The proliferation of convictions secured through plea agreements not only undermines the public perception of the legitimacy of the criminal justice system but can have disproportionate impacts on people of color. For example, one study of the Manhattan District Attorney’s office found that, in the plea negotiation stage, Black defendants were significantly less likely than white defendants to receive offers of reduced charges and more likely to receive sentence offers involving prison time.²⁹

In 2019, Judge Rowan Wilson of the New York Court of Appeals also raised concerns about how pleas operate in New York State. Dissenting in a case on the waivers of appeal rights that often are required by the terms of a plea agreement, he noted that:

The game is not worth the candle. That is not to say this is a game: for many defendants, the harsh and chilling effect of appellate waivers results in the deprivation of their constitutional and statutory rights, far from anything one could, other than with great irony, call a game. Rather, our Court’s tortured jurisprudence on appellate waivers has wreaked havoc on the lower courts, district attorneys, defense counsel and defendants, and is not worth any of the hypothetical benefits purportedly bestowed by appellate waivers.²⁸

The proliferation of convictions secured through plea agreements not only undermines the public perception of the legitimacy of the criminal justice system but can have disproportionate impacts on people of color. For example, one study of the Manhattan District Attorney’s office found that, in the plea negotiation stage, Black defendants were significantly less likely than white defendants to receive offers of reduced charges and more likely to receive sentence offers involving prison time.²⁹ Another study, set in Wisconsin, found that white defendants without a criminal history were more than 25% more likely than Black defendants to have a top charge dropped or reduced.³⁰ Because of this, “white defendants who face initial felony charges [were] more likely than black defendants to end up being convicted of misdemeanors rather than more serious crimes. Similarly, white defendants initially charged with misdemeanors [were] more likely than black defendants to be convicted for crimes carrying no possible incarceration or not being convicted at all.”³¹ A 2019 review of research on racial disparities in the application of the trial penalty found similar issues, noting that Black defendants were substantially more likely to be imprisoned than white defendants and were likely to face longer sentences

as well.³² Based on this review, the article concluded that “[d]isparities with how the trial penalty is applied across both courts and races add[] an additional layer of inequality and injustice” to the criminal justice system.³³

At the same time, however, for all its flaws, plea bargains also represent an important safety valve as criminal sentences have become increasingly severe. As New York defense attorney Scott Greenfield notes, such pleas are often the best way for those facing criminal charges to mitigate the impact of America’s increasingly severe sentencing regime.³⁴ Judge Goodwin’s cases suggest just how difficult it is to address the trial penalty productively — in one case where Judge Goodwin rejected the plea, the defendant appears to have been sentenced to a longer prison term than the prosecution initially sought.³⁵ Simply eliminating plea bargains as a practice could expose other such defendants to vastly increased sentences.

New York’s Disappearing Trial

As of 2019, 96% of felony convictions and 99% of misdemeanor convictions in New York State were the result of guilty pleas.³⁶ These figures align with national trends. In *Lafler v. Cooper*, the U.S. Supreme Court noted that 97% of federal convictions and 94% of state convictions were the result of pleas.³⁷ That trend continues to today: according to analysis of fiscal year 2019 by the U.S. Sentencing Commission, more than 97% of federal defendants plead guilty rather than go to trial.³⁸

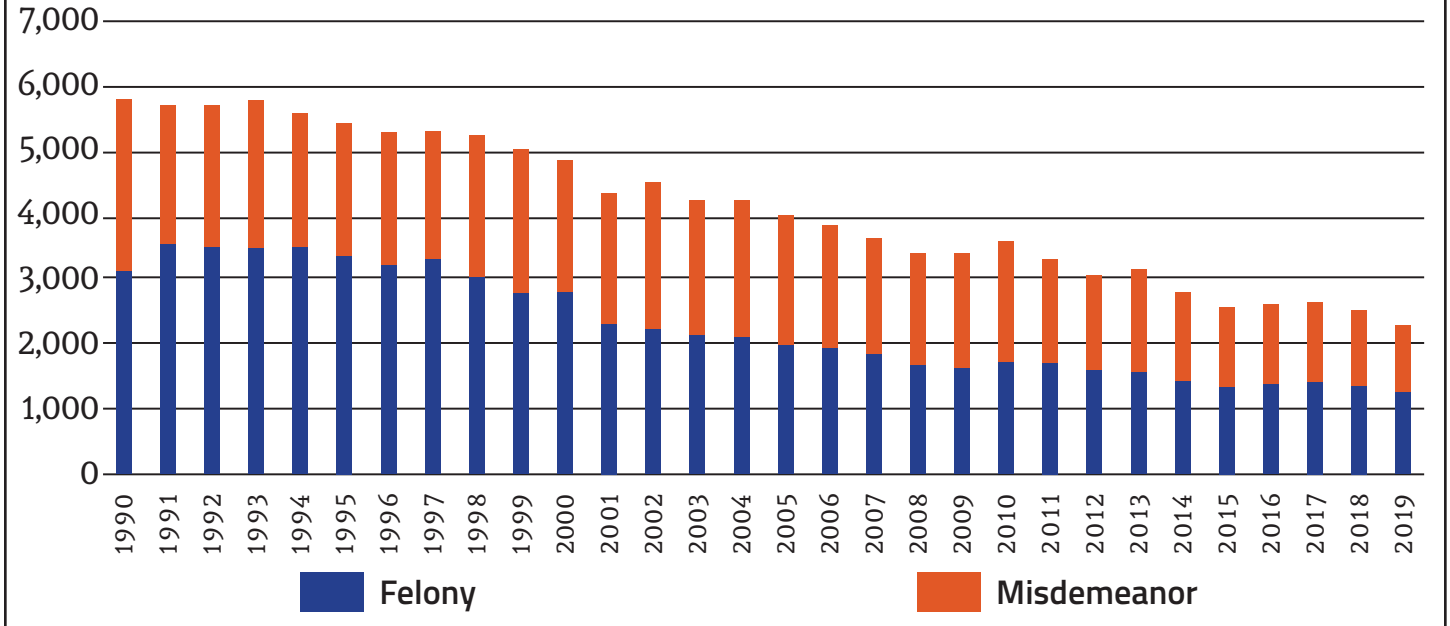
Indeed, since 1990, criminal justice system activity in New York has been in decline. New York courts are handling and resolving far fewer criminal justice matters now than they were in 1990. In 1990, New York courts disposed of 476,162 justice-related matters (misdemeanors, felonies and violations) whether through conviction, dismissal, or non-prosecution resolutions. Over the next three decades, this number fell by 22%, down to 373,070 dispositions in 2019. Felony and misdemeanor convictions also declined. In 1990, 56,197 felony convictions, whether by trial, plea or other adjudication were obtained in New York. In 2019, only 25,450 felony convictions were obtained, a 55% decrease. In the same period, misdemeanor convictions fell by 44%.



As of 2019, 96% of felony convictions and 99% of misdemeanor convictions in New York State were the result of guilty pleas.³⁶ These figures align with national trends.

This general decrease does not fully account for the steeper decline in the number of misdemeanor and felony trials in New York. As displayed in the table below, in 1990, there were 5,786 felony and misdemeanor trials in New York State courts. By 2019, that number had fallen to 2,284, a 61% overall decrease in which felony trials fell by 59% and misdemeanor trials fell by 62%. In New York City, the trends were slightly different though the declines were equally dramatic: Total felony trials fell by 68%, from 2,157 in 1990 to 681 in 2019. Misdemeanor trials fell by 57% to just 388 in 2019.³⁹

Trials In New York 1990 to 2019



As expected, the decrease in trials was accompanied by a marked rise in guilty pleas. In 1990, 91% of felony convictions in New York were obtained through a plea. Throughout the 1990s that percentage increased, reaching 96% in 2001. This trend held for misdemeanors as well. In 1990, 96% of misdemeanor convictions were obtained through guilty pleas. As with felonies, this number steadily increased throughout the 1990s. By 1996 and every year after, 98% to 99% of misdemeanor convictions were obtained by plea. In short, if someone is convicted in New York State, whether of a felony or a misdemeanor, it is overwhelmingly likely that they were convicted by plea rather than at trial.⁴⁰

DEFINING THE TRIAL PENALTY: PRACTITIONER EXPERIENCES AND SURVEY RESULTS

Insights and survey responses from the criminal defense community make clear that the trial penalty exists in New York State, and that it routinely dissuades criminal defendants from exercising their right to trial. The trial penalty has two major, related consequences: (1) Individuals who exercise their constitutional right to trial face severely enhanced penalties, a reality which, in turn, (2) discourages other individuals from putting the government to its proof at trial or asserting other valuable pretrial rights, such as the right to receive discovery, including *Brady* material,^v conduct a defense investigation, and challenge the legality of the government’s investigatory practices, including the collection of evidence. Practitioners told story after story about clients suffering these consequences: some serving posttrial sentences far in excess of the plea offers they had received because they exercised their right to trial; some who pled guilty rather than take the risk of a conviction and an excessive posttrial sentence.



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Survey and Interview Methodology

To conduct the survey, an initial outreach was made to the heads of all public defender offices and administrators of assigned counsel plans throughout the state as well as to private practitioners through the NYSACDL, New York Criminal Bar Association and NACDL (defense bar associations) to encourage broad and varied participation. The survey included both narrow and open-ended questions, designed to obtain information about whether, and how, the trial penalty impacts criminal defense practice in New York.

This online survey consisted of 13 questions about each attorney’s experiences with the trial penalty in New York State. A copy of the survey and the responses are included in Appendix 2. The survey provided the following definition of the trial penalty:

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. This penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial. To avoid the penalty, accused persons not only forego a trial, they must also surrender many other fundamental rights which are essential to a fair justice system. Depending upon the jurisdiction, the accused often must plead guilty solely to avoid pretrial incarceration, or, to avoid a vastly increased penalty,

^v This refers to exculpatory material the government is required to provide to a defendant under *Brady v. Maryland*, 373 U.S. 83 (1963).

may be required to waive the right to discovery, access to *Brady* material, the right to conduct a meaningful investigation, the right to challenge unlawfully seized evidence, the right to develop mitigation, and the right to appeal.

In addition to these questions, the survey invited practitioners to provide narrative examples of cases where they encountered the trial penalty. As follow-up, interviews were conducted with a select group of survey participants to gather additional information about their experiences and cases they had handled that were impacted by the trial penalty.^{vi}

In total, 372 defense attorneys from 40 of New York's 62 counties responded to the survey. The largest numbers of replies came from New York, Kings and Queens counties, but members of the defense community from across New York State contributed as well.

Substantial efforts were also made to obtain the prosecutorial perspective on these issues. These included multiple letters to every district attorney listed in the District Attorney's Association of the State of New York to advise them of the project and to invite them to provide information on plea practices and policies in their district. Follow-up inquiries by telephone message and email were also made to solicit their perspective. Only one response was received across 62 counties. The District Attorney of Washington County agreed to respond verbally in October 2019, indicating, in sum and substance, that the trials have not decreased in this county, but noting that the office did not maintain statistics. A sample of the letters are included in Appendix 3.



The vast majority of defense attorneys reported experiencing a trial penalty in their practice. In total, 94% of these practitioners reported that the trial penalty plays a role in criminal practice in their county.⁴¹

Trial Penalty Prevalence

The vast majority of defense attorneys reported experiencing a trial penalty in their practice. In total, 94% of these practitioners reported that the trial penalty plays a role in criminal practice in their county.⁴¹ Most — 70% — believed that the trial penalty was more prevalent in one class of case (i.e., in felonies or misdemeanors) than others.⁴² Of those who believed the trial penalty was more prevalent in one class case than another (i.e., the 70% noted above), 93% believed that it was more common in felonies than misdemeanors.⁴³

vi Throughout, these case studies are identified in the text in bold. In many of these cases, clients understandably wished to keep identifying details of the incident confidential either for reasons of privacy or fear of retribution. Accordingly, where possible, stories are identified by the person's name or by either a pseudonym or a name derived from some attribute of the case, where confidentiality was requested.

Consequences of Pleading Guilty

Before examining the systemic issues that contribute to the trial penalty, this report first addresses how the trial penalty — and the resolution of a vast majority of criminal cases by guilty plea — negatively impacts the justice system, principally by insulating criminal charges and law enforcement conduct from rigorous scrutiny. The table below shows that large numbers of defense attorneys believed that the trial penalty manifested not only in longer sentences but also in the waiver of pretrial, trial, and posttrial rights. The rights they identified most often as being impacted by the trial penalty included the rights to appeal, make pretrial suppression motions, receive discovery and conduct a meaningful defense investigation.



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Ways the Trial Penalty Manifests Itself in Waivers of Rights⁴⁴	
Right	Number and Percent of Responses Finding the Trial Penalty Impacted This Right
<i>Waiver of the Right to Counsel</i>	9 (2.84%)
<i>Waiver of Time to Conduct a Meaningful Investigation</i>	75 (23.66%)
<i>Waiver of Discovery</i>	80 (25.24%)
<i>Waiver of Pretrial Suppression Motions</i>	112 (35.33%)
<i>Waiver of Access to Experts to Develop Mitigation</i>	26 (8.20%)
<i>Waiver of Appeal</i>	216 (68.14%)
<i>Waiver of Prospective Claims of Ineffective Assistance</i>	10 (3.15%)
<i>Waiver of Freedom of Information Act Requests</i>	5 (1.58%)

This survey was conducted before January 2020, when New York State adopted legislation changing its criminal procedure discovery laws. As discussed further below, these laws increased the discovery requirements for prosecutors prior to making or withdrawing a plea offer. However, given the laws' recent enactment, and the 2020 onset of the COVID-19 pandemic and its attendant disruptions of court proceedings, it is difficult to say whether the new legislation will impact defendants' willingness to waive their pretrial and trial rights.

These pretrial rights serve as an important check on government overreach — including overreach by investigating agents and prosecutors. Pretrial motions test prosecutorial legal theories, as well as law enforcement methods and conduct, primarily with respect to evidence-gathering activities. Trials also can test these aspects of a government's case, as well as the government's proof. As the number of people exercising their pretrial, trial and appellate rights continues to dwindle, criminal cases and law enforcement conduct are increasingly protected from scrutiny.



Writing in September 2020, Barbara Zolot, the senior supervising attorney of the Center for Appellate Litigation, noted that “appeal waivers have become a standard condition of negotiated pleas in New York State.”⁴⁷ As a result of these waivers, legal issues that would be appealable under New York State law and precedent, even when a defendant pleads guilty, such as trial court rulings on motions to suppress, cannot be raised on appeal. As a result, concerns like “police misconduct that would come to light upon appellate review remain[] concealed,”⁴⁸ and defendants lose the benefit of the possibility of such review in negotiating the disposition of their case.

Indeed, there is evidence that plea offers are strategically used by prosecutors to dispose of cases brought by law enforcement officers whose credibility might not withstand cross-examination at pretrial hearings or at trial. For example, in 2019, it was revealed that the Queens District Attorney’s Office “had built its own office credibility database, collecting substantiated misconduct allegations, criminal matters, adverse credibility findings and civil lawsuits” with respect to the law enforcement officers handling its cases.⁴⁵ Former prosecutors from the office reported to news outlets “that such lists are used to help DAs push for early plea deals — without disclosing officers’ problems to defense.”⁴⁶

Defendants also relinquish their right to appeal their convictions when they plead guilty, as plea offers are typically structured to require a waiver of the right to appeal as part of the agreement. Writing in September 2020, Barbara Zolot, the senior supervising attorney of the Center for Appellate Litigation, noted that “appeal waivers have become a standard condition of negotiated pleas in New York State.”⁴⁷ As a result of these waivers, legal issues that would be appealable under New York State law and precedent, even when a defendant pleads guilty, such as trial court rulings on motions to suppress, cannot be raised on appeal. As a result, concerns like “police misconduct that would come to light upon appellate review remain[] concealed,”⁴⁸ and defendants lose the benefit of the possibility of such review in negotiating the disposition of their case.

In addition to the appellate waivers typically required by plea agreements, New York courts have also determined that certain postconviction collateral challenges are automatically waived if a defendant pleads guilty. For instance, defendants who enter guilty pleas are barred from filing postconviction claims for actual innocence unless they can support their claim with DNA evidence.⁴⁹ New York courts also have refused to grant appeals based on violations of defendants’ statutory rights where the defendant entered into a guilty plea. As New York’s highest court, Court of Appeals, explained in *People v. Taylor* in reaching this conclusion, even where the violation “invoke[s] a statutory right [that] . . . bears directly on the defendant’s factual guilt,” the guilty plea “remove[s] this issue from the case” and the defendant “cannot resuscitate it on appeal.”⁵⁰

Decisions barring postplea appeals emphasize efficiency and finality.⁵¹ For example, in *People v. Tiger*, the Court of Appeals noted that “[p]ermitting a collateral attack on a guilty plea . . . would have enormous ramifications to the efficacy of our criminal justice system.”⁵²

Despite this, several New York judges have questioned whether these practices in fact promote efficiency

and finality. In *People v. Batista*, Judge Alan Scheinkman of the Second Department raised several challenges to the purported efficiency of plea waivers. First, he noted that in practice, even when pleas require that a defendant waive the right to appeal substantive issues, the litigation does not end there. Rather, the question before the Court then becomes whether a particular waiver was effective: in at least 380 cases in the last five years it has been found not to be.⁵³ As a result, Judge Scheinkman noted that “[t]o the extent that appeal limitations are not perceived as effective, their role in rendering convictions final will not be effective either.”⁵⁴ Judge Scheinkman also noted that appellate reviews of waivers could actually be more time-consuming than the substantive issues that a defendant had been forced to waive:

It is extremely time-consuming to parse through the transcripts of pleas in hundreds of cases and to weigh the arguments presented in the briefs as to the validity or invalidity of appeal limitations in the context of highly nuanced factual settings. By way of contrast, review of whether a particular sentence is excessive is generally less time-intensive.⁵⁵

Judge Wilson, echoing Judge Scheinkman’s concerns, then went one step further, writing in *People v. Thomas* that:

Rather than conserving judicial resources, appellate waivers consume the time of prosecutors, defense counsel and the court in attempting to create a record that might satisfy our appellate waiver jurisprudence. All that time and effort would be saved were appellate waivers banned.⁵⁶

While some Court of Appeals judges have expressed their disagreement with Judge Wilson’s position,⁵⁷ trends since *Thomas* suggest that New York’s waiver jurisprudence does consume immense judicial resources. From *Thomas* in 2019 to January 2021, 90 waivers were invalidated by New York’s appellate divisions: in a single case, *People v. Bisono*, the Court of Appeals invalidated ten waivers at once, a result New York attorney Paul Shechtman described as “unprecedented.”⁵⁸



In barring appellate review of guilty pleas in the absence of exonerating DNA evidence, the Court of Appeals may allow wrongful convictions to stand. The National Registry of Exonerations lists 15 defendants in New York who have been exonerated in the last 15 years of crimes to which they pled guilty.⁵⁹ Many of those prosecutions relied on information provided by civilian witnesses or law enforcement officers that was later discredited or disproved.

Moreover, any purported gains in efficiency must be weighed against the cost of such waivers. These include the risk that violations of defendants’ constitutional rights may go unaddressed by the Court of Appeals, or that innocent defendants may lose the ability to challenge their convictions. That is, in barring appellate review of guilty pleas in the absence of exonerating DNA evidence, the Court of Appeals may allow wrongful convictions

to stand. The National Registry of Exonerations lists 16 defendants in New York who have been exonerated in the last 15 years of crimes to which they pled guilty.⁵⁹ Many of those prosecutions relied on information provided by civilian witnesses or law enforcement officers that was later discredited or disproved. For example:

- ◆ In 2015 and 2016, five inmates at the Auburn Correctional Facility in Auburn, New York, pled guilty to promotion of prison contraband. Each claimed that the weapons had been planted on them by one of the prison guards. Two of the inmates were due to be released when these new charges were brought, but they knew if they went to trial, it would be their word against the guard's. All five pled guilty, and four of them received additional sentences between one and a half and four years, to run consecutive to the sentences they were currently serving. Two weeks after the fifth inmate pled guilty, the Cayuga County District Attorney revealed that the same guard had admitted to planting a weapon on another inmate at the Auburn prison. Based on that admission, that other inmate's conviction was vacated, and the district attorney subsequently asked the Cayuga County Supreme Court to vacate the convictions of these five inmates as well.⁶⁰
- ◆ In 1963, 29-year-old Paul Gatling, a Black man, was arrested for the murder of a white man in Brooklyn. A convicted felon told police that he had seen Gatling near the scene of the crime immediately after the shooting. The victim's wife, who had been home at the time of the shooting, told police that a Black man with a shotgun had demanded money and then shot her husband when he refused. Initially, she was not able to pick Gatling out of a lineup but later identified him as the gunman while he was being questioned by police. Although he faced the death penalty, Gatling originally decided to go to trial. But in the middle of his trial, Gatling pled guilty and was sentenced to 30 years to life. His sentence was eventually commuted, and he was released on parole in 1974. Forty years later, Gatling sent a letter to the Brooklyn District Attorney who had formed a Conviction Review Unit to re-investigate credible claims of innocence. The unit uncovered evidence that had not been disclosed to Gatling's defense counsel at the time of trial: the victim's wife had been having an affair with a man who was boarding at her house and that man told detectives that he had heard her threaten to kill her husband (the victim) if he continued to beat her. Based on that evidence, the prosecution moved to vacate Gatling's conviction and a court granted that motion in 2016.⁶¹
- ◆ Following a 2012 explosion from a ruptured gas line in West Haverstraw in which four people were badly injured, the Rockland County District Attorney charged the owner of the excavating company that had caused the rupture. Fifty-three-year-old Fidel Padilla claimed that he had contacted the utility companies to allow them to go to the property first and mark the location of gas and electric lines before they began digging. After that conversation, he waited several days and then only dug in areas where there were no markers. Nevertheless, he agreed to plead guilty to a felony count of reckless endangerment. But prior to sentencing, he filed a motion to withdraw his plea after learning that the state agency overseeing utilities had cited the gas company for marking the wrong spot at Padilla's excavation site. The citation had been issued a week before Padilla entered his guilty plea, but the prosecutor had not disclosed it. Padilla also said that the prosecutor had threatened to file charges that could result in his deportation if he did not plead guilty. The Rockland County Supreme Court Judge granted his motion and dismissed the charges.⁶²



According to the National Registry of Exonerations, 2754 wrongful convictions have been identified since 1989, and of those, 569 defendants, or 20% of the total, pled guilty.⁶³ Similarly, of the 375 people that have been exonerated with DNA evidence since 1989, 44, or 12% pled guilty to crimes they did not commit.⁶⁴

These cases illustrate the troubling consequence of a system that overemphasizes convictions through guilty pleas. According to the National Registry of Exonerations, 2754 wrongful convictions have been identified since 1989, and of those, 569 defendants, or 20% of the total, pled guilty.⁶³ Similarly, of the 375 people that have been exonerated with DNA evidence since 1989, 44, or 12% pled guilty to crimes they did not commit.⁶⁴ When the vast majority of defendants relinquish fundamental rights designed to challenge and test the government’s proof before, during and after trial on appeal, convictions based on evidence that is unconstitutional, insufficient or even false can result.

Pleas also have a negative impact on the broader justice system. If defendants, even guilty ones, waive trial, it becomes far more difficult to police constitutional violations like illegal searches that may have contributed to their arrest or imprisonment. For example, Barbara Zolot identified several cases of police misconduct that were only brought to light on appeal, including manufactured testimony, racially biased policing, and unconstitutional searches.⁶⁵ Similarly, reports from former prosecutors suggest that one of the uses of the officer credibility database assembled by the Queens County District Attorney’s Office might have been to push for early pleas without disclosing officers’ credibility issues to the defense.⁶⁶ Such practices might be more difficult if officers were subject to trial scrutiny. Together, these findings support Judge Wilson’s conclusion that because of plea bargains and appeal waivers, “defendants are chilled from pursuing their fundamental rights to appeal, while the public’s confidence in the system’s fairness wastes away.”⁶⁷

Factors Contributing to the Trial Penalty

The Task Force identified four primary aspects of New York’s criminal justice system that contribute to and deepen the impact of the trial penalty: prosecutorial conduct, judicial conduct, sentencing laws and excessive caseloads.

Prosecutorial Conduct

Prosecutors play a key role in driving the trial penalty in New York State. Indeed, when defense attorneys were asked to rate the primary driver of the trial penalty, more than 37% selected “a culture of practice by prosecutors.”⁶⁸ Since most cases are disposed of by guilty plea, “[f]or all intents and purposes, prosecutors *are* the criminal justice system.”⁶⁹ They have virtually complete and unreviewable discretion to decide which criminal charges to bring and when and whether to offer plea deals, which can exert tremendous influence over a defendant’s decision on whether to go to trial. Prosecutors also make sentencing recommendations that can influence judges’ decisions with respect to the appropriate penalties.



In making plea offers, prosecutors may threaten to increase the severity of the charge or to add charges if the defendant refuses to plead guilty.

Defense attorneys described a variety of prosecutorial policies and practices that contribute to the trial penalty, including (1) aggressive charging, (2) contingent plea offers and waivers of pretrial rights, (3) late or incomplete discovery, (4) penalizing motion practice, and (5) seeking much harsher sentences after trial.

Aggressive Charging

Prosecutors choose which charges to bring, a decision in which they have broad discretion. With this discretion comes considerable leverage. In making plea offers, prosecutors may threaten to increase the severity of the charge or to add charges if the defendant refuses to plead guilty. Frequently, the facts of a case may support any number of charges, leaving prosecutors free to select, initially, more serious charges carrying higher penalties, creating an opportunity to offer a plea deal to a lesser offense or sentence that the defendant is likely to take. Given this flexibility, several practitioners reported that prosecutors will charge a felony in a case where the conduct arguably warrants only a misdemeanor, because the risk of jail time exerts substantial pressure to plead guilty.

Furthermore, criminal defendants are often motivated to plead guilty due to unrelated external factors, and prosecutors can leverage those factors in deciding what charges to pursue to increase the likelihood of a guilty plea. For example, prosecutors can use the prospect of immediate release to pressure a defendant to plead guilty: 36% of practitioners reported that one way the trial penalty manifests itself is through the use of bail to leverage pleas — if a defendant does not plead guilty at the first appearance, bail will be set.⁷⁰ As one attorney noted: “Bail is used to induce guilty pleas . . . [I]f you do not PG [plead guilty] to TS [time served] or some other small sentence, bail will be set and you will spend more time in [jail] just waiting for your next court date.”⁷¹ Likewise, a term of probation in lieu of incarceration after prolonged detention awaiting trial may be offered late in the case to induce a plea in exchange for immediate release from custody.

Other external factors may also lead those charged with crimes to plead, and prosecutors can leverage those factors as well. As one practitioner reported, a key driver of the trial penalty is the “collateral consequences for the client (time to litigate case, inconvenience of returning to court multiple times[,], enormous wait time in court[,], etc.)” Another related the story of a survivor of domestic violence that illustrates the many pressures defendants face that may encourage them to take a plea:

[She] also had immigration concerns. [S]he was pregnant and beaten by her spouse. She and I met with the DA and she shared her history. The DA agreed she was a victim but the best they would offer was an attempted reckless assault. If [the] client lost at trial, she would face prison or probation and would lose her job and status in the country. Under this threat, without discovery, she took the plea deal.⁷²



Renata Hill

In the summer of 2006, seven young black lesbian women traveled to Greenwich Village from their homes in New Jersey for a night out. While they were walking down the street, a man propositioned one of the women, who was just 19 at the time. After she told him she was gay, the stranger threatened to rape the young women “straight,” then physically assaulted the group. A fight broke out when the women tried to defend themselves. Although it lasted only four minutes, the stranger received a knife wound and was taken to the hospital.

All seven women were arrested at the scene and were charged with first, second- and third-degree assault, and first- and second-degree gang assault. Video evidence showed another unidentified man joining the brawl, and the women’s defense was that the man actually stabbed the stranger. Nonetheless, the prosecutors accused Patreese Johnson, the owner of the knife, of having inflicted the injury. So, in addition to the other charges, they also charged her with second-degree attempted murder.

Bail was set for all the women, but most could not make bail. After spending some time in custody, three of the women pled guilty to assault and were sentenced to six months in jail and five years’ probation. The remaining four were offered plea deals, as well, but they rejected them and chose to challenge the charges at trial. As Ms. Johnson explained: “They said in order for me to take the deal I need to plead guilty, but I’m not

going to say that I'm guilty. I felt so confident I'm not pleading guilty, because I'm not guilty. I defended myself. Let the people judge it."

In the wake of the incident, the man told the press that he was the victim of a hate crime and local and national media seized on his side of the story (the New York Times headline read "Man Is Stabbed in Attack After Admiring a Stranger"). It is unclear whether the jury was influenced by the media's portrayal of the women, but all four women who went to trial were found guilty, albeit of lesser offenses than the prosecution's top charges. Ms. Johnson was acquitted of attempted murder but was convicted of first-degree assault and second-degree gang assault. The other three, Venice Brown, Renata Hill, and Terrain Dandridge, were convicted of lesser degrees of assault and gang assault.

Consistent with their trial testimony, at sentencing, the women emphasized the fear they felt during the altercation with the stranger: Just three years earlier, a 15-year-old girl was killed during a strikingly similar incident in Newark, New Jersey, where the women lived. The judge showed little sympathy for the women, however, expressing skepticism that the stranger's words posed any threat. He sentenced Ms. Dandridge to three and a half years in prison, Ms. Brown to five years, Ms. Hill to eight years, and Ms. Johnson to 11 years.

On appeal, the Appellate Division found multiple flaws in the women's convictions. It reduced Ms. Johnson's sentence from 11 to eight years. It ordered Ms. Brown and Ms. Hill new trials because the trial judge had not properly instructed the jury on the defense of justification. It dismissed entirely the charges against Ms. Dandridge, citing the lack of any evidence that she had been involved in the brawl.

Yet while Ms. Dandridge's record was ultimately cleared, no such relief was available to the three women who had taken pleas. There was even less evidence against them, but forced to choose between remaining in jail to await trial or pleading and being released in less than six months, these three pled guilty. They will live the rest of their lives with felony convictions.

Although Ms. Hill won her appeal, having once faced a prison sentence, this time she took no chances. She was anxious to return to her young son, and, given the outcome of her first trial, she was terrified by the prospect of receiving a large sentence if she again chose to exercise her right to a new trial and lost.

Another attorney described a case with:

a 60-year-old home health aide with no prior law enforcement contact. After being arrested her license was suspended. She's been out of work for months and is struggling financially. Even though she maintains her innocence, she cannot afford to await trial. The ADA is insisting she complete an anger management program that costs \$165. She will also have to pay \$120 in court costs upon the entry of her plea. My client feels obligated to do whatever just to resolve the case and be able to return to work.⁷³

These kinds of challenges can all encourage defendants to take a plea, as **Renata Hill** and **Father of Two** did in the cases described above and below.

In addition to overcharging, defense attorneys practicing in New York City noted that prosecutors fail to adequately scrutinize cases presented to them by the New York City Police Department (NYPD) prior to charging. One defense attorney related that essentially every case brought in by the NYPD is charged in Queens County. Other research supports this observation: a study of prosecutorial practices in New York County found that, between 2010 and 2011, 95.6% of cases brought in by police for screening were accepted for prosecution.⁷⁴



Even in the rare case where prosecutors acknowledge that their cases lack sufficient proof, their practice is to wait for the court to grant a defense motion to dismiss the charges based on the untimeliness of the prosecution under the Speedy Trial Act.

Defense attorneys indicated that prosecutors appear to prefer to resolve charged cases rather than evaluating the charges and refusing to prosecute those that are not meritorious. As one practitioner said: “[I]n Manhattan the prosecutors will not dismiss a domestic violence case. You have to do a very strong proffer to get a dismissal. Their practice is to run the speedy trial clock.”⁷⁵

Thus, even in the rare case where prosecutors acknowledge that their cases lack sufficient proof, their practice is to wait for the court to grant a defense motion to dismiss the charges based on the untimeliness of the prosecution under the Speedy Trial Act. Another defense attorney described prosecutors as “rarely if ever being willing to dismiss unwarranted charges[. M]aking deals rather than reassessing credibility of their complainants in cases where charges should be dismissed. Valuing conviction over all else.” Still another attributed the trial penalty to prosecutors’ “[f]ailure to evaluate credibility of facts presented by police.”⁷⁶

The practice of employing charging discretion to extract a resolution even in doubtfully provable cases exists even in misdemeanor cases involving innocuous infractions and extremely weak evidence. A recent article on New York City misdemeanor practices gave an example of a young man arrested for theft of services, after he used a discounted MetroCard reserved for disabled persons.⁷⁷ The young man explained that the arrest was a mistake: He worked in social services and was accompanying a group of disabled people, helping them to swipe their cards. The arresting officer mistook one of those swipes for the young man’s own. Even after seeing a letter



Father of Two

A father of two in his forties with no prior criminal record and who was the sole source of income for three generations of family members was dining in a restaurant when he got into an argument with his companion and scalding hot soup was spilled on her leg and arm, burning her badly enough to require a skin graft. All indications were that the spill and burn were likely an accident, and he voluntarily surrendered to police when he first learned of the surprisingly serious injury caused by the hot soup. But prosecutors decided to charge him with first-degree assault — an offense that would have required them to prove that he had used a dangerous weapon to cause serious physical injury — as if he had used a knife or a gun. They also would have had to prove that he intended to cause serious physical injury.

That charge carried a mandatory minimum sentence of five years in prison if convicted, regardless of a spotless record and the man's contributions to society. As the sole breadwinner for his children and elderly parents, he could hardly afford the risk of prison for five years. On the eve of trial, the prosecutor offered the client a plea: if he pled guilty to reckless assault (by means of intoxication), the prosecutor would recommend a sentence of 90 days in prison (to be served on weekends) plus five years' probation, to which the trial judge agreed.

Unwilling to risk his ability to support his family if convicted of a five-year mandatory minimum, the client accepted the plea deal. He was able to remain employed by serving his sentence on the weekends, and ultimately due to his excellent compliance with the terms of his probation his probation was terminated early, short of three years. Although he avoided a lengthy prison sentence, he will be a convicted felon for the rest of his life.

from the young man’s former employer corroborating his story, the prosecutor refused to dismiss the case: “I can tell you that we don’t dismiss cases. I mean, we do, but we have to have proof that he is not guilty.” Instead, she offered an adjournment in contemplation of dismissal (ACD), which imposes a temporary mark on a person that can be considered in future charging decisions if the defendant is arrested again.⁷⁸ Because the young man’s prior \$30,000 salary was too high to qualify him for public defender assistance, he would have had to hire a private attorney if he wanted to defend the case. He had lost his job after arrest, and he would likely have had to wait a year for trial. Even at trial, the judge might simply have believed the arresting officer’s story over his, and he would have ended up with a permanent criminal record.⁷⁹

Weak cases involving minor purported infractions, like this one, should be declined by prosecutors.⁸⁰ But where guilty pleas or agreements to conditional dismissals can be so easily secured due to the systemic issues discussed above, prosecutors have little incentive to do so. Defendants know they face severe consequences for rejecting a prosecutor’s offer. And once a guilty plea has been entered, the prosecutor’s evidence and theory of the case will likely never be tested.



Survey responses provide further evidence that there is pressure to plead guilty early, even before defendants can take advantage of pretrial protections. Thirty-five percent of defense attorneys stated that, in their experience, guilty pleas in felony cases are generally entered before a judge hears any pretrial motions, such as motions to suppress evidence or change venue.

Contingent Plea Offers and Waivers of Pretrial Rights

Not only do prosecutors have broad discretion to charge, they also have broad discretion to set the terms and conditions of plea offers. These terms and conditions may place additional pressure on defendants to plead rather than exercise their constitutional pretrial and trial rights. As an initial matter, prosecutors can condition plea offers on immediate acceptance and penalize defendants who refuse to plead immediately, whether because the defendant wants to present the case to a grand jury, are considering potential pretrial motions, or because they simply need more time to consider an offer.

One interviewee described a case where the prosecutor offered a plea to a one- to two-year sentence initially, but withdrew the offer because it was not accepted immediately. When the defendant tried to accept the offer the next day, the prosecutor increased the sentence by one year. Another survey respondent noted that the “Albany County DA has ridiculous AUO 1st [aggravated unlicensed operation of a motor vehicle] and Felony DWI offers, always including jail time, and offers go up at each stage usually forcing a plea.”⁸¹ Finally, one practitioner indicated that in Kings County “after the hearings [with respect to pretrial motions, for example] there will be no offer.”⁸²

Survey responses provide further evidence that there is pressure to plead guilty early, even before defendants can take advantage of pretrial protections. Thirty-five percent of defense attorneys stated that, in

their experience, guilty pleas in felony cases are generally entered before a judge hears any pretrial motions, such as motions to suppress evidence or change venue. Another 11% said that guilty pleas are generally entered before pretrial motions are even filed. Five percent said the pleas are generally entered before discovery is exchanged.^{vii} And 34% said that guilty pleas are generally entered before charges are formally brought in an indictment.^{viii} Fewer than 8% of defense attorneys said that guilty pleas are entered in felony cases after pretrial motions are heard or just before trial.⁸³ Results were only slightly higher in misdemeanor cases where around 12% of practitioners said that guilty pleas are generally entered after pretrial motions are heard or just before trial.⁸⁴

For instance, one defense attorney related that a 16-year-old client accepted a plea offer to second-degree manslaughter after the Dutchess County prosecutor threatened to withdraw the offer or add more charges if counsel filed a motion to move the case to family court. The plea offer was conditioned on waiving the argument so that it was not preserved for appeal.⁸⁵



Defense attorneys from other counties also mentioned that prosecutors frequently make one-time offers or withdraw offers if their clients insist on being indicted by a grand jury or want to file suppression motions.

In certain circumstances, prosecutors can use plea negotiations to avoid submitting a case to the grand jury. For example, until the 2020 election of a new district attorney, it was Queens County practice that prosecutors would not make plea offers after a grand jury had indicted the defendant. That essentially meant that prosecutors could shield charges from grand jury scrutiny by requiring a plea deal, if any, to be completed before presenting the case before a grand jury. In response to a survey question asking for examples of prosecutorial policies and practices that contribute to the trial penalty, 15 of the 21 Queens County practitioners who responded mentioned this specific policy.⁸⁶ As one of them explained:

Prosecutors in Queens, by definition, will punish individuals for [insisting on] their indictment or not waiving their indictment. The Queens waiver policy is literally an institutional effort to force 180.80 waiver [the right to be indicted within 120 hours of arrest] and discovery rights in order to get the “opportunity” to negotiate a plea.⁸⁷

This policy is also significant because it allows Queens County to avoid postindictment discovery. New York’s criminal procedure laws currently require prosecutors to turn over discovery materials 20 to 35 days after

vii It is possible that reforms to New York’s discovery law passed during the development of this report will change this practice. However, as also noted elsewhere, any impact of this discovery law is not reflected in this report given the timing of that law’s passage.

viii In this scenario, a prosecutor would require a guilty plea after arrest and arraignment on a complaint but before a grand jury has determined whether probable cause to indict exists. Alternatively, prosecutors may pressure a defendant to waive the time restrictions on bringing an indictment in order to consider a “favorable” plea. In other words, if a defendant insists on having his case heard by a grand jury, which in New York includes the right to testify, a more favorable plea offer is withdrawn or withheld.



Queens County Woman

A first-time offender with no prior arrests or convictions was charged in Queens County with burglary after she caught her husband cheating on her and took his safe and drove off with it. After the husband called the police, the wife returned tearful and apologetic. The matter could have been charged as a misdemeanor petty larceny or not charged at all. Yet the prosecutor charged her with burglary, a violent felony in New York.

While the prosecutor offered to reduce the charge to a misdemeanor if she pled guilty, that offer was conditioned on the defendant waiving her right to be indicted by a grand jury. Facing the potential of a jail sentence if she took the case to trial, the defendant decided to accept the prosecutor's offer, which included a potential reduction to a disorderly conduct violation if she completed an anger management program. But because her guilty plea still resulted in a conviction, the defendant lost her job working with children and has been unable to find employment since. She was also required to pay restitution to her husband, who claimed that money had been removed from the safe.

When interviewed, her attorney expressed the wish that the client had allowed the case to go to the grand jury as she would have testified and would have been a good witness. But the risk of serving time in prison if she lost at trial was not worth putting the state to its burden of proof.

an indictment or information,^{ix} depending on whether the defendant is in custody.⁸⁸ Thus, this policy has the effect of forcing defendants to waive access to evidence they would otherwise have been entitled to.

The new Queens District Attorney elected in 2020 has pledged to end this policy and, as discussed below, New York has implemented new discovery rules that may blunt the impact of this policy even if it is retained. However, it remains to be seen whether and how effectively that pledge will be implemented. In any event, the next district attorney could reinstate the policy, and other counties could adopt similar practices. Moreover, as noted further below, some practitioners are skeptical that this policy will actually facilitate the greater sharing of discovery materials due to the long-standing culture and practices that resisted such sharing.

Defense attorneys from other counties also mentioned that prosecutors frequently make one-time offers or withdraw offers if their clients insist on being indicted by a grand jury or want to file suppression motions. The concept of the “one-time” or “one-day” plea offer was specifically identified by attorneys in Westchester,⁸⁹ Oneida,⁹⁰ New York⁹¹ and Kings counties⁹² as contributing to the trial penalty. In Erie County, an attorney noted that “[o]ffers are or may be withdrawn if there is not a plea before indictment, or after motions” while in St. Lawrence County, a practitioner reported that there was a practice of “withdrawal of offers if [a] plea [is] not accepted.” One defense attorney said that “[i]n NY County prosecutors flat out say that if you ‘do the hearings’ there will be no offer.” Another from Dutchess County said that “[p]rosecutors often threaten that our clients will get consec[utive] sentences and max sentences if they ‘force me to indict him.’”⁹³ And another from Kings County said that “[p]rosecutors will pull offers as retaliation for defendants litigating suppression issues.”⁹⁴ Finally, one attorney reported that “[C]ayuga [C]ounty dramatically increases the penalty on felonies if the DA has to respond to omnibus motions and discovery.”⁹⁵ These practices force defendants to choose between testing the prosecutor’s charges and evidence through pretrial practice, or taking advantage of the only opportunity they may get to negotiate a plea bargain.



The pressure on defendants to plead guilty early is compounded because New York law limits defendants’ guilty plea options once they have been indicted for certain types and classes of felonies.

The pressure on defendants to plead guilty early is compounded because New York law limits defendants’ guilty plea options once they have been indicted for certain types and classes of felonies. For example, under section 220.10(5) of the New York Criminal Procedure Law, a defendant indicted for a Class A drug felony must plead to at least a Class B felony, while a defendant indicted for a Class B violent felony that is also an armed felony must plead to at least a Class C violent felony. As a result, defendants have strong incentives to accept plea deals prior to indictment in order to avoid triggering such restrictions. The statute can serve as a tool for prosecutors seeking to coerce pleas, but it also restricts the discretion of prosecutors who might otherwise be open to more lenient resolutions once an indictment is issued.⁹⁶ The strictness of this regime makes New York an outlier: even section 1192.7(a)(2) of California’s Penal Code, which limits the types of cases where a plea can be offered, includes language that provides some flexibility in offering pleas based on the circumstances of the case.⁹⁷

ix An “information” is an alternative type of charging instrument, like an indictment, that may be used in New York State.



Richmond County Contraband

A resident of Richmond County was arrested and charged with misdemeanor menacing after being accused of waving a knife at a neighbor. This initial charge became the basis for a search warrant of the defendant's home. During that search, police discovered a number of contraband items, including a large capacity ammunition device, gravity knives, throwing stars, narcotics and untaxed cigarettes.

The man was charged with a selection of felonies and misdemeanors for this contraband. The charge for possession of the large capacity ammunition device, a third-degree violent felony, was the most serious. The defendant had no prior felony record, and none of the charged offenses had a mandatory minimum sentence.

He was offered a pretrial disposition which would have released him almost immediately into 12 months of treatment after he pled to one of the felonies and one of the misdemeanor offenses. If he successfully completed the treatment, the felony plea would be vacated entirely and the misdemeanor disposed of with only a conditional discharge. The man declined since he was generally distrustful of law enforcement and averse to almost any plea.

His attorney also believed that trial was a viable option: There was a strong case for suppression of all the contraband as the search warrant and search warrant application were

defective and overbroad. Also, other people lived and had lived in the home, including a deceased relative who was known to have been a knife collector. Even if they lost the suppression motion and the case proceeded to trial, his lawyer planned to argue that prosecutors could not prove that the accused was the person who possessed the items. But one of the conditions of the plea offer was waiver of the man's right to appeal. If he accepted the plea deal, he would lose the opportunity to appeal the suppression issue.

He exercised his right to trial. Unfortunately, the prosecutor had evidence that undermined his defenses, but the prosecutor was not legally required to disclose it to defense counsel until long after the offer was rejected. In the end, the man was convicted at trial of the twelve possessory offenses, including the felony charge for possession of the high-capacity ammunition device. He was sentenced to six years in prison, with the possessory offense sentences all running concurrently. Although the sentence was six times longer than the treatment mandate in the original non-jail treatment offer, the prosecutor portrayed it as an act of mercy since that they could have requested a 29-year sentence had they argued that the sentences should run consecutively.

Late or Incomplete Discovery

Defense attorneys across several counties identified prosecutorial practices of delaying or withholding discovery as a significant contributing factor to the trial penalty. Frustration with prosecutorial delays in providing discovery was reported in Albany, Kings, New York, Rockland, Richmond, Queens, Orange, Westchester and Monroe counties.⁹⁸ One attorney described frustration at the practice of “[d]iscovery dump[s] right before trial” and “unnecessary protective orders”⁹⁹ that shield some items from discovery, while several others described delays in the delivery of materials or withholding discovery prior to indictment. These practices hinder the defense's ability to conduct a robust pretrial investigation to identify potential defenses and increase the risk that late-breaking discovery will contain additional incriminating information leading to a potential conviction and a more severe posttrial sentence.



Some practitioners are skeptical that these discovery reforms will meaningfully impact the trial penalty problem. One attorney explained that judges frequently provide extensions of time to prosecutors to comply with the new discovery requirements, which may weaken the impact of the new law.

Some of this may be an outgrowth of New York’s prior discovery laws. Until very recently, pleading guilty early in a case usually meant that the defendant would do so without the benefit of discovery. Despite the Supreme Court’s 1963 *Brady v. Maryland* decision, which required prosecutors to turn over evidence favorable to the accused, New York has historically permitted prosecutors to wait until just before trial to share evidence under the so-called “blindfold law.” That practice put defendants at a disadvantage since they had few ways to assess the strength of the prosecution’s case as they considered a plea. This happened in the **Richmond County Contraband** case where the absence of prompt discovery deprived the defendant of crucial information that would have influenced his plea decision. The evidence disclosed in that late discovery appears to have led to a conviction and a sentence that far exceeded the plea offer.



Defense attorneys report that prosecutors seek drastically increased sentences following a trial, even where the defendant is acquitted of the top count.

New York reformed its criminal discovery rules in January 2020, and it is possible that those reforms will minimize, to some extent, the coercive nature of early plea offers. Under the new rules, if a prosecutor makes a plea offer prior to indictment, he or she is required to provide the defense with all discoverable materials at least three days before the offer expires. During later stages in the case, discoverable materials must be shared seven days before the offer expires.¹⁰⁰ Thus, under the current rules, defendants who receive plea offers are supposed to obtain “all items and information that would be discoverable prior to trial” before having to decide whether to accept an offer.¹⁰¹ According to the Center for Court Innovation, a New York–based think tank that studies ways to improve court operations, defendants can waive the right to discovery before pleading guilty, “but the prosecution cannot make such a waiver a condition of the plea.”¹⁰²

Some practitioners are skeptical that these discovery reforms will meaningfully impact the trial penalty problem. One attorney explained that judges frequently provide extensions of time to prosecutors to comply with the new discovery requirements, which may weaken the impact of the new law. While it is premature to assess the ultimate impact of discovery reforms on the trial penalty in New York for the reasons stated above, given the pervasive nature of the trial penalty, and a culture that sustains coercive plea practices, practitioners’ skepticism is understandable.

Prosecutorial Posttrial Sentencing Recommendations

Defense attorneys reported that prosecutors also contribute to the trial penalty by making posttrial sentencing recommendations that are far harsher than their plea offers and by making clear in pretrial negotiations that they are prepared to make such recommendations.¹⁰³ This means that clients considering whether to plead or go to trial know that they likely face a more severe sentencing recommendation from the prosecutor if they are convicted at trial. One noted: “I have only one time had a guilty verdict where the prosecutor did not robotically ask for the maximum, even where significantly lower plea bargains had been offered.” Another



Victor Gutierrez

Victor Gutierrez was charged with attempted murder in the second degree after becoming involved in a bloody altercation during which multiple members of his girlfriend's family sustained stab injuries from a knife. There were conflicting accounts of what happened during the incident. According to the family, Mr. Gutierrez arrived at their home, wielding a knife, and began to attack the family. Mr. Gutierrez maintained that he was at the bottom of a dog pile as multiple family members attacked him using household items as weapons, including a knife wielded by the girlfriend's father.

The knife that Mr. Gutierrez allegedly used did not have his DNA or any blood on it. In fact, it was recovered in the corner of the kitchen behind the washing machine, with nobody being able to explain how it got there. Meanwhile, police photographs showed a second knife in a pile of other items that the family had been using to attack Mr. Gutierrez, but this second knife was never recovered or tested.

Despite the apparent deficiencies in its case, the Richmond County District Attorney's office charged Mr. Gutierrez with attempted murder in the second degree, in

addition to various assault and criminal weapons possession charges, all stemming from this single incident. The maximum sentence for attempted murder at the time was 25 years.

Prior to trial, the prosecution made multiple plea offers, starting with 17 years in prison. That decreased to 15 years, and then eventually to 12. At that point, having already served two years in jail awaiting trial, Mr. Gutierrez was willing to plead guilty in exchange for time served, but the prosecution would not agree to that. Mr. Gutierrez decided to exercise his right to trial and he was ultimately acquitted of attempted murder. The jury found him guilty only of assault and weapons possession.

Yet despite the murder acquittal, the prosecution requested a sentence of 32 years — nearly three times longer than the last plea offer the prosecution had made when the offense at stake was attempted murder. Even more shockingly, the judge felt that this was not enough: he ordered Mr. Gutierrez’s sentence to run consecutively — 34½ years in total and almost triple the prosecution’s last plea offer.

stated “I have tried two [class] B misdemeanors where the offer went from time served to a request of 60 days jail post-conviction, for no reason other than going to trial. On the other end, I tried a homicide where the prosecutor requested essential[ly] triple the life sentence after a trial where before the offer was one life sentence.”¹⁰⁴

This phenomenon does not arise because — or at least not solely because — trial reveals additional facts that justify a higher sentence. As one practitioner explained, prosecutors “ask[] for significantly increased sentences after trial, even when facts have not come out at trial that would justify an increase in their recommendation.”¹⁰⁵ Another noted that “[p]rosecutors in New York County believe if they prepare a case for trial then the ‘price’ goes up. Therefore, the earlier your client pleads guilty, maybe the better.”¹⁰⁶



Practitioners and their clients recognize that prosecutors are likely to ask for the maximum sentence after trial. They also know that it is possible that such a sentence, even on one of the lesser crimes they are charged with, may result in a longer sentence than the plea they were offered. All of this increases the incentive to take a plea.



Ontario County Driver

A woman was arrested following a traffic accident and alleged to have run a stop sign in Ontario County and accused of driving under the influence of illegal substances. She was charged with Driving While Ability Impaired (By drugs), an E felony, and Misdemeanor Assault as the other driver as well as she suffered injuries.

The prosecutor made a pretrial plea offer: if the woman pled guilty, her sentence would be reduced to 60 days in jail followed by five years' probation. Although she had a prior conviction, the woman maintained that she was not impaired by drugs and refused to accept a plea admitting otherwise. Her case was bolstered by a toxicology report that revealed that, at the time of the accident, the defendant had only one drug in her system — a medicine for which she had a prescription. The prosecutor refused to adjust the plea offer and insisted that jail time was still an appropriate punishment. The prosecutor threatened that all deals were off if she did not accept the offer.

When the woman ultimately turned down the prosecutor's plea offer, and the Grand Jury indicted on the charge of Vehicular Assault, a Class D felony, which carries a sentence of 2 ½ to seven years.

The woman exercised her right to trial and was acquitted on the felony counts. She

was found guilty only of misdemeanor assault on a reckless driving theory, a conviction that rarely carries a jail sentence.

According to her defense counsel, the typical sentence would usually involve drug treatment or probation, this woman was sentenced to 60 days in jail and three years of misdemeanor probation — almost the exact same sentence she would have received had she pled guilty to the E felony charge before trial, except that the probation would have been longer for a felony. She received the same sentence for a misdemeanor after trial that she was offered pre-trial on a felony plea. At sentencing, the judge explicitly told the client that she had gotten a break from the jury, so it was appropriate to impose the original plea offer as the sentence.

Fortunately, the client's entire conviction was overturned on appeal as the Court found a lack of evidence at trial to support reckless conduct. Had she taken the plea instead of insisting on going to trial, she would have been branded with a felony conviction.

Indeed, defense attorneys report that prosecutors seek drastically increased sentences following a trial, even where the defendant is acquitted of the top count. For example, a defendant charged with murder and assault who goes to trial and is acquitted of the murder and convicted of the assault might receive a more severe sentence than if they had taken the pretrial plea offered when a murder conviction was still pending. **Victor Gutierrez** experienced this: after being charged with murder and offered a 12-year plea, he went to trial and was acquitted of the murder only to be sentenced to 34½ years on lesser assault and weapons possession charges. Thus, the trial penalty exists even where the defendant prevails, in part, at trial.

The combination of these two factors helps drive the trial penalty: practitioners and their clients recognize that prosecutors are likely to ask for the maximum sentence after trial. They also know that it is possible that such a sentence, even on one of the lesser crimes they are charged with, may result in a longer sentence than the plea they were offered. All of this increases the incentive to take a plea.

Judicial Conduct

Defense attorneys believed that judges also play a significant contributing role in the prevalence of the trial penalty. More than 25% identified judges' culture of practice as the most significant factor driving the trial penalty.¹⁰⁷ In New York, judges are permitted to — and often do — participate in plea negotiations. Practitioners observed that judges use their authority to coerce defendants to plead guilty with threats of higher sentences

posttrial. Judges are also responsible for setting bail, which, as discussed above, can act as a significant incentive to plead early rather than be required to make bail in order to be released. Additionally, judges have discretion in imposing sentences and can use that discretion to penalize those who have exercised their right to a trial.

Judges' Role in Plea Negotiations

Unlike many states, New York permits judges to directly intervene in plea negotiations between prosecutors and defendants.¹⁰⁸ Judges are permitted to intervene in negotiations because, in theory, a judge's involvement can lead to fairer outcomes. Judges are ostensibly neutral third parties who can restrain prosecutors' expansive discretion and discourage bad faith negotiating tactics. However, New York criminal procedure rules provide scant direction or restriction with respect to judicial conduct during plea negotiations.¹⁰⁹ Furthermore, judges are not required to serve as a check on prosecutorial overreach.

Judges have the power under New York State law to dismiss charges "in the interest of justice."¹¹⁰ However, as one researcher noted: "Courts have concluded that this power must be 'exercised sparingly' . . . that is, only in rare cases."¹¹¹ A number of attorneys went even further, stating that judges do not use this authority at all, but rather rubberstamp a prosecutor's decisions and are reluctant to "undercut" the prosecutor's discretion. As one remarked, "Judges act as an extended arm of the DA's office. There is not even an illusion of impartiality. They go along with recommendations more often than not."¹¹²



Practitioners identified various aspects of judges' conduct that contribute to the trial penalty, including "[j]udges threatening to set bail if defendants don't take [a] current deal,"¹¹⁴ "threatening higher sentences after trial,"¹¹⁵ "[m]aking an offer available only once, on the same day it is offered," and "judges refusing to entertain guilty pleas once hearings have started."¹¹⁶

Even more concerning, some defense attorneys observed that judges not only fail to challenge either the charges or the proposed plea offer, but also pressure defendants to take pleas. When asked whether "judges actively encouraging the accused to plead guilty through the use or threat of an enhanced penalty after trial" was a factor that contributed to the trial penalty, 178 attorneys, about 72% of those who answered the survey question, said it was. Fifty-one of those 178 described this as one of the most significant factors driving the trial penalty in their county.¹¹³

Defense attorneys' reports of judges' role in the sentencing process were consistent with their observations of prosecutors' practices. **Kareem Devaughn** faced extraordinary pressure to accept a plea offer from his presiding judge. In that case, Mr. Devaughn's counsel explained that the judge took the position that the plea offer was too lenient. The judge also set a deadline for acceptance of any plea. Practitioners identified various aspects of judges' conduct that contribute to the trial penalty, including "[j]udges threatening to set bail if defendants don't take [a] current deal,"¹¹⁴ "threatening higher sentences after trial,"¹¹⁵ "[m]aking an offer available only once, on the same day it is offered," and "judges refusing to entertain guilty pleas once hearings have started."¹¹⁶



Kareem Devaughn

Following an extensive investigation, 41 residents of the Poughkeepsie and Kingston area were arrested in a takedown of a cocaine-trafficking ring. Kareem Devaughn had not been involved in the larger operation but had supplied drugs locally. He surrendered to police in the takedown and was charged in a Dutchess County state court with conspiracy to possess with intent to distribute and conspiracy to distribute cocaine.

The prosecutor offered him a plea to 10 years' incarceration. Mr. Devaughn declined the initial offer, as he was hoping for a maximum sentence of six years. The parties continued to negotiate and seemed to be on the verge of a plea deal somewhere between seven and eight years.

Amid negotiations, however, the parties met with the presiding judge, Judge Edward McLoughlin, who indicated that he believed the initial plea offer was far too lenient. Instead, he proposed that the offer should be 10 years for the drug charge plus an additional, consecutive five years for a gun charge. Judge McLoughlin also pressured the parties to resolve plea negotiations before January 1, 2020 — the date New York's new discovery rules were due to go into effect. He indicated that he would not accept any plea agreements made after that date and that any sentence at trial would be far, far harsher than even his suggested 15-year "cap." The prosecutor then withdrew the initial plea offer.

Facing this extreme pressure and fearing an even worse trial penalty if convicted, Mr. Devaughn ultimately capitulated, accepted a negotiated plea offer to 10 years. He never received discovery nor learned the extent of the evidence, if any, against him. Mr. Devaughn did not want to plead guilty, but he felt as though he had no other reasonable alternative given what the judge had said about his case.

There are also other ways that a judge may signal his or her belief that pleading guilty is the defendant's best option. For example, a recent article highlighted a representative example where "a judge told a 17-year-old defendant in a marijuana case . . . that if he did not take a plea deal, which involved no jail time, he would be 'coming back and forth to court over the next 18 to 24 months.'"¹¹⁷ Suggestions from a judge, particularly to a younger defendant with less experience in the criminal justice system, may be especially influential and may prompt a defendant to plead guilty.

Moreover, judges' comments during plea negotiations are usually shielded from scrutiny. Although the State Commission on Judicial Conduct has repeatedly admonished judges for threatening higher posttrial sentences during plea negotiations, the law sets a high bar for when judge's comments are so coercive that the judge has committed error that requires resentencing.¹¹⁸ Under current New York State law, a judge may not explicitly threaten that a heavier sentence *will be* imposed posttrial. But nothing prevents the judge from commenting on the sentence a defendant is *likely* to receive posttrial.

Two Appellate Division cases highlighted by the State Commission on Judicial Conduct's 2013 Annual Report illustrate this fine-line distinction. In *People v. Stevens*, the First Department criticized a judge who noted a posttrial sentence of "25 to life" and told the defendant "[i]f you're convicted after trial . . . that's what you're going to get."¹¹⁹ That comment apparently amounted to "outright coercion"¹²⁰ that merited resentencing the defendant. However, in *People v. Cornelio*, the First Department held that a judge's comments were not coercive when he told the defendant that he faced "a possible 100 years in prison," and then added that "based on the facts known to [him, the judge] would not hesitate to impose" that sentence.¹²¹ Thus, while a judge cannot threaten a specific sentence, he or she is not legally prohibited from informing a defendant about what a maximum term might be and stating that the judge is fully prepared to impose it.



When asked to provide specific examples of judicial practices impacting the trial penalty, nearly a quarter of those who responded identified judges' practices of threatening harsh and even maximum posttrial sentences.

In any event, fine distinctions between a "threat" to impose a specific sentence and a comment concerning a sentence that may be imposed are likely irrelevant most criminal defendants, who are likely to view both statements as equally coercive. Defense attorneys cited a range of comments from judges that they believe unduly influence defendants' decisions during plea negotiations, including comments that do not qualify as explicit threats regarding sentencing. An attorney from Queens County said that "[o]ften, judges will reiterate the worst parts of the case acting and speaking to defendants as if they are already guilty. This is usually not informative but often feels like a scare tactic to force a plea."¹²² Another from Kings County described "[j]udges regularly giving lengthy lectures on what could happen if they go to trial and using the maximum sentences as a deterrent for trial . . . insisting on sidebars before hearings and trials commence[] so clients feel colluded against when the judge then reiterates the risk."¹²³ Another from Westchester County cited "suggestions being made that [the] client is better off pleading guilty than risking trial."¹²⁴

Explicit threats of severe and maximum sentences are prevalent. When asked to provide specific examples of judicial practices impacting the trial penalty, nearly a quarter of those who responded identified judges' practices of threatening harsh and even maximum posttrial sentences. As one defense attorney from New York County noted, "[j]udges routinely threaten defendants that after trial they would be facing up to the maximum sentence permissible by law, including consecutive time, to extract guilty pleas, even when the chances of a defendant actually getting the maximum are slim."¹²⁵ Another from Dutchess County noted that "[o]ne of our felony judges make[s] clear the [defendant] will be punished for *filing motions*, forcing pleas[] prior to the receipt of any discovery at all or risk consecutive max sentences."¹²⁶ Still another attorney from Queens County noted that judges will reserve such comments for off-the-record discussions, thus eliminating any evidence that they have acted improperly.¹²⁷

Thus, the involvement of judges in plea discussions appears to exacerbate, not alleviate, the concern that those defendants who do exercise their constitutional trial rights will be subject to a trial penalty.



About 64% responded that “judicial manipulation of bail/pretrial release determinations to induce guilty pleas” contributed to the trial penalty in their county. Over half of those said that they viewed this factor as significant or one of the most significant factors driving the trial penalty.¹³⁰

Judges’ Discretion to Set Bail

Even before plea negotiations take place, judges can encourage pleas through their bail practices. People who are unable to make bail have a strong incentive to accept plea offers so that they can be immediately released. This is particularly true in misdemeanor cases, where the time spent in detention awaiting trial can far exceed the potential sentence. According to the New York State Division of Criminal Justice Services, “around 80% of the jail sentences imposed for misdemeanor convictions were less than 30 days, whereas the mean docket age of misdemeanor cases commencing jury trial is over 400 days, and the mean docket age of misdemeanor cases commencing bench trial is over 350 days.”¹²⁸ Another study found that detained defendants are 25% more likely to plead guilty than similarly situated people who are released.¹²⁹ In sum, pretrial incarceration, particularly for misdemeanors, makes it far more likely that criminal defendants will plead guilty.

One attorney described a client who spent almost two years in jail protesting his innocence before the District Attorney’s office finally dismissed the charges. Despite testimony from the client’s coworkers and boss corroborating his alibi, the prosecutor continued to pursue the case even as they offered more and more lenient pleas to the point where the client could have left jail immediately if he had accepted. His determination to maintain his innocence ultimately was successful, but many make the rational decision to plead guilty rather than serve a lengthy period of pretrial incarceration. People are particularly likely to plea if prompt release is necessary to meet financial or family responsibilities.

Defense attorneys discussed judges’ practices of setting exorbitant bail as a factor contributing to the trial penalty. About 64% responded that “judicial manipulation of bail/pretrial release determinations to induce



Nicole Addimando

In September 2017, Nicole Addimando shot and killed her boyfriend after years of physical and sexual abuse. She was arrested and charged with second-degree murder, manslaughter, and criminal possession of a weapon. With no prior record and two small children, she remained out on bond prior to trial.

The District Attorney's office urged Ms. Addimando to take a plea and forgo a trial. According to her attorneys, there were numerous plea discussions and prosecutors offered her a guilty plea to Manslaughter 1st Degree with 12 years prison in exchange for her guilty plea. Defense counsel were authorized to explore the State's willingness to enter into a plea with a considerably shorter sentence. Although plea discussions continued and defense counsel were confident a plea could be reached for a sentence of less than 10 years, ultimately plea discussions failed and Ms. Addimando, believing she had acted in self-defense particularly as a survivor of abuse, took her case to trial. She pled not guilty.

At trial, Ms. Addimando related a lifelong history of abuse from the time she was a young child, and which had continued through several relationships. She recounted numerous instances of physical and sexual violence by her boyfriend, including while she was pregnant. She also testified that her boyfriend had threatened to kill her on the evening of the shooting. In support of her defense, in addition to other evidence, she submitted corroborating evidence including photographs depicting abuse and testimony of medical professionals who treated her while the abuse was ongoing and who verified her injuries.

Based on her own testimony and that of a forensic psychologist, who testified that Ms. Addimando had been a victim of extreme and severe intimate partner violence, Ms. Addimando argued that her actions were necessary and justified. The prosecution presented evidence challenging that defense and the jury ultimately rejected it and found her guilty of second-degree murder and second-degree criminal possession of a weapon.

Before sentencing, Ms. Addimando's attorneys petitioned the court to impose a lesser sentence under the Domestic Violence Survivors Justice Act because she was a

victim of domestic violence, and the abuse was a significant contributing factor to her criminal behavior. In support, the defense again offered evidence of a long history of physical, sexual, and emotional abuse.

Dutchess County Judge Edward McLoughlin rejected this petition, finding that sentencing Ms. Addimando under the normal sentencing range would not be “unduly harsh.” He noted that, although he found the evidence “compelling” for both sides, “the defendant had the opportunity to leave her abuser” and chose not to. At sentencing, he noted:

“...in many other cases there are plea bargains. There were very reasonable offers to resolve this case both as to the degree and the sentence that this court entertained, but there was ultimately no agreement between the parties and the Defendant chose her Constitutional right to go to trial.”

He sentenced her to 19 years to life for second-degree murder and 15 years plus 5 years supervised release for the weapon, which by operation of law run concurrently.

When asked by reporters if she had any regrets about turning down the plea deal, Ms. Addimando explained: “If I had taken a plea, I would have wondered every single day I served: ‘What if I spoke, what if I was brave?’ I was not willing to give up the chance to be free, to be with my children.” Now, she may spend the rest of her life in prison.

guilty pleas” contributed to the trial penalty in their county. Over half of those said that they viewed this factor as significant or one of the most significant factors driving the trial penalty.¹³⁰ Asked about specific judicial bail policies that drove the trial penalty, defense attorneys identified “excessive bail” and threats to set bail if defendants refused to plead as factors that drove the trial penalty.¹³¹

Reforms to New York bail practices address only some of these concerns. In April 2019, New York passed pretrial reforms that, among other things, limited defendants’ eligibility for cash bail, or preventive detention, solely to those accused of the most serious offenses. In support of this policy, Human Rights Watch has noted that “by limiting pretrial detention, fewer people will be pressured to plead guilty simply to get out of jail.”¹³² In April 2020 however, yielding to pressure to weaken these reforms,¹³³ the legislature expanded the categories of crimes for which judges could set cash bail and added further conditions, such as a person’s legal history or legal status as a “persistent offender” that would permit a judge to set bail.¹³⁴ Thus, bail practices are likely to remain an important driver of the trial penalty, particularly in misdemeanor cases.

Judicial Bias in Sentencing

Perhaps the most common way that judges drive the trial penalty is by imposing harsh posttrial sentences, often significantly higher than what was offered during plea negotiations. Indeed, when asked how the trial penalty manifests itself, 88% of practitioners chose “significantly increased penalty if convicted after trial,”



David Garcia

In December 1997, David Garcia and an accomplice were charged with entering three Brooklyn establishments armed with handguns and taking jewelry and personal belongings from employees. Mr. Garcia was also charged with a fourth armed robbery at another jewelry store a month later. Prosecutors accused him of having fired two shots at an employee. Although Plexiglas had stopped the bullets, Mr. Garcia was charged with attempted murder and multiple counts of armed robbery.

The charges were severed and set to be tried in two separate trials: one for the fourth robbery and attempted murder, followed by another for the earlier three robberies. Mr. Garcia elected to represent himself, and the court appointed stand-by counsel to assist him.

Before Mr. Garcia's first trial, the Assistant District Attorney offered a plea deal: if Mr. Garcia pled guilty to all four robberies, the prosecutor would seek a sentence of 15 to 30 years. Mr. Garcia rejected the offer, went to trial, and was convicted of attempted murder and robbery by the jury.

After the first trial, but before sentencing, the judge offered Mr. Garcia 20 years to cover all the charged crimes if he pled guilty to the remaining charges. Mr. Garcia's stand-by counsel urged him to take the offer, warning that, if he insisted on going to trial, "you will surely never walk out of prison again." Mr. Garcia also rejected this offer, and chose to go to trial on the remaining

charges. The judge sentenced him to 50 years for the first conviction, even though he had just made an offer of 20 years to cover all the crimes, including those that had not yet been tried.

After losing his second trial, Mr. Garcia was convicted of an additional eight counts of robbery. At sentencing, the same judge stacked three more consecutive 25-year sentences on him, for a total of 125 years' incarceration: more than six times what he offered Mr. Garcia before the second trial.

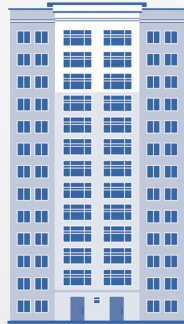
It was not until twenty years later, after Mr. Garcia had filed numerous motions in state and federal court, that Judge Jack Weinstein of the Eastern District of New York ruled that his sentence had been unconstitutionally vindictive. Judge Weinstein called the sentence "an inappropriate expression of judicial anger." "If 20 years could be said to fulfill legitimate penological goals . . . then this sentence six times its promised length is excessive. There is no apparent reason why 105 additional years imprisonment would be necessary to accomplish acceptable correctional goals." Due to the limitations on federal habeas corpus relief under AEDPA, Judge Weinstein remanded the case to state court for further proceedings. Ultimately, Mr. Garcia was sentenced to 35 years determinate, a sentence he is still serving today.

the highest selection rate of any answer to that question. When asked to identify specific examples of judicial practices contributing to the trial penalty, more than a quarter of attorneys who provided examples mentioned judges' sentencing practices, often noting that judges will impose "exponentially longer" sentences¹³⁵ — even the maximum sentence under the statute — posttrial.



After the prosecution put on its case, Rose was offered a plea to three to nine years, which he refused. He was convicted. Although he faced a mandatory minimum sentence of 15 years, the judge sentenced him to the maximum possible sentence of 25-years to life.¹³⁶

In one such example, Robert Rose was charged with killing his mother's abusive boyfriend, after Rose returned home to find the boyfriend on the stoop with a firearm. In the course of a struggle with the boyfriend, Rose killed him with that firearm. Rose had no criminal record and voluntarily surrendered the following day. He was released on bail due to an outpouring of community support, for the three-year period prior to trial. After the prosecution put on its case, Rose was offered a plea to three to nine years, which he refused. He was convicted. Although he faced a mandatory minimum sentence of 15 years, the judge sentenced him to the maximum possible sentence of 25-years to life.¹³⁶ **David Garcia**, discussed above, faced a similar penalty when, after being convicted at his first trial, the court offered him a 20-year sentence if he would plead guilty to other outstanding charges.



George Mims

George Mims was arrested and tried for two armed robberies, which occurred within minutes of each other in a Bronx apartment building. Two young men, one armed with what appeared to be a working pistol, followed a group of people, including a woman and three-year old child, into an elevator, and then took money and jewelry at gunpoint. Immediately afterwards, they robbed another group. The victims, while shocked, were unharmed. Of the seven total victims, only two identified Mr. Mims from the police arranged line-ups and photo displays. One of those two later admitted that she was never sure of her identification.

Though Mr. Mims did not match the description of the perpetrator (who was described as being in his early 20's while Mims was 30), he was investigated because at the time he was on parole for possession of a weapon. He voluntarily surrendered upon learning of the accusation.

At trial, Mr. Mims presented a solid alibi that he was at home with his wife. That alibi was corroborated by his wife and two babysitters who were in and out of the apartment. All of them said he was home all night. His home was several subway stops away from the location of the crime. The two identifications — witness memory — was the only evidence connecting Mr. Mims to the crimes. There was no forensic evidence, such as DNA or fingerprints; no proceeds of the crime were recovered; no pistol was located; and no incriminating statement linked him to the crime. Throughout the trial, and after, Mr. Mims steadfastly maintained his innocence. Nevertheless, the jury convicted.

During the trial, he was repeatedly offered pleas to 15 years. Then, five minutes before the jury returned a verdict, the judge offered him 10 years. Maintaining his innocence, he angrily declined the offer. After the conviction, the judge imposed a sentence of 40 years, quadruple the offer George received five minutes before conviction. Mr. Mims was 30 when he was arrested. He is now 53, having served 23 years in prison and will not be eligible for parole for another 11 years.



Provard Jones

Provard Jones was 19 when his father lost his job at a stone quarry in Jefferson County. The financial stress his family faced, compounded by his mother's announcement that she was leaving them, led him to devise a plan with a friend to rob a local insurance office. But when the two friends arrived at the office armed with a shotgun, the Geico employee had already left the premises and gotten into her car. Upon being confronted, the woman sounded her car horn. Mr. Jones panicked and fired the shotgun, fatally shooting her.

When he was arrested, Mr. Jones confessed immediately. He explained that they had never intended to kill anyone; they had only planned to rob the woman. Nevertheless, the Jefferson County prosecutor charged Mr. Jones with first-degree murder, which, at the time, still carried the death penalty. However, the prosecutor offered to take the death penalty off the table and agree to a 30-year sentence in exchange for a plea to murder.

The average maximum prison term for murder in state cases at the time was 20.8 years. Moreover, Mr. Jones had no prior criminal history. But, facing the death penalty and the likely prospect of an all-white jury, Mr. Jones, who is Black, took a plea to a sentence nearly 10 years longer, rather than risk the prospect of a trial and death penalty. His codefendant, who was white (but who was not the shooter), did have a prior criminal history. He was permitted to enter a guilty plea to attempted murder and was sentenced to nine to 18 years.

Even though the Court of Appeals has since deemed the death penalty unconstitutional, Mr. Jones cannot challenge the prosecutor's leverage of that unconstitutional law. He is currently serving his 23rd year in prison and will not be eligible for parole until 2029.

When he declined, and proceeded to trial for a second time, he was sentenced to 125 years' imprisonment. **George Mims** was offered a 10-year plea five minutes before his conviction. After, he was sentenced to 40 years.

Some of those who responded believed that these lengthier posttrial sentences reflect a judicial bias against those who chose to go to trial. One defense attorney from Queens County noted that some judges “after getting [the] probation report on a guilty trial verdict, decide that because [the] client did not admit guilt (after denying guilt at trial) they should get jail time, or [the] judge decides they didn't like [the] defense excuses at trial and give[] jail time.”¹³⁷ And another from Nassau County commented that “judges feel [trial] is a waste of their time and [that they] should be punished.”¹³⁸

The impression that a judge is biased or apt to impose a harsh posttrial sentence can easily encourage people to plead guilty, even if the defendant believes the plea offer is unfair. As one defense attorney from Kings County explained, “Once guilt is proven, judges feel no constraints, and will sentence toward the high range almost universally. I deal with mostly serious felonies, and any violent crime conviction garners very harsh sentences. As I tell my clients when discussing plea bargains, ‘Judges are almost never criticized for harsh sentences after trial — only lenient ones.’”¹³⁹ As a result, some judges cultivate a reputation for imposing harsh sentences, increasing the likelihood that defendants appearing before them will forgo their trial rights due to the risk of an unduly severe sentence.

Sentencing Laws

Defense attorneys saw New York sentencing laws as a significant cause of the trial penalty. **Provard Jones**, who took a plea to avoid the possibility of sentencing under New York's now-unconstitutional death penalty statute, shows how harsh sentences can induce pleas. While New York no longer maintains the death penalty, practitioners saw other severe sentencing provisions such as mandatory minimum sentences and sentencing enhancements for repeat and persistent offenders as key drivers of the trial penalty.



Of the practitioners who weighed the significance of the various factors contributing to the trial penalty, 77% identified mandatory minimum sentencing laws as contributing to the trial penalty.¹⁴⁰ Forty-five percent rated such sentencing laws as significantly or most significantly contributing to the trial penalty in their county of practice.

Mandatory Minimum Sentences

Mandatory minimum sentences are sentences that a judge is required by statute to impose. In other words, a judge lacks the authority to sentence below the minimum established by the statute. These laws can result in substantial sentences posttrial regardless of the individual circumstances of the offense. Thus, people charged with crimes carrying mandatory minimum sentences are far more likely to plead guilty if presented with an offer that does not carry a mandatory minimum.



George Martinez

In March 2006, George Martinez was arrested for burglary in the Bronx after police found stolen property in his apartment. On the night of his arrest, Mr. Martinez told the Assistant District Attorney that he had accompanied a man to an apartment building and helped carry away stolen merchandise, but he had not entered the apartment. Mr. Martinez also gave a written statement admitting this.

The grand jury indicted Mr. Martinez and charged him with burglary in the second degree and related counts. As permitted by New York law, Mr. Martinez's indictment did not specify whether he acted as a principal or an accomplice to the burglary, but it did allege that he had entered the apartment with the intent to commit a crime. Since second-degree burglary is classified as a violent felony, this would count as Mr. Martinez's third violent felony. That meant that he could face a mandatory life sentence as a persistent violent felony offender, even though he had committed no actual violence during the burglary.

The Assistant District Attorney offered Mr. Martinez a plea deal of five and a half to eleven years. This included the potential for Mr. Martinez to leave prison on conditional release after serving just over seven years. However, Mr. Martinez believed he could not be convicted of burglary because he had never entered the apartment. At most, he thought he would be convicted of criminal possession of stolen property, which he acknowledged committing and which carried a maximum sentence of four years. He rejected the plea and went to trial.

It was not until the eve of trial that his counsel, at the urging of the judge, recommended

Creative Commons of Yankee Stadium drawing by Marty Fuller. (used under CC BY / removed 'Yankee Stadium')

that Mr. Martinez accept the plea offer. Confused by that advice given his belief that he could not be found guilty of burglary, Mr. Martinez again rejected the offer. He went to trial, still basing his defense on the fact that he had never entered the apartment.

At the end of trial, and at the request of the Assistant District Attorney, the court charged the jury that they could find Mr. Martinez guilty of burglary as an accomplice even if they determined that he had never entered the apartment. The jury returned a guilty verdict. Although both the prosecutor and judge had offered a sentence of five and a half to eleven years even on the eve of trial, because of the mandatory minimum, Mr. Martinez was sentenced to 17½ years to life.

Of the practitioners who weighed the significance of the various factors contributing to the trial penalty, 77% identified mandatory minimum sentencing laws as contributing to the trial penalty.¹⁴⁰ Forty-five percent rated such sentencing laws as significantly or most significantly contributing to the trial penalty in their county of practice. As one practitioner noted, “High mandatory minimums discourage clients from going to trial even on weak cases, even when the case is overcharged.”¹⁴¹ Another commented that “minimums are used explicitly by the prosecution and court to encourage clients to take prison sentences.”¹⁴² This finding aligns with prior surveys of defense attorneys that identify mandatory minimums as a major contributor to the trial penalty.¹⁴³

Numerous offenses carry mandatory minimum sentences in New York. Although misdemeanors, save for certain weapons offenses, generally do not carry mandatory minimum sentences, several felony classifications do. For example, Class A-I felonies,^x which include not only first-degree murder,¹⁴⁴ but also possession of two ounces or more of a controlled narcotics,¹⁴⁵ generally carry minimum sentences of at least 15 years; murder charges carry a minimum of at least 20 years.¹⁴⁶ Class A-II felonies generally carry a minimum of three years, though predatory sexual assault against a child carries a 10-year minimum.¹⁴⁷

Sentencing Enhancements for Repeat Offenders

Defense attorneys felt that New York’s system of mandatory minimum sentences and sentencing enhancements also helped drive the trial penalty by giving judges and prosecutors another way to increase sentence severity posttrial. New York’s sentencing laws allow and sometimes mandate the imposition of an enhanced sentence for repeat offenders. Defendants charged with a second violent felony offense face a mandatory sentencing enhancement that increases in severity based on the offense. For example, the minimum sentence for a first-time Class B violent felony conviction is five years.¹⁴⁸ But, for a defendant convicted of a Class B violent felony who also has a prior conviction for a violent felony, the minimum sentence increases to 10 years.¹⁴⁹ For a persistent violent felony offender — someone convicted of at least two prior violent felonies — the minimum increases to twenty years to life.¹⁵⁰

x New York divides its criminal offenses into classes, with Class A-1 Felonies being the most serious and Class E felonies being the least serious. Below that, in roughly descending order of severity are Class A, B, and unclassified misdemeanors. Finally, New York maintains a separate class of violation offenses that are less serious than either misdemeanors or felonies.



Jordan Ellison

Jordan Ellison, who had a long history of petty larceny in Monroe County, was stopped by police in the parking lot of a local Gap store with stolen merchandise. He was approached by the police while still on mall premises and immediately complied with their request to drop the merchandise. He did not resist arrest.

Because, just days earlier, he had violated a stay-away order at a local Macy's, the prosecutor was able to charge him with third-degree burglary, a felony.

The maximum sentence he could have received was seven years in prison, but the prosecutor promised to seek a sentence of two to four years if he pled guilty. Moreover, the court warned Ellison that he would be sentenced as a persistent felony offender if he went to trial and lost, which would carry a minimum sentence of 15 years.

Undeterred, Mr. Ellison took his case to trial. When he lost at trial, consistent with his pretrial warning, the judge concluded that Ellison was a persistent felony offender, sentencing him to 20 years to life in prison for shoplifting — more even than the mandatory minimum.

An appellate court reduced the sentence to the 15-year minimum, noting that, even considering Mr. Ellison's long criminal record, "he is essentially a serial shoplifter who does not engage in acts of violence." The appellate court could not reduce the sentence further because Mr. Ellison's counsel at the time had not challenged the persistent felony offender finding. As a result, he was still serving a sentence that was nearly four times higher than what he would have received had he pled guilty. Following a second appeal challenging Mr. Ellison's sentence, the appellate court vacated the persistent felony offender determination in the interests of justice and again reduced his sentence $5\frac{1}{2}$ - 11 as second felony offender. He was immediately released following the decision on his second appeal.



Jeffery Lowery

Jeffrey Lowery, a 55-year-old man, was on parole after having served several stints in prison, when he was arrested for violating the Sexual Offender Registration Act (SORA). At the time, Mr. Lowery was being regularly supervised by a parole officer, was subject to unannounced investigations of his residence, and was being tracked 24 hours a day, seven days a week, by a GPS-equipped ankle bracelet. Except for a single missed curfew check, Mr. Lowery was compliant with every condition of his parole. He never missed an appointment with his parole officer, and he reported to the Rochester parole office every 90 days to be photographed.

However, SORA also required him to report his address to local police every 90 days. But because of past incidents with the local police, Mr. Lowery had been barred from meeting his parole officer at the local jail, which happened to be at the same address where he was supposed to report for SORA. Thus, all the circumstances suggested that his failure to report was unintentional: he believed he was barred from contacting local law enforcement, and he was already reporting regularly to his parole officer, who always knew his whereabouts, day and night, based on the tracking device he wore.

Given the technical nature of the violation, the prosecutor offered Mr. Lowery a sentence of one to three years if he pled guilty. Later at sentencing, the prosecutor admitted that he had doubts about the charge:

Quite frankly, Your Honor, I didn't believe we could prove the case at trial. This was a highly technical case. He failed to appear for a photograph after being directed by Sheriff York not to come to the jail. I felt it was a close case. I had reasonable doubt in my own mind that it's something a jury would in fact convict

the defendant of. We thought he had a viable case to sell that to a jury. . . . That's why that plea offer was made because — short of losing all together and getting nothing on Mr. Lowery.

Nevertheless, the prosecutor threatened that, if Mr. Lowery refused the pretrial offer, he would pursue a persistent felony offender sentence, which would mean a minimum of 15 years to life in prison if convicted.

Mr. Lowery rejected the offer, chose to exercise his right to a trial and was convicted. True to his word, the prosecutor sought persistent felony offender status based on Mr. Lowery's past convictions for which he had already served 30 years in prison. During sentencing, the prosecutor focused much of his argument on a decades-old assault during which a local police deputy was badly beaten, which ostensibly barred Mr. Lowery from the location where he was required to report. The prosecutor ignored Mr. Lowery's recent rehabilitative record which did not involve a single accusation of violent behavior for almost 20 years.

The judge agreed with the persistent felony offender status determination and sentenced Mr. Lowery to 15 years to life, citing public interest as the preeminent concern. Neither the judge nor the prosecutor explained why the public interest required a 15-year minimum sentence when, prior to trial, the prosecutor had been prepared to offer only one to three years in prison for a case concerning a single failure to report.

Even where a defendant's second or third conviction does not qualify as a violent felony, prosecutors have the discretion to seek (and judges have the discretion to impose) a sentencing enhancement for second and persistent felony offenders. Although these enhancements are not mandatory, they can result in harsh sentences even for defendants charged with relatively minor offenses. Indeed, the penalties available under the enhancements can increase a defendant's potential sentence exponentially. Moreover, prosecutors and judges have broad discretion in applying these sentencing enhancements. **Jordan Ellison** experienced this when, as a result of a persistent felony finding, the two to four-year plea he was offered became a 15-year sentence after trial and became 5 1/2 to 11 years after two separate appeals. **Jeffery Lowery** also faced a 15-year sentence when he went to trial on a technical parole violation that might otherwise have carried a one- to three-year sentence.

Practitioners identified several ways these enhanced sentences contributed to the trial penalty. Some noted that the laws themselves resulted in higher sentences posttrial. Others indicated that judges used their discretion to impose sentencing enhancements in a manner that contributed to the trial penalty. One practitioner, asked how judicial policy contributed to the trial penalty, suggested that there were "so few trials that [j]udges believe they are almost required to enhance the sentence after trial for the 'inconvenience' [sic] of having to go through a trial."¹⁵¹ Judges were not the only groups defense attorneys suggested used enhanced penalties to facilitate the trial penalty — as one attorney reported, the "Nassau DA's office routinely recommends enhanced sentences after guilty verdicts."¹⁵²



A final factor that defense attorneys said contributes to the trial penalty are excessive caseloads. These put pressure on judges, prosecutors and defense attorneys to encourage people to accept plea offers and to avoid the time and resources required to take a case to trial.

Excessive Caseloads for Judges, Prosecutors and Defense Attorneys

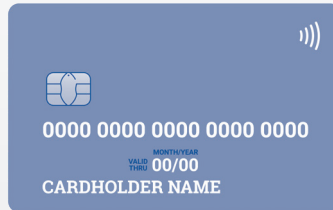
A final factor that defense attorneys said contributes to the trial penalty are excessive caseloads. These put pressure on judges, prosecutors and defense attorneys to encourage people to accept plea offers and to avoid the time and resources required to take a case to trial.

Judges are under pressure from within the judiciary and without¹⁵³ to move dockets quickly and to reduce the backlog of pending cases before them. As part of New York State Chief Judge Janet DiFiore’s three-year Excellence Initiative, judges were given “standards and goals” as benchmarks for resolving the cases on their dockets.¹⁵⁴ For criminal cases, the “standards and goals” are case resolutions within 90 days for misdemeanors and 180 days from filing of an indictment for felonies.

Numerous defense attorneys cited specifically the “standards and goals” under the Excellence Initiative as a factor contributing to the trial penalty. Indeed, while prompt resolution of criminal cases is an important constitutional right, and required by New York State’s Speedy Trial statute,¹⁵⁵ pressure on judges to resolve cases quickly (and thereby avoid trials) may incentivize judges to discourage criminal defendants from exercising their right to litigate cases up to and including a trial. A number of practitioners attributed the judicial bias against trials to judges’ caseloads and the “standards and goals” they are expected to meet.¹⁵⁶ Thus, while the Excellence Initiative’s focus on reducing the amount of time defendants must wait before their day in court offers is commendable, practitioners’ experiences suggest that it is creating additional pressures that drive the trial penalty.

Some defense attorneys’ approach to plea offers also are impacted by their excessive caseloads. While some practitioners denied that workload impacts their personal practice, many noted the pressure they feel from the need to manage a large caseload. Some attorneys expressed concern about not having “enough time to investigate their cases before they have to make crucial decisions about trial”;¹⁵⁷ “[l]ow pay for [assigned counsel] and LAS [Legal Aid Society] Lawyers forcing them to handle too many cases”;¹⁵⁸ and the “inability to spend adequate time on cases where exposure to jail is less than for others.”¹⁵⁹ One 2020 survey of judges, prosecutors, and defense counsel similarly suggested that defense counsel played a role, and possibly a significant one, in encouraging defendants to take pleas.¹⁶⁰ As one defense attorney put it:

Quite frankly, caseloads are much higher than they should be. People are not being paid fairly, cannot afford to keep working at their jobs (particularly in public service) and leave for more lucrative positions. This shifts the heavy burden of additional cases to the remaining attorneys who have at least double the felony caseloads if not significantly higher. Investigators aren’t able to keep up with



Robert Chibatto

In May 2012, Robert Chibatto was arrested for reaching into the open window of a car and stealing a messenger bag on the passenger seat. The messenger bag allegedly contained a phone charger, camera, college ID, \$30 in cash, some makeup, and a debit card, which the victim cancelled on the same day and which was never used. Mr. Chibatto was arrested after police identified him in a video.

The Manhattan Assistant District Attorney told Mr. Chibatto that if he pled guilty they would recommend a sentence of two to four years. The arraignment judge offered Mr. Chibatto a one and a half- to three-year sentence in exchange for his guilty plea. Mr. Chibatto declined and instead chose to exercise his right to a trial. The core issue was whether the state could prove there was a debit card inside the bag. If the state could not prove it, Mr. Chibatto would face no more than a year in prison.

The only evidence supporting the existence of the debit card was the victim's testimony. But she admitted that she often used other purses to carry her possessions, and the judge observed that the evidence "sound[ed] somewhat circumstantial." The jury, however, credited the victim's allegations and convicted Mr. Chibatto of one count of grand larceny in the fourth degree. That conviction counted as a Class E felony, even though the victim suffered no actual loss because of the debit card theft.

Despite the minimal harm Mr. Chibatto had caused, the sentencing judge urged, and the Assistant District Attorney recommended, a sentence enhancement based on Mr. Chibatto's status as a persistent felony offender, which carried a minimum sentence of 15 years to life.

Defense counsel argued against the enhancement, noting that Mr. Chibatto's prior offenses were primarily nonviolent, that the most serious offenses had occurred three decades earlier, and that Mr. Chibatto had both mental and physical health problems.

Although presentence investigation reports corroborated Mr. Chibatto’s declining health, the judge dismissed those concerns. While the judge signaled that even he did not believe a life sentence was appropriate, the next lowest sentence available carried a maximum of four years, and the judge did not believe that was long enough: “If there was something between seven and twelve [years], we wouldn’t be here.” Thus, the judge determined to apply the persistent felony offender enhancement and imposed a sentence of 15 years to life. Thus, an offense that the arraigning judge thought merited one and a half- to three years suddenly became a 15-year minimum, with the possibility of life in prison.

This was too much for the appellate court, which overturned the persistent felony offender determination, noting that it was “an improvident exercise of discretion.” It then reduced the sentence to two to four years. By that time, however, Mr. Chibatto had already served more than four years in prison.

caseloads. Attorneys and social workers aren’t able to keep up. All of this contributes to the penalty because at some point something slips, or a case doesn’t get enough attention, or a vital piece of information is missed. More money and more staffing are both required to ensure fair defenses.¹⁶¹

Another practitioner noted the impact excessive defense caseloads can have on clients facing charges: “Excessive caseloads for attorneys leads to [the] client’s belief that the attorney is too busy to handle the case and too busy to adequately prepare their case for trial leading to pressure to enter a plea.”¹⁶²

While this evidence seemingly supports the position that the criminal justice system simply cannot handle more trials, encouraging guilty pleas is not the only way to reduce caseloads and clear dockets: prosecutors could decline to prosecute cases where the offenses are minor and the evidence is weak. Judges could also exercise greater discretion to dismiss cases where they believe defendants have been wrongly or too aggressively charged. Whatever value efficiency has to the justice system, that value does not supersede the right to a fair trial and equitable sentencing practices.^{xi}

xi One important mechanism for mitigating the impact of excessive caseloads would be ensuring the implementation and funding of reforms mandated by *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (2010). That case established that indigent defendants in five counties across New York were being deprived of constitutionally adequate criminal defense counsel. The resulting settlement mandated numerous changes in the funding of indigent defense in New York State. In particular, it required the state of New York to develop standards setting out appropriate workloads and caseloads for indigent criminal defense counsel and mandated funding to ensure that workloads did not exceed those standards. It also required counties to develop a plan to improve defense counsel access to investigators and expert witnesses. See generally, *Hurrell-Harring Settlement and Implementation Information*, NYS Office of Indigent Legal Services (last visited Jan. 19, 2021), <https://www.ils.ny.gov/content/hurrell-harring-settlement-and-implementation-information>; NYS Office of Indigent Legal Services, *A Determination of Caseload Standards pursuant to § IV of the Hurrell-Harring v. The State of New York Settlement* (2016). While this mandate was initially only binding on the five counties who were party to *Hurrell-Harring*, New York later extended these standards to all counties in the state. N.Y. Exec. § 832(4). These caseload standards and the separate funding for the independent hiring of investigators experts, once fully funded in 2023, could enable cases to be more fully defended and more frequently tried.

THE TRIAL PENALTY BY THE NUMBERS

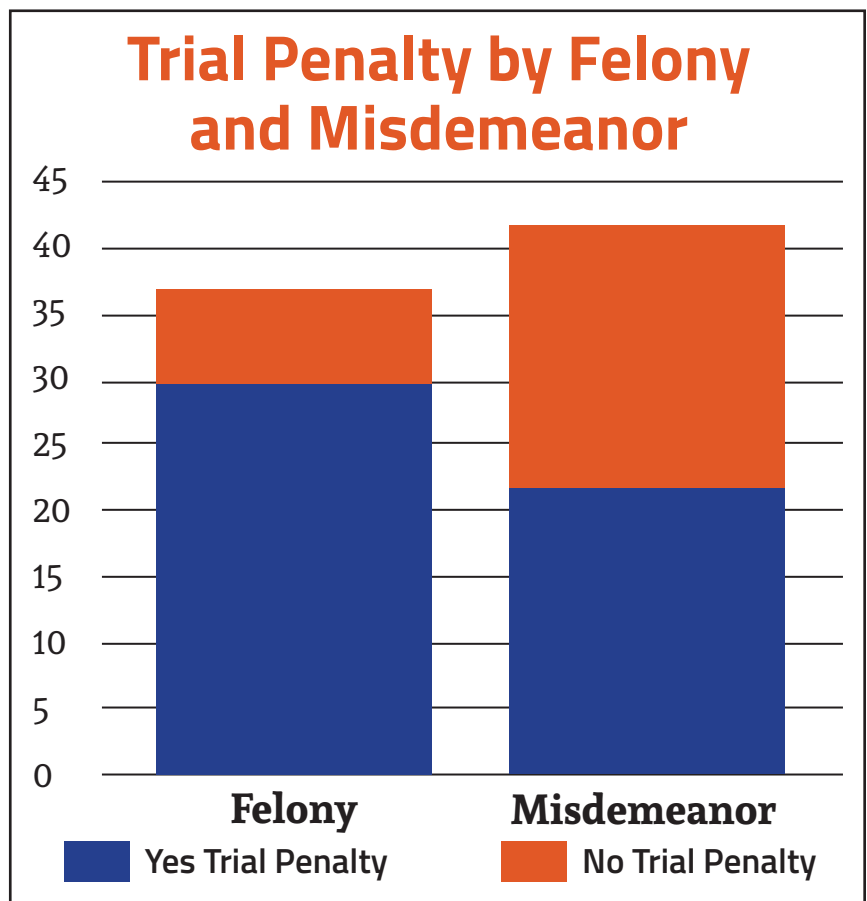
An analysis of the limited available data supports the observations and impressions of criminal defense attorneys concerning the trial penalty: those who take their cases to trial risk greater — potentially much greater — penalties than those associated with their proposed plea offers. An analysis of trials in New York City using data from two organizations, New York County Defender Services and Neighborhood Defender Services, shows that many defendants who do take their case to trial run the risk of longer, and sometimes much longer, sentences than they would have received through a plea. The results also suggest that younger Black defendants are more likely to experience a trial penalty than their white, older counterparts.^{xii}



Individuals who go to trial frequently suffer worse outcomes than they would have if they took a plea. In 66% of cases, an individual received a more severe sentence than the one offered as part of his or her plea offer: either a longer term of imprisonment or a sentence with harsher non-imprisonment terms than they would have received under their plea offer.

New York County Defender Services and Neighborhood Defender Services provided a sample of 79 cases,^{xiii} all involving a plea offer that was declined and a subsequent conviction on the top count. This is a small sample, and one concentrated in New York County; therefore, the conclusions must be considered with those limitations in mind. But even this small sample suggests that people in Manhattan are experiencing the trial penalty: people who reject pleas and go to trial frequently receive sentences longer, and sometimes much longer, than the plea that they rejected.

Individuals who go to trial frequently suffer worse outcomes than they would have if they took a plea. In 66%

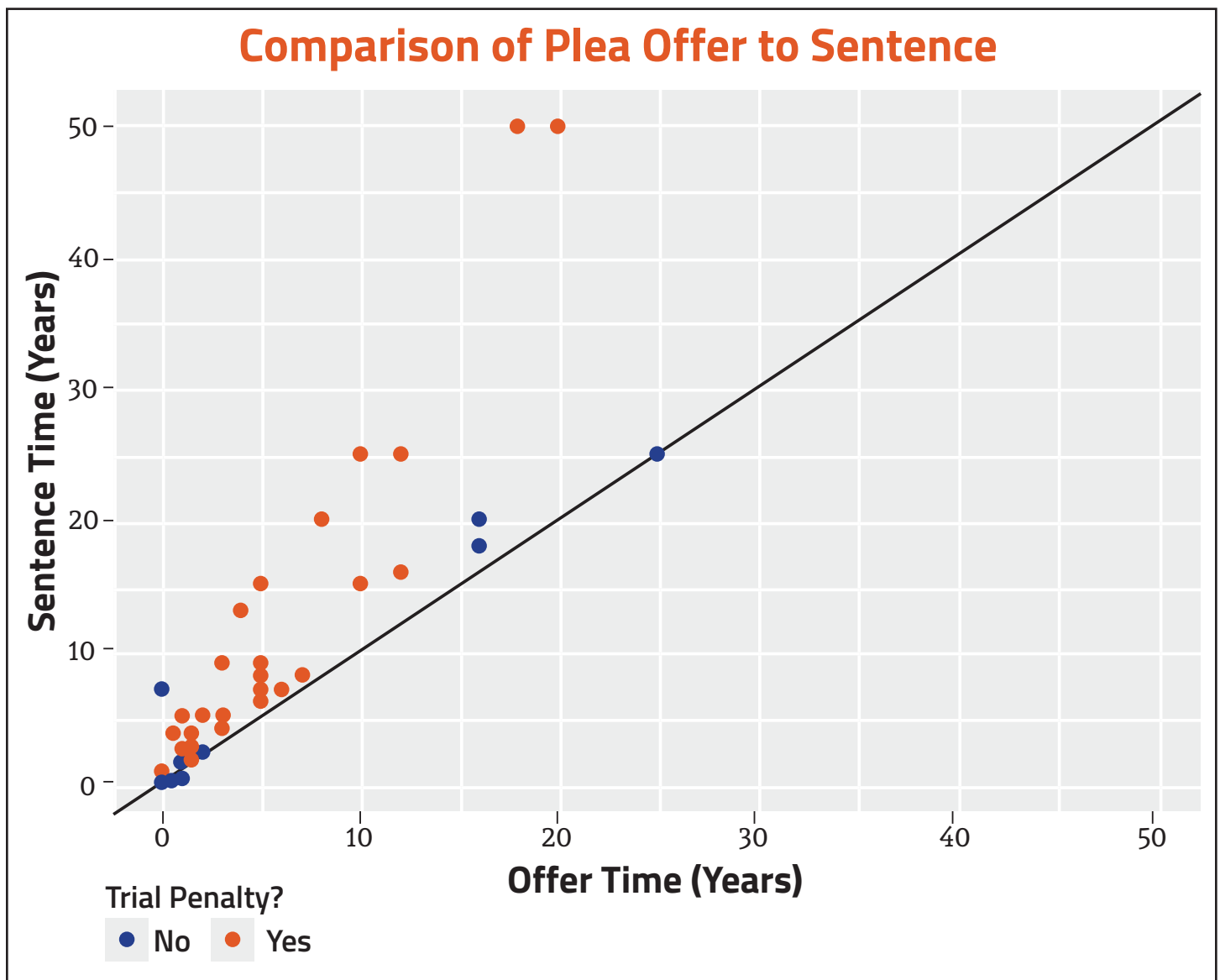


xii Further information on the data and methods for this section is included as Appendix 4.

xiii NYCDS and NDS were the only two providers who responded to the Project's inquiries and indicated that they maintained such statistics and were willing to share the data with the Task Force. The LAS of Queens responded positively but given the form of the archived files and ensuing pandemic we could not access the information.

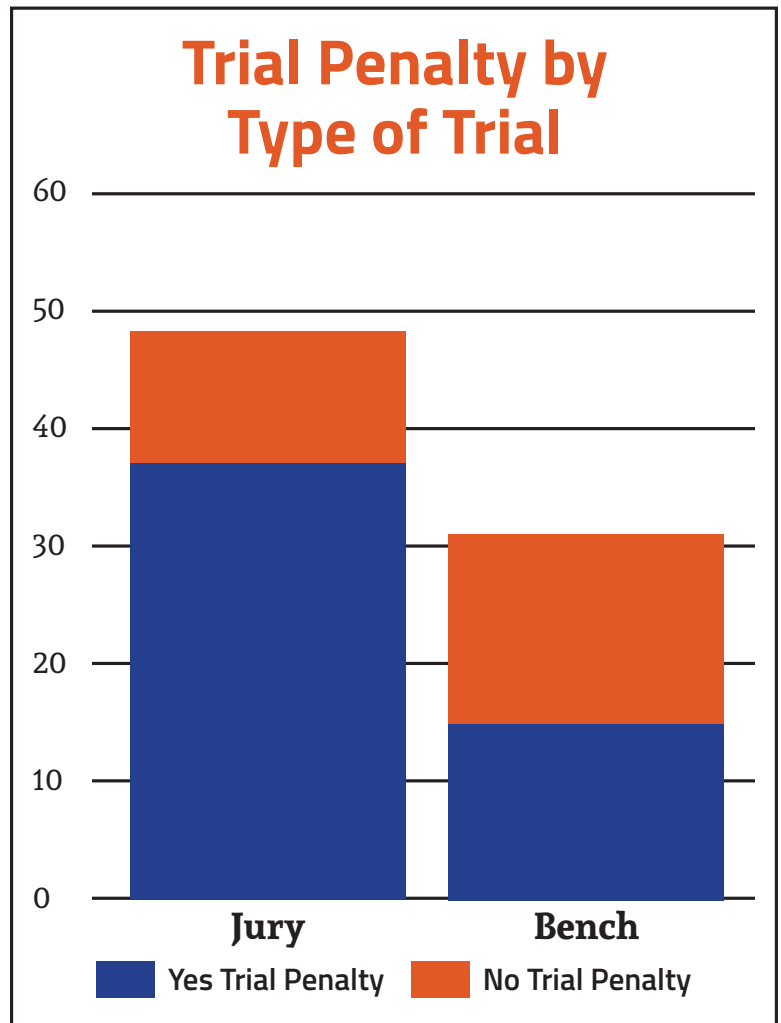
of cases, an individual received a more severe sentence than the one offered as part of his or her plea offer: either a longer term of imprisonment or a sentence with harsher non-imprisonment terms than they would have received under their plea offer. That 66% figure includes several misdemeanor cases where the maximum possible prison sentence is one year. But the trial penalty is even more common where longer prison sentences are at stake. In 89% of cases where the offer time was greater than four years, going to trial resulted in a penalty. Thus, an individual who is offered a plea to a multi-year prison term faces an even greater risk of a longer sentence should he or she go to trial.

Prison sentences for those subject to a trial penalty were longer, sometimes substantially longer, than the plea offer they received. In this limited sample, the average increase in sentence length in cases where there was a trial penalty was 3.48 years. This figure includes several misdemeanor offenses where the maximum possible sentence was a year and where non-prison sentences like probation and required programming like anger management can also be imposed in lieu of incarceration. This confirms findings from previous research on New York City plea bargains showing that people who go to trial on misdemeanors, like those who go to trial on felony charges, also receive longer or more severe sentences than those who plead guilty.¹⁶³



Where sentences involved imprisonment, and particularly sentences for felony charges, which carry longer prison terms, the trial penalty is often even greater. A statistical model exploring the relationship between plea offers and sentences found that every 10% increase in the length of sentence in years offered as part of the plea was associated with a 9.6% increase in the resulting sentence. For example, when the length of sentence offered in the plea offer is one year, the expected resulting sentence will be about 1.6 years; when the length of sentence offered is five years, the expected resulting sentence will be about 7.5 years; and when the length of sentence offered is 20 years, the expected resulting sentence will be about 28 years.

The graph above reflects this: the black line shows what the sentence would be if the plea offer and trial sentence were the same. Each dot is a case from the sample — the higher the dot is above the line the greater the difference between the plea that was offered and the sentence received. As the graph shows, as offer time increased, sentences received after trial increased even more substantially. Thus, turning down plea offers involving long prison terms resulted in even longer sentences after conviction at trial.



The data also showed a distinction between the risk of a trial penalty for jury trials as opposed to bench trials: Individuals tried by jury experienced a trial penalty more often than individuals tried by a judge: 77% of people who had a jury trial experienced a trial penalty compared to 48% of people who had bench trials. Additionally, a trial penalty was more likely to exist when the offense was a felony: there was a trial penalty in 81% of felony cases compared to 52% of misdemeanor cases.¹⁶⁴



People who were less than 25 years old and Black were more likely to receive a trial penalty than those were older or white. While more data is needed to fully explore how the trial penalty affects people of color, these initial findings raise the concerning possibility that the trial penalty may have a greater effect on communities of color.

Statistical modeling in the sample also indicated that age and race may also impact who received a trial penalty. Analyzing this data using a logistic regression model, a tool that helps analyze the relationship between the trial penalty and various factors in the sample, showed that people who were less than 25 years old and Black were more likely to receive a trial penalty than those who were older or white. While more data is needed to fully explore how the trial penalty affects people of color, these initial findings raise the concerning possibility that the trial penalty may have a greater effect on communities of color.

Thus, for the dwindling number of people who do choose to take their case to trial, the risks are substantial: even the limited data available from Manhattan suggests that those who go to trial often experience longer sentences than they would if they had taken a plea.

FIXING THE TRIAL PENALTY: PRINCIPLES AND POLICY RECOMMENDATIONS

The findings from this report suggest that the trial penalty poses a serious threat to the integrity of New York State’s criminal justice system. Accordingly, the NYSACDL Trial Penalty Task Force has developed as set of principles designed to address this problem. These principles, in turn, have informed the development of a set of policies and legislative recommendations to fix the issues created by the trial penalty and improve the functioning of New York’s criminal justice system.

Principles

- 1.** The trial penalty — the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial — undermines the integrity of the criminal justice system.
- 2.** No one should be punished for exercising her or his rights, including seeking pretrial release and discovery, investigating a case, challenging law enforcement conduct, and filing or litigating pretrial statutory and constitutional motions.
- 3.** The decline of criminal trials erodes the oversight function of the jury thereby muting the voice of lay people in the criminal justice system and also undercuts the role of appellate courts in supervising the work of trial courts.
- 4.** The decline of criminal trials — and attendant waivers of the right to appeal and the right to challenge unconstitutional police action — undermines the oversight ability of courts and juries to ensure law enforcement accountability.
- 5.** The decline of criminal trials tends to encourage longer sentences thereby contributing to mass incarceration, including mass incarceration of people of color and the poor.
- 6.** Trials protect the presumption of innocence and encourage the government to charge cases based on sufficient, legally obtained evidence to satisfy the reasonable doubt standard.
- 7.** The decline of criminal trials impacts the quality of prosecutorial decision-making, defense advocacy and judicial supervision.
- 8.** The trial penalty creates a coercive effect which profoundly undermines the integrity of the plea bargaining process.

9. Mandatory minimum sentences undermine the integrity of plea bargaining by creating a coercive effect and undermine the integrity of the sentencing process by eliminating case-by-case individualized evaluation.
10. Neither prosecutors nor judges should be permitted to use mandatory minimum sentences to retaliate against a defendant for the decision to go to trial or challenge evidence.

Policy Recommendations

1. Mandatory minimum sentencing statutes should be repealed or subject to a judicial safety valve in cases where the court determines the individual circumstances justify a sentence below the mandatory minimum.
2. A judicial second-look statute should be enacted to enable a court to review lengthy sentences after substantial service thereof to ensure that the sentences are proportionate over time.¹⁶⁵
3. Prosecutors should be prohibited from conditioning plea offers on a waiver of statutory or constitutional rights necessary for a defendant to make an informed decision on whether to plead guilty. These rights include a defendant's right to seek pretrial release or discovery, the right to investigate their case, or litigate pretrial motions.
4. NYCPL § 220.10(5) should be repealed because it limits the ability to resolve a case by pleading guilty to a lesser charge.
5. The Code of Judicial Conduct should include an express prohibition against retaliatory or vindictive sentences for a defendant who has rejected a pretrial plea offer and proceeded to trial.
6. Procedures should be adopted to ensure that defendants are not punished with substantially longer sentences for exercising their right to trial or related constitutional rights. Posttrial sentences should not disproportionately increase the pretrial plea offer solely because the defendant has elected to proceed to trial.
7. Judicial or prosecutorial policies which prohibit pretrial plea dispositions on trial-ready cases should be prohibited.
8. It should be unethical for a prosecutor to seek a higher sentence compared to the pretrial offer based on the defendant litigating his or her statutory or constitutional rights, including the right to trial.

9. Judicial pretrial disposition quotas should not be used as a metric by which judicial or systemic performance is evaluated. Judicial performance should not be assessed by reference to disposition rates nor should any judicial assignment determination hinge on the percentage of cases in a judge’s docket in which evidentiary hearings or trials are conducted.
10. NYCPL § 710.70 should be amended to read “shall” instead of “may” to effectuate the legislative intent to preserve issues in suppression motions for appeal even after a guilty plea and preserve appellate review of pretrial decisions on motions.^{xiv}
11. Courts, prosecutors, and public defenders should collect information on plea offers and trial outcomes. Agencies involved in criminal cases should collect data on at least (1) the best plea offered; (2) the final plea offered; and, if applicable, (3) any final sentence. Together, these three data points would give more insight into how the trial penalty operates in New York.^{xv}
12. Compassionate release legislation should be enacted to provide an avenue to seek a judicial order granting early release based upon advanced age, illness, or extraordinary circumstances.
13. The clemency process should be reformed to expand eligibility by reducing the requisite period of time that must be served and to provide for opportunities for commutation based upon the recommendation of an independent panel comprised of various system stakeholders, as well as public health and community representatives. There should be no bar to people who plead guilty from seeking relief under a freestanding claim of actual innocence pursuant to NYCPL § 440.10(1)(h).
14. The judicial, prosecutorial, and defense functions should be funded at a level sufficient to ensure that the disposition of cases is driven solely by the interests of the defendant, the public, and justice and not by a need to triage limited resources.
15. Criminalization of disfavored social or personal behavior should be discouraged to relieve the burden on criminal court dockets.

xiv Proposed legislative language (modifications in bold):

C.PL. 710.70(2):

2. An order finally denying a motion to suppress evidence **shall** be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty **and notwithstanding an otherwise enforceable waiver of the right to appeal.**

xv The Prosecutorial Transparency Act, LB-151, proposed in Nebraska in 2021, provides an example of how such a recommendation might be implemented. It requires that, for each case prosecuted, the prosecutor collect and report to state authorities numerous pieces of demographic and criminal information related to the defendant and the plea. Specifically, it requires the prosecutor to report “Whether a plea was offered and if the offer had a time limit...Terms of any plea offered, including dismissal of charges, charges pleaded to, charges covered by the plea but not part of the conviction, and any sentencing recommendations in the plea; and Whether the plea was accepted or rejected....” It also requires that such information be made publicly available.

CONCLUSION

It is time to end the trial penalty in New York State, and to reverse the decline in trials and rise in guilty pleas over the past three decades. The observations of criminal defense attorneys and the experiences of their clients establish that prosecutors have broad discretion both at the charging stage and the plea offer stage, and thus can effectively pressure a defendant to plead guilty — potentially without engaging in pretrial motion practice, reviewing discovery, or even requiring his or her case to be presented to a grand jury — rather than face a post-trial sentence that is significantly harsher than the plea offer. In some cases, judges also can pressure defendants to plead, through comments, bail decisions, and sentencing practices. Increasingly severe sentencing regimes exert pressure as well, by exposing defendants to much higher post-trial sentences. Finally, massive caseloads and under-resourced defender offices make the outcome of a criminal trial even less certain, even if a defendant is otherwise willing to exercise his constitutional trial right and risk a lengthier sentence. Moreover, the data shows that the risk of the trial penalty is real: defendants who are convicted post-trial face substantially more severe sentences than they would have received had they accepted a plea offer.

A number of reforms are needed to address this problem. Defendants' exposure to severe and disproportionate sentences should be reduced through the elimination of mandatory minimums, the curtailment of expansive criminal codes, and the implementation of expanded second-look, compassionate release, and clemency options. Prosecutors and judges should be restricted from penalizing defendants based solely on the exercise of their constitutional right to trial, or their right to make pretrial motions raising statutory and/or constitutional claims. Finally, data should drive reform: judges' performance and assignments should not be based on disposition quotas or hearing and trial volumes, and data on pleas and sentencing dispositions should be collected and publicized, to promote transparency and further study concerning the operation of the trial penalty in New York State. Together, these reforms will restore the central role of the trial as a check on the justice system and ensure that defendants can exercise their constitutional trial rights without fear of reprisal.

APPENDIX 1: NYSACDL SCOPE OF THE TRIAL PENALTY STATEMENT

The use of trials has basically disappeared from the legal system. This has transformed the legal system into one in which almost all defendants waive fundamental rights: the right to a trial; the right to discovery and a meaningful opportunity to investigate; Fourth, Fifth and Sixth Amendment Rights to challenge unlawfully obtained evidence; and the right to appeal. These rights are not only important to the accused but provide a necessary check on law enforcement and prosecutorial overreach and abuse. It is vital to explore and understand the extent to which such waivers may be employed not to reward an accused person for early acknowledgement of guilt, but rather to punish the exercise of fundamental rights.

It is widely believed that the main culprit of the decrease in trial rates is a “trial penalty,” which most often refers to the significant difference between a pretrial sentence offer versus the posttrial sentence imposed as a consequence of exercising the fundamental right to trial. However, when, how and why the trial penalty impacts the criminal process and the causes that contribute to it has not been examined closely in New York State.

Additionally, there has been little study of the various points of the criminal process where the decision to go to trial could be impacted. For example, the coercion could start at the commencement of the case, as prosecutors enjoy unbridled charging authority and the ability to invoke mandatory minimum sentences, which would be applicable for trial but not a plea deal. The defendant’s decision could then be impacted by a judge prioritizing speedy disposition, or a defense attorney who, without adequate discovery or investigation, believes their client will be safer with a plea deal.

The various factors that have eroded the constitutional right to trial have reduced government transparency and accountability, diminished public confidence in the system, and ousted the public from the exercise of its historical oversight role in the criminal justice system as members of a trial jury.

This project will identify and assess the causes, prevalence, and influence of various factors that induce the overwhelming majority of criminally accused persons in New York State to waive a trial. It is vital to understand what factors have contributed to the decline in trials to develop appropriate recommendations to ameliorate those aspects of institutional coercion that unreasonably burden the right to a trial and undermine the integrity of the justice system.

APPENDIX 2: NYSACDL SURVEY EXAMPLE AND RESULTS

Survey Landing Page Text

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. This penalty is now so severe and pervasive that it has virtually eliminated the constitutional right to a trial. To avoid the penalty, accused persons not only forego a trial, they must also surrender many other fundamental rights which are essential to a fair justice system. Depending upon the jurisdiction, the accused often must plead guilty solely to avoid pretrial incarceration, or, to avoid a vastly increased penalty, may be required to waive the right to discovery, access to *Brady* material, the right to conduct a meaningful investigation, the right to challenge unlawfully seized evidence, the right to develop mitigation, and the right to appeal.

The New York State Association of Criminal Defense Lawyers (NYSACDL) has created a task force to assess the extent to which the trial penalty exists in the state courts of New York State, and to identify its causes and potential remedies. Our investigation builds on the National Association of Criminal Defense Lawyers’ (NACDL) report which studied the trial penalty on the federal level, however, our focus is purely on New York State prosecutions.

Our goal is to issue a comprehensive report and recommendations that can provide the basis for broad reform movement. To compile the necessary data, NYSACDL seeks your assistance. Your responses to the following survey will be tremendously helpful.

This survey should take no more than 15-25 minutes to complete. It targets state prosecutions (not federal), and consists of two parts. Part I seeks to identify where you practice, the extent to which accused persons in your jurisdictions face a trial penalty, and the various stages in the process at which the trial penalty comes into play. Part II asks you to identify a specific case or cases which you believe the trial penalty was evident and contributed to a particularly illustrative example of resulting injustice.

PLEASE THINK ABOUT ILLUSTRATIVE CASES BEFORE YOU BEGIN TAKING THE SURVEY. While NYSACDL cannot guarantee it will use any particular story, if it does, NYSACDL will contact you to ensure that the information used in NYSACDL’s research, reporting, website, press releases, or any other materials associated with the project is accurate, and that your client is identified only with your consent and your client’s consent.

Survey Questions

Q1. In what county in New York State do you practice? (NOTE: If you practice in multiple counties, please complete a separate survey for all counties in which you feel you have adequate experience to provide meaningful responses.) (Total Responses = 372)

Answer	Number of Responses	Percent of All Responses
<i>Albany</i>	16	4.30%
<i>Allegany</i>	2	0.54%
<i>Bronx</i>	21	5.65%
<i>Broome</i>	2	0.54%
<i>Cayuga</i>	1	0.27%
<i>Chemung</i>	1	0.27%
<i>Chenango</i>	1	0.27%
<i>Clinton</i>	3	0.81%
<i>Columbia</i>	2	0.54%
<i>Delaware</i>	1	0.27%
<i>Dutchess</i>	8	2.15%
<i>Erie</i>	12	3.12%
<i>Franklin</i>	1	0.27%
<i>Fulton</i>	1	0.27%
<i>Genesee</i>	5	1.34%
<i>Greene</i>	1	0.27%
<i>Kings</i>	55	14.78%
<i>Monroe</i>	19	5.11%
<i>Nassau</i>	8	2.15%
<i>New York</i>	77	20.70%
<i>Oneida</i>	6	1.61%
<i>Onondaga</i>	16	4.30%
<i>Ontario</i>	7	1.88%
<i>Orange</i>	5	1.34%
<i>Orleans</i>	2	0.54%
<i>Otsego</i>	1	0.27%
<i>Queens</i>	33	8.87%
<i>Rensselaer</i>	1	0.27%
<i>Richmond</i>	6	1.61%

Rockland	11	2.96%
Schenectady	2	0.54%
St. Lawrence	2	0.54%
Steuben	1	0.27%
Suffolk	3	0.81%
Sullivan	4	1.08%
Tompkins	1	0.27%
Ulster	4	1.08%
Warren	2	0.54%
Washington	2	0.54%
Westchester	26	6.99%

The following counties had no responses: Cattaraugus, Chautauqua, Cortland, Essex, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Niagara, Oswego, Putnam, Saratoga, Schoharie, Schuyler, Seneca, Tioga, Wayne, Wyoming, Yates

Q2. For the state felony cases that you resolve by guilty plea at what stage is the plea generally entered? (Total Responses = 367)

Answer	Number of Responses	Percent of All Responses
<i>Before indictment</i>	123	33.51%
<i>Before discovery</i>	16	4.36%
<i>Before motions</i>	39	10.63%
<i>After motions but before hearings</i>	130	35.42%
<i>After hearings</i>	10	2.72%
<i>Just before trial</i>	16	4.36%
<i>Some other state (open response)</i>	33	8.99%

Q3. For the state misdemeanor cases that you resolve by guilty plea at what stage is the plea generally entered? (Total Responses = 366)

Answer	Number of Responses	Percent of All Responses
<i>Before conversion to information</i>	9	2.46%
<i>Before discovery</i>	65	17.76%
<i>Before motions</i>	108	29.51%
<i>After motions but before hearings</i>	114	31.15%
<i>After hearings</i>	12	3.28%
<i>Just before trial</i>	32	8.74%
<i>Some other stage (please specify)</i>	26	7.10%

Q4. Do you believe the trial penalty is a factor in your county? (Total Responses = 367)

Answer	Number of Responses	Percent of All Responses
Yes	344	93.73%
No	23	6.27%

Q5. If the trial penalty is a factor in your county, is the trial penalty uniform throughout the county, or does it vary by locality? (Total Responses = 342)

Answer	Number of Responses	Percent of All Responses
Uniform	134	39.18%
Varies	208	60.82%

Q6. In what court(s) is it most prevalent? (Total Responses = 201)*This question only appears if someone answers "Varies" to Question 5.*

Answer	Number of Responses	Percent of All Responses
City/Municipality/Town/Village	29	14.43%
Circuit/District	2	1.00%
County	73	36.32%
Supreme	84	41.79%
NYC Criminal Court	13	6.47%

Q7. If the trial penalty is a factor in your county, does it vary by type of case — i.e., is the trial penalty more prevalent in misdemeanor or felony cases? (Total Responses = 327)

Answer	Number of Responses	Percent of all Responses
<i>Equally prevalent between misdemeanor and felony cases</i>	99	30.28%
<i>Varies between misdemeanor and felony cases</i>	228	69.72%

Q8. In what type of case is the trial penalty more prevalent in your county? (Total Responses = 230)
This question only appears if someone answers "Varies between misdemeanor and felony cases" to Question 7

Answer	Number of Responses	Percent of All Responses
Felony	215	93.48%
Misdemeanor	15	6.52%

Q9. In what ways does the trial penalty manifest itself?
 (Please include all that apply.) (Total Responses = 317)

Answer	Number of Responses	Percent of all Responses
One time only offers at first appearance	108	34.07%
The use of bail to induce a guilty plea (In other words, in your jurisdiction, is an accused person told that if they do not plead guilty at their first appearance, bail will be set)	116	36.59%
Dramatically reduced plea offers in response to defense efforts challenging constitutional or other core weaknesses	152	47.95%
Waiver of the right to counsel	9	2.84%
Waiver of time to conduct a meaningful investigation	75	23.66%
Waiver of discovery	80	25.24%
Waiver of pretrial suppression motions	112	35.33%
Waiver of access to experts to develop mitigation	26	8.20%
Waiver of appeal	216	68.14%
Waiver of prospective claims of ineffective assistance	10	3.15%
Waiver of FOIA (Freedom of Information Act) requests	5	1.58%
Significantly increased penalty if convicted after trial	280	88.33%
Other (Open Response)	42	13.25%

Q10. What external factors contribute to the trial penalty in your county? (Total Responses = 249)

	Does not Contribute to the Trial Penalty in My County	Slightly Contributes to the Trial Penalty in My County	Contributes to the Trial Penalty in My County	Significantly Contributes to the Trial Penalty in My County	Most Significantly Contributes to the Trial Penalty in My County	Total
<i>Mandatory minimum sentences</i>	23 (9.47%)	33 (13.58%)	77 (31.69%)	61 (25.10%)	49 (20.16%)	243
<i>Statutory limitations on plea bargaining</i>	61 (25.31%)	50 (20.75%)	64 (26.56%)	44 (18.26%)	22 (9.13%)	241
<i>Prosecutorial abuse of the charging function</i>	22 (9.21%)	29 (12.13%)	59 (24.69%)	69 (28.87%)	60 (25.10%)	239
<i>Judicial manipulation of bail/pretrial release determinations to induce guilty pleas</i>	31 (12.60%)	57 (23.27%)	73 (29.80%)	52 (21.22%)	32 (13.06%)	245
<i>Judicial involvement in the plea process, i.e., judges actively encouraging the accused to plead guilty through the use or threat of an enhanced penalty after trial</i>	23 (9.35%)	45 (18.29%)	61 (24.80%)	66 (26.83%)	51 (20.73%)	246
<i>Judicial disengagement from the plea process, i.e., judges unaware of a prosecutor's offer of a significantly reduced sentence in exchange for a guilty plea prior to trial</i>	136 (57.14%)	48 (20.17%)	33 (13.87%)	14 (5.88%)	7 (2.94%)	238
<i>Excessive defense caseloads</i>	69 (29.24%)	65 (27.54%)	61 (25.85%)	25 (10.59%)	16 (6.78%)	236
<i>Pressure from court administrative agencies</i>	91 (38.40%)	57 (24.05%)	35 (14.77%)	31 (13.08%)	23 (9.70%)	237
<i>Financial cost of litigation up to and including trial</i>	140 (58.33%)	31 (12.92%)	28 (11.67%)	20 (8.33%)	21 (8.75%)	240

Q11. Do you believe that the trial penalty is primarily caused by: (Please rank in order with 1 being the greatest factor and 7 the least contributing factor) (Total Responses = 246)

	1	2	3	4	5	6	7	Total
Laws	20 (8.85%)	25 (11.06%)	37 (6.37%)	49 (21.68%)	38 (16.81%)	33 (14.60%)	24 (10.62%)	226
Court Rules	10 (4.39%)	9 (3.95%)	18 (7.89%)	43 (18.86%)	64 (28.07%)	43 (18.86%)	41 (17.98%)	228
Culture of practices by judges	62 (26.84%)	64 (27.71%)	49 (21.21%)	23 (9.96%)	12 (5.19%)	15 (6.49%)	6 (2.60%)	231
Cultures of practices by prosecutors	89 (37.71%)	75 (31.78%)	35 (14.83%)	8 (3.39%)	6 (2.54%)	6 (2.54%)	17 (7.20%)	236
Cultures of practices by defense attorneys	6 (2.62%)	7 (3.06%)	13 (5.68%)	40 (17.47%)	42 (18.34%)	45 (19.65%)	76 (33.19%)	229
A combination of the culture of practice by multiple participants in the criminal justice system	47 (20.00%)	39 (16.60%)	58 (24.68%)	41 (17.45%)	21 (8.94%)	19 (8.09%)	10 (4.26%)	235
Excessive caseloads	7 (3.10%)	16 (7.08%)	23 (10.18%)	26 (11.50%)	44 (19.47%)	60 (26.55%)	50 (22.12%)	226

Q12. For the cause(s) above you think are the leading causes of the trial penalty, please provide one or two examples in the corresponding text box (Total Responses = 185)

Text answers omitted

Q13. In what type of case is the trial penalty more prevalent in your county? (Total Responses = 232)

Answer	Number of Responses	Percent of All Responses
<i>I/we track the number of cases filed.</i>	150	64.66%
<i>I/we track the number or percentage of cases disposed by guilty plea.</i>	136	58.62%
<i>I/we track the number or percentage of cases that result in a trial.</i>	135	58.19%
<i>I/we do not track relevant data.</i>	61	26.29%
<i>I/we track other data that might be relevant to the trial penalty in my county.</i>	35	15.09%

APPENDIX 3: EXAMPLE OUTREACH MATERIALS



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August 26, 2019

Hon. David Soares
Albany County District Attorney
Albany County Justice Building
6 Lodge Street
Albany, NY 12207

Dear Hon. District Attorney:

I write to you in my capacity as a Vice President to the New York State Association of Criminal Defense Attorneys (NYSACDL) concerning a statewide project to investigate and address the diminishing number of trials conducted in New York State. NYSACDL has organized a Task Force to investigate the reasons for the sharp reduction in trials in recent years. Our perspective and initial investigation suggests that trials are becoming significantly less frequent due to a host of factors including the risk of a substantially higher penalty if one loses at trial than if one enters a guilty plea at an earlier phase. Our goal is to investigate the number of cases tried and the causes behind this potential penalty, which may include resource needs and/or stresses on your line prosecutors to achieve outcomes in a heavy volume system, and shine light on the issue for the public and, hopefully, advance reform to strengthen the criminal justice system. The right to a trial is a fundamental constitutional right and many believe that trials are essential to the health of the adversarial system, provide important government accountability, and foster public participation in the criminal justice system.

Our work is multifaceted and aided by a team of pro bono attorneys from Skadden, Arps, Slate, Meagher & Flom assisting in the effort. We are researching and gathering statistics from as broad an array of sources as we can and the intention is to publish a report with findings and recommendations. The aim is to collect data from every county in New York from as many and diverse a population of stakeholders as are willing to share data pertinent to the effort. It is our hope that, although the Task Force is sponsored by the defense bar, colleagues in public prosecutors' offices throughout the State will collaborate by sharing data and information about the plea/trial process that may shed light on the reasons for the reduction in trials.

Hon. David Soares
August 26, 2019
Page 2

I write to invite your Office to participate in our efforts by sharing statistics your Office collects. We are evaluating statistics specifically for the past five years and ask if you would provide information available to your office on the following for as long as you have been keeping statistics:

- How many prosecutions do you initiate annually (for each response please provide the data for each year for which you have data)?
- How many cases are resolved after the commencement of trial either at or after jury selection in a jury trial or at or after opening statements in a bench trial?
- How many cases are tried to verdict?
- Can you provide the above data broken down by misdemeanor and felony categorization?
- How have the annual number of trials changed since you began tracking them or over the past twenty years?
- Does your office maintain statistics on the plea offers extended versus sentences after conviction on cases?
 - If yes, will you provide these statistics in whatever form you track and collect?
- Does your office have a policy or practice, formal or informal, on the type and/or timing of pre-trial plea offers?
 - What is the policy or practice?
 - Does it differ based on seriousness of crime?
 - If you have a written policy or training materials, we would be most grateful for a copy. If you do not wish to send an internal policy out, if you could describe the key aspects of the policy/practice, we would appreciate that. (For instance, when your office accepts a plea agreement, is a reduction offered for accepting responsibility?)
- How much if any authority does each individual prosecutor have over what offers are extended in misdemeanor cases/felony cases?

Please send your responses to my attention at

NYSACDL 90 State Street, Suite 700
Albany, New York 12207.

Page 1 of 3

Page 2 of 3

Hon. David Soares
August 26, 2019
Page 3

You may also email a scanned response to our Executive Director at jivanort@nysacdl.org.

Finally, we are pleased to speak with you to learn more about your Office's perspective and position on the reduced number of trials and welcome any other additional information you think we should consider regarding the reduction in trials. Please let us know if you would like to share your perspective with a member of the task force.

Thank you for your time and consideration.

Sincerely,

Susan J. Walsh
212-403-7348

Page 3 of 3



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NEW YORK STATE ASSOCIATION
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December 5, 2019

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JENNIFER CHILLA VAN ORT, ALBANY

Sherri Brooks
112 State Street
Suite 1010
Albany, NY 12207

Dear Ms. Brooks:

I write to you again in my capacity as a Vice President of the New York State Association of Criminal Defense Lawyers (NYSACDL) concerning a statewide project to investigate and address the diminishing number of criminal trials conducted in New York State. NYSACDL has convened a Task Force to investigate the reasons for the reduction in trials in recent years. We thank you for circulating the survey to your attorneys. We are calibrating those results and look forward to including them in our report. To the extent you have not already, please circulate the survey which will close by the end of this year.

<https://www.surveymonkey.com/r/nytrialpenalty>

Our goal remains to investigate the number of cases tried and the reasons behind this potential penalty, to shine a light on the issue for the public, and, hopefully, to advance reform to strengthen the criminal justice system.

Our work would benefit greatly if defense providers would assist by sharing available data and information about the plea and trial process. I write to invite your Office to participate in our efforts, again this time by sharing statistics your Office collects. We request statistics for the past five years. If you do not keep statistics for whatever reason, that information is also valuable to our effort. Otherwise, please indicate information available to your office on the following:

- How many prosecutions do you defend annually (for each response please provide the data for each year for which you have data)?
- How many cases are resolved after the commencement of trial either at or after jury selection in a jury trial or at or after opening statements in a bench trial?
- How many cases are tried to verdict?
- Can you provide the above data broken down by misdemeanor and felony categorization?

- How have the annual number of trials changed since you began tracking them or over the past twenty years?
- Does your office maintain statistics on the plea offers extended versus sentences after conviction on cases?
 - If yes, will you provide these statistics in whatever form you track and collect?
- In your experience, do prosecutors in your jurisdiction have a policy or practice, formal or informal, on the type and/or timing of pre-trial plea offers?
 - What is the policy or practice?
 - Does it differ based on seriousness of crime?
 - Does your office have a policy or practice, formal or informal, on the handling of these offers?
 - If you have a written policy or training materials, we would be most grateful for a copy. If you do not wish to send an internal policy out, if you could describe the key aspects of the policy/practice, we would appreciate that.
- In your experience, how much if any authority does each individual prosecutor have over what offers are extended in misdemeanor cases/felony cases?

Please send your responses to my attention at:

NYSACDL
90 State Street, Suite 700
Albany, New York 12207

You may also email a scanned response to our Executive Director at jlvanort@nysacdl.org.

Finally, we are pleased to speak with you to learn more about your Office's perspective and position on the reduced number of trials and welcome any other additional information you think we should consider regarding the reduction in trials. Please let us know if you would like to share your perspective with a member of the task force.

Thank you for your time and consideration.

Sincerely,

Susan J. Walsh

212-403-7348



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February 19, 2020

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EXECUTIVE DIRECTOR
JENNIFER CHILLA VAN ORT, ALBANY

Sherri Brooks
112 State Street
Suite 1010
Albany, NY 12207

Dear Ms. Brooks:

As you may recall, I wrote to you in December concerning a statewide project to investigate and address the diminishing number of criminal trials conducted in New York State. We defense lawyers know this as the "trial penalty." Fully cognizant of the challenges we all face to press for reform in New York this year, I write to you again in my capacity as a Vice President of the New York State Association of Criminal Defense Lawyers (NYSACDL) to urge your Office to participate in our study.

NYSACDL's Task Force is investigating the reasons for the reduction in trials in recent years. Our goal remains to investigate the number of cases tried and the reasons behind this potential penalty, to shine a light on the issue for the public, and, hopefully, to advance reform to strengthen the criminal justice system.

Our work would benefit greatly if we had a greater showing from defense providers who might share available data and information about the plea and trial process. I write once again to invite your Office to participate in our efforts by sharing statistics your Office collects. We request statistics for the past five years. *If you do not keep statistics for whatever reason, that information is also valuable to our effort.* Otherwise, please indicate information available to your office on the following:

- How many prosecutions do you defend annually (for each response please provide the data for each year for which you have data)?
- How many cases are resolved after the commencement of trial either at or after jury selection in a jury trial or at or after opening statements in a bench trial?
- How many cases are tried to verdict?
- Can you provide the above data broken down by misdemeanor and felony categorization?
- How have the annual number of trials changed since you began tracking them or over the past twenty years?
- Does your office maintain statistics on the plea offers extended versus sentences after conviction on cases?
 - If yes, will you provide these statistics in whatever form you track and collect?

- In your experience, do prosecutors in your jurisdiction have a policy or practice, formal or informal, on the type and/or timing of pre-trial plea offers?
 - What is the policy or practice?
 - Does it differ based on seriousness of crime?
 - Does your office have a policy or practice, formal or informal, on the handling of these offers?
 - If you have a written policy or training materials, we would be most grateful for a copy. If you do not wish to send an internal policy out, if you could describe the key aspects of the policy/practice, we would appreciate that.
- In your experience, how much if any authority does each individual prosecutor have over what offers are extended in misdemeanor cases/felony cases?

Please send your responses to my attention at:

NYSACDL
90 State Street, Suite 700
Albany, New York 12207

You may also email a scanned response to our Executive Director at jlvanort@nysacdl.org.

To those of you who have responded, we thank you. To those of you we have yet to hear from, thank you for your time and consideration.

Sincerely,

Susan J. Walsh
212-403-7348

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ROBERT G. WELLS, SYRACUSE

EXECUTIVE DIRECTOR
JENNIFER GULLA VAN ORT, ALBANY

February 24, 2020

Hon. David Soares
Albany County District Attorney
Albany County Justice Building
6 Lodge Street
Albany, NY 12207

Dear Hon. District Attorney:

I am writing to you in my capacity as a Vice President to the New York State Association of Criminal Defense Attorneys (NYSACDL) to follow up with you on a statewide project to investigate and address the diminishing number of trials conducted in New York State.

You may recall that I sent a letter to you last August requesting your Office's input on the project. We invited all 62 District Attorney's Offices in New York to participate because we believe that your input is valuable to the project. It remains our hope that although our Task Force is sponsored by the defense bar, that our colleagues in public prosecutor's offices will collaborate by sharing data and information about the plea/trial process that may shed light on the reasons for the reduction in trials.

Our perspective and initial investigation supports the notion that trials are becoming significantly less frequent due to a host of factors including the risk of a substantially higher penalty if one loses at trial than if one accepts a plea. Our goal is to investigate the number of cases tried, the causes behind this potential penalty (which may include resource needs), and/or the stresses on your line prosecutors to achieve outcomes in a heavy volume system, to shine light on the issue for the public and, hopefully, to advance reform to strengthen the criminal justice system. Our work is multifaceted and aided by a team of *pro bono* attorneys from Skadden, Arps, Slate, Meagher & Flom assisting in the effort. We are researching and gathering statistics from as broad an array of sources as we can and our goal is to publish a report on our findings.

While we too are mindful of the significant changes to New York's criminal justice system since the first of the year, our focus for this project is on the reduction in trials specifically. The right to trial is a fundamental constitutional right and many believe that trials are essential to the health of the adversarial system, provide important government accountability and foster public participation in the criminal justice system.

We are evaluating statistics from the last five years and ask for information on the following:

- How many prosecutions do you initiate annually (for each response please provide the data for each year for which you have data)?
- How many cases are resolved after the commencement of trial either at or after jury selection in a jury trial or at or after opening statements in a bench trial?
- How many cases are tried to verdict?
- Can you provide the above data broken down by misdemeanors and felony categorization?
- How have the annual number of trials changed since you began tracking them or over the past twenty years?
- Does your office maintain statistics on the plea offers extended versus sentences after conviction on cases?
 - If yes, will you provide these statistics in whatever form you track and collect?
- Does your office have a policy or practice, formal or informal, on the type and/or timing of pretrial plea offers?
 - What is that policy or practice?
 - Does it differ based on seriousness of crime?
 - If you have a written policy or training materials, we would be most grateful for a copy. If you do not wish to send an internal policy out, if you could describe the key aspects of the policy/practice, we would appreciate that. (For instance, when your office accepts a plea agreement, is a reduction offered for accepting responsibility?)
- How much if any authority does each individual prosecutor have over what offers are extended in misdemeanor cases/felony cases?

Please send your responses to my attention at:

Susan J. Walsh
NYSACDL
90 State Street, Suite 700
Albany, NY 12207

You may also email them to our Executive Director, Jen Van Ort at jvanort@nysacdl.org.

Finally, we are pleased to speak with you to learn more about your Office's perspective and position on the reduced number of trials and welcome any other additional information you think we should consider regarding the reduction in trials. Thank you for your time and consideration.

Sincerely,



Susan J. Walsh
212-403-7348

APPENDIX 4: DATA AND METHODS FOR TRIAL PENALTY BY THE NUMBERS

This appendix discusses the information used in the trial penalty impact analysis. It reviews the data sample, explains how the trial penalty was defined, and discusses the analysis methods used to generate the results.

Data

Data for the analysis of the trial penalty in Manhattan came from two organizations, New York County Defender Services (NYCDS) and Neighborhood Defender Services (NDS). Both are public defense organizations serving New York County in New York State, with NDS focusing specifically on residents of Harlem.

For this project, both organizations provided data regarding all of their cases over a certain time period where an individual both (1) was offered a plea and rejected that plea and (2) went to trial and was convicted on the top count (most serious charge) on which they were charged. NYCDS data includes all cases fitting these criteria from 2016 to 2019, 63 cases total. NDS data includes all cases fitting these criteria from 2015 to 2020, 16 cases total. Additional information regarding the attributes of this dataset are included in the table in this section.

“Trial penalty” was defined as a case in which an individual received a plea offer, rejected that plea offer, was convicted of the top count at trial, and then received a sentence that was worse than their plea offer and equal to or worse than any applicable mandatory minimum.

For jail or prison sentences, “worse” was defined as a sentence longer than the offered plea. For non-custodial sentences, an attorney familiar with criminal matters assessed whether the sentence was worse than the plea offer. If a person was offered a non-custodial plea and received a custodial sentence, that was counted as “worse” and, by extension, as a trial penalty.

Trial Penalty Analysis Dataset Key Variables	
Total Cases	79
NYCDS Cases	63
NDS Cases	16
Bench or Jury Trial	
Bench Trial	31
Jury Trial	48
Race	
Black	35
White	10
Unknown	34
Citizenship	
Citizen	60
Non-citizen	13
Unknown	6
Offense Class	
Felony	37
Misdemeanor	42
Trial Penalty	
Trial Penalty	52
No Trial Penalty	27
Other variables in the data included age, gender, whether someone was subject to a predicate offense enhancement, plea offer time in years, sentence time in years, type of crime (violent, drug, property, other), and age grouping.	

Analysis

Three types of analyses were conducted on the trial penalty data: (1) comparisons on key variables (e.g., jury trial/bench trial, felony/misdemeanor); (2) linear regression, assessing the relationship between plea time and sentence time; (3) and logistic regression, which sought to build a statistical model that would explore what attributes might be most relevant in understanding when people receive a trial penalty in New York. In all cases, the statistical models were explicitly intended to analyze the relationship among and between the attributes as they impacted the trial penalty outcomes, not build causative or predictive models.

- ◆ **Key Variable Comparisons:** this analysis used Chi-Square Tests to explore whether there were statistically significant differences in who received a trial penalty based on key attributes of people in the dataset. This analysis did not assess causation — whether the attribute *caused* someone to receive a trial penalty. Rather, this analysis focused only on whether there was a statistically significant relationship between a particular variable and receiving a trial penalty. Statistical significance refers to the likelihood that a particular variable’s relationship to the trial penalty is random. This is measured using a statistic called the probability value or “p-value,” a number that represents the probability that the observed result happens randomly, assuming no relationship exists between the variable and trial penalty outcome. For example, a p-value of 0.05 indicates that there is a 95% chance that a particular relationship is not random. The p-value is computed based on the assumption that the null hypothesis (that a particular result is random) is true. Thus, in this analysis, if the null hypothesis is true, then there is no significant relationship between a given variable to the trial penalty. Traditionally, the null hypothesis is rejected if the probability value is below 0.05. Accordingly, for this research, if the p-value is less than 0.05, the null hypothesis will be rejected, suggesting the presence of a relationship between the variable and the trial penalty.
- ◇ The key variables focused on in this report and the level of statistical significance (p-values) associated with those variables were:
 - ◇ **Jury Trial Versus Bench Trial:** There was a statistically significant relationship between whether someone had a bench or jury trial and whether they received a trial penalty. (p = 0.008645)
 - ◇ **Felony Versus Misdemeanor:** There was a statistically significant relationship between whether someone’s offense was a felony or misdemeanor and whether they received a trial penalty. (p = 0.007281)
 - ◇ **Other Tested Variables:** These were the only two variables tested that yielded a statistically significant relationship to the trial penalty. Other variables that were tested and found not to have a statistically significant relationship with receiving a trial penalty when analyzed individually included (1) race, (2) citizenship, (3) gender, (4) whether the person had a criminal history that would trigger New York’s predicate offense sentencing enhancements, (5) the type of offense, (6) the size of the plea offer, (7) the size of the resulting sentence, and (8) age. However, as discussed, some of these variables, such as race and age, showed statistically significant relationships to the trial penalty when modeled together.

- ◆ **Linear Regression:** this analysis sought to understand the numerical relationships between the offer that people received in the system and the sentence they received. This analysis was not causal, meaning that it did not seek to understand whether longer offers *caused* longer sentences, only whether there was an association between the two. Because the data in this study was highly skewed towards shorter sentences (i.e., the sample contained far more short sentences than long ones), a log transformation was used to facilitate data analysis. A log transformation replaces variables with their equivalents when the logarithmic mathematical function is performed. This log function facilitates the analysis of skewed datasets such as this one.
 - ◇ This model revealed that there was a statistically significant and positive relationship between the plea offer time and the sentence time. The positive relationship means that as plea offers go up, sentences go up and the statistical significance means that it is highly unlikely ($p < 0.00001$) that this relationship is the result of random chance.
 - ◇ The model showed that every 10% increase in offer time, measured in years, was matched by a 9.6% increase in sentence time in years. There is some variability around this finding such that it is possible to report with 95% confidence that the sentence increase associated with a 10% increase in plea offer time is between 7.42 and 11.76%.
 - ◇ The adjusted R-squared value of this model, an indication of how well the model fits the data, was 0.689 — an indicator of medium accuracy.
- ◆ **Logistic Regression:** this analysis explored how variables interacting with each other might affect the likelihood of someone in the dataset receiving a trial penalty. This model was not a causal model that is intended to predict whether someone in another dataset might be likely to receive a trial penalty. Rather, it sought to understand the project dataset and what variables in that dataset might be most useful in assessing when someone received a trial penalty.
 - ◇ To explore interactions between variables, the logistic regression model included the following variables: (1) race, (2) gender, (3) citizenship, (4) age group, (5) plea offer time, (6) jury or bench trial, (7) crime type, (8) whether the offense was a misdemeanor or felony, and (9) whether the person had a predicate offense.
 - ◇ The resulting model was 88.61% accurate in interpreting whether someone in the dataset received a trial penalty.
 - ◇ While all the variables above played some role in explaining whether or not someone received a trial penalty, race and age group had the strongest impact. Being black and younger than 25 years old increased the probability that someone in the dataset would receive a trial penalty.

ENDNOTES:

- 1 See JaneAnne Murry et al., *Second Look = Second Chance: The NACDL Model “Second Look” Legislation*, Nat’l Ass’n of Crim. Def. Lawyers (2020), <https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-the-nacdl-model-second-look-legislation.pdf>; Colleen Grablick, *D.C. Council Gives Final Approval To Second Look Act*, DCist (Dec. 1, 2020, updated Dec. 15, 2020), <https://dcist.com/story/20/12/01/dc-council-approves-criminal-justice-reform-bill/>.
- 2 Human Rights Watch, *An Offer You Can’t Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* 2 (2013) (“HRW Report”).
- 3 HRW Report at 2-3 (“When prosecutors choose to pursue charges carrying mandatory penalties and the defendant is convicted, judges must impose the sentences. Prosecutors, in effect, sentence convicted defendants by the charges they bring.”).
- 4 HRW Report at 31 (“[F]rom 1980 to 2010, the percentage of federal drug cases resolved by a plea increased from 68.9 percent to 96.9 percent . . .”).
- 5 HRW Report at 2 (“[P]lea agreements, once a choice to consider, have for all intents and purposes become an offer drug defendants cannot afford to refuse.”).
- 6 HRW Report at 100.
- 7 HRW Report at 2.
- 8 Nat’l Ass’n of Crim. Def. Lawyers, *The Trial Penalty: the Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* 6 (2018) (“NACDL Report”).
- 9 NACDL Report at 5, citing the following footnote: “In 1970, for example, 15 percent of federal cases went to trial. Hindelang Criminal Justice Research Ctr., Univ. at Albany, Sourcebook of Criminal Justice Statistics Online tbl.5.22.2010 (Kathleen Maguire ed.), available at <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>. But this percentage started rapidly declining in the ensuing decades, to a low of 2.9 percent in 2015. U.S. Sentencing Commission, *Overview of Federal Criminal Cases Fiscal Year 2015*, at 4 (2016), available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf. The state statistics duplicate the federal pattern, and, indeed, indicate that less than two percent of state cases proceed to trial today. Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System — and What Can Be Done About It*, 111 N.W. U. L. Rev. 1429, 1432 (2017). At the same time, and hardly coincidentally, the number of prosecutions rose. In 1970, according the Hindelang Criminal Research Ctr. Sourcebook on Criminal Justice Statistics, federal prosecutors filed charges against 36,356 defendants. By 2011, this number had almost tripled to a peak of 102,617 filings. John Gramlich, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, Pew Research Center, Mar. 28, 2017, available at <https://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades/>. It has since declined to 77,152. Id.”
- 10 NACDL Report at 25 (“The prosecutor is almost always at an informational advantage because he is not required to share information from his investigation with the defendant before offering and requiring the acceptance of a plea deal, leaving the defendant to guess what the prosecutor will be able to prove beyond a reasonable doubt.”).
- 11 NACDL Report at 7.

- 12 NACDL Report at 6.
- 13 NACDL Report at 28 (“For instance, in many districts, it is common practice to require defendants to waive the right to appeal their sentence or important legal rulings including, for example, the legality of the criminal statutes or police conduct, including the legality of a stop, search, or seizure, or the acquisition of other forms of evidence. And where a defendant has already litigated such an issue, waiver of the right to appeal an adverse determination is frequently a condition of the guilty plea.”).
- 14 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) (“Finally, this Article uses its findings to demonstrate that the average federal defendant who goes to trial would actually have been much better off pleading guilty, even after accounting for her chances for acquittal. As this study shows, defendants who go to trial have only a twelve percent chance of being acquitted, but can expect a sixty-four percent longer sentence if convicted, a poor gamble by any metric.”).
- 15 *Id.* at 1213-14.
- 16 See, e.g., Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 La. L.Rev. 119, 126 (2020) (“[I]n 2012, the average sentence received by a federal drug offender after trial was three times higher than the average sentence received after a guilty plea: 16 years versus 5 years and 3 months. Evidence indicates that judges in state courts, too, impose lower penalties on defendants who plead guilty and waive their right to a trial.”).
- 17 See also Ram Subramanian et al., *In the Shadows: A Review of the Research on Plea Bargaining*, Vera Inst. of Just. (Sept. 2020), at 44 (“[R]esearch does appear to confirm that, among the millions of cases that are settled through guilty pleas each year, a meaningful number of people are actually innocent of the crimes with which they were charged.”).
- 18 Emma Andersson & Jeffery Robinson, *The Insidious Injustice of the Trial Penalty: “It is not the intensity, but the duration of pain that breaks the will to resist.”* 31 Fed. Sentencing Rep. 222 (Apr./Jun. 2019).
- 19 Marc A. Levin, *A Plea for Reviving the Right to a Jury Trial and a Remedy for Assembly-Line Justice*, 31 Fed. Sentencing Rep. 272 (Apr./Jun. 2019).
- 20 Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 Fed. Sentencing Rep. 284 (Apr./Jun. 2019).
- 21 Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 Fed. Sentencing Rep. 309 (Apr./Jun. 2019).
- 22 Vikrant P. Reddy & R. Jordan Richardson, *Why the Founders Cherished the Jury*, 31 Fed. Sentencing Rep. 316 (Apr./Jun. 2019).
- 23 *Id.*
- 24 *United States v. Walker*, No. 2:17-cr-00010 (S.D. W. Va. June 26, 2017).
- 25 *United States v. Walker*, 922 F.3d 239, 254 (4th Cir. 2019).
- 26 *United States v. Stevenson*, 425 F. Supp. 3d 647 (S.D. W. Va. April 12, 2018).
- 27 Jed Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. of Books, Nov. 20, 2014.
- 28 *People v. Thomas*, 34 N.Y. 3d 545, 587 (2019).
- 29 Subramanian, et al., *supra* note 17, at 24, 26.

- 30 Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. Rev. 1187, 1215 (2018).
- 31 *Id.* at 1240.
- 32 Rick Jones & Cornelius Cornelssen, *Coerced Consent: Plea Bargaining, the Trial Penalty, and American Racism*, 31 Fed. Sentencing Rep. 265, 265 (Apr./Jun. 2019).
- 33 *Id.* at 270.
- 34 *See, e.g.*, Scott Greenfield, *Will Grabs Plea Bargaining by The Tail*, Simple Justice (May 21, 2020), <https://blog.simplejustice.us/2020/05/21/wills-grabs-plea-bargaining-by-the-tail/>.
- 35 Suja A. Thomas, *Guest post on the Fourth Circuit’s reaction to district judge’s rejection of plea bargains*, Sentencing Law & Policy (May 20, 2019) (“I recognize that Judge Goodwin’s actions resulted in a black defendant being sent to prison for much more time than the prosecution wanted — continuing to contribute to the problem of mass incarceration.”).
- 36 DCJS Computerized Criminal History File as of July 18, 2020.
- 37 *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”).
- 38 U.S. Sentencing Comm’n, *Fiscal Year 2019 Overview of Federal Criminal Cases 8* (2020) (“In fiscal year 2019, the vast majority of offenders (97.6%) pleaded guilty.”).
- 39 DCJS Computerized Criminal History File as of July 18, 2020.
- 40 *Id.*
- 41 App’x 2, Question 4.
- 42 App’x 2, Question 7.
- 43 App’x 2, Question 8.
- 44 App’x 2, Selections from Question 9.
- 45 George Joseph, *Queens DA Will Release Secret Records On NYPD Officer Dishonesty*, Gothamist (Nov. 20, 2019, 9:38 AM), <https://gothamist.com/news/queens-da-will-release-secret-records-nypd-officer-dishonesty>.
- 46 *Id.*
- 47 Barbara Zolot, *The Gov’t Tool You’ve Never Heard of That Conceals Police Misconduct*, N.Y.L.J. (Sept. 18, 2020, 10:00 AM), <https://www.law.com/newyorklawjournal/2020/09/18/the-govt-tool-youve-never-heard-of-that-conceals-police-misconduct/>.
- 48 *Id.*

- 49 See *People v. Tiger*, 32 N.Y.3d 91, 100 (2018) (holding that defendants who plead guilty do not have a cognizable claim to vacate the judgment against them on constitutional grounds even where their claim is based on evidence of actual innocence unless they introduce new DNA evidence). See also N.Y. Crim. Proc. Law § 440.10(1)(h). The Court reached the conclusion in *Tiger* even though the defendant had a compelling case for actual innocence based on new evidence and had defeated a civil lawsuit, with its lower evidentiary standard, relating to the conduct to which she pled guilty. The majority opinion cited interests in efficacy and finality as support for not allowing a collateral attack on a guilty plea. Both the majority and the concurrence cited the key role that guilty pleas play in the judicial system, and the majority specifically cited statistical figures regarding the overwhelming use of guilty pleas in the federal and state judicial system as support for the decision.
- 50 *People v. Taylor*, 65 N.Y.2d 1, 7 (1985).
- 51 See, e.g., *People v. Lopez*, 6 N.Y.3d 248, 256 (2006) (citing “[t]he important goals of fairness and finality in criminal matters” as the reason for prohibiting defendants from raising claims of excessive sentence where they have waived their right to appeal as part of a plea agreement).
- 52 *Tiger*, 32 N.Y.3d at 103 (emphasis added).
- 53 *People v. Batista*, 167 A.D.3d 69, 82 (2d Dep’t 2018).
- 54 *Id.*
- 55 *Id.* at 83.
- 56 See generally *Thomas*, 34 N.Y.3d 545.
- 57 *Thomas*, 34 N.Y.3d at 586 n. 5 (“Accurately presented, the empirical evidence demonstrates that appeal waivers continue to serve the goals of finality and judicial economy that we recognized in *Seaberg*.”).
- 58 Paul Shechtman, *Large Number of Invalidated Appeal Waivers Illustrates Need for Change*, N.Y.L.J. (Jan. 18, 2021), <https://www.law.com/newyorklawjournal/2021/01/06/large-number-of-invalidated-appeal-waivers-illustrates-need-for-change/>.
- 59 Mich. Univ. Sch. of L., *Browse Cases*, The Nat’l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P&FilterField2=ST&FilterValue2=NY> (last visited Mar. 8, 2021). Notably, DNA evidence contributed to only three of these exonerations, which calls into question the Court of Appeals’ decision in *People v. Tiger* to permit actual innocence claims only in cases involving DNA evidence.
- 60 Mich. Univ. Sch. of L., *Naythen Aubain*, The Nat’l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5171> (last visited Jan. 20, 2021); Mich. Univ. Sch. of L., *Donnesia Brown*, The Nat’l Registry of Exonerations <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5174> (last visited Jan. 20, 2021); Mich. Univ. Sch. of L., *Sean Gaines*, The Nat’l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5162> (last visited Jan. 20, 2021); Mich. Univ. Sch. of L., *Jose Muniz*, The Nat’l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5172> (last visited Jan. 20, 2021); Mich. Univ. Sch. of L., *Thomas Ozzborn*, The Nat’l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5163> (last visited Jan. 20, 2021).
- 61 Mich. Univ. Sch. of L., *Paul Galting*, The Nat’l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4881> (last visited Jan. 20, 2021).

- 62 Mich. Univ. Sch. of L., *Fidel Padilla*, The Nat'l Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4705> (last visited Jan. 20, 2021).
- 63 <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (choose “Detailed View” from the “Browse Cases” dropdown; apply a filter of “P”) (last visited Jan. 20, 2021).
- 64 *DNA Exonerations in the United States*, Innocence Project <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Jan. 20, 2021).
- 65 Zolot, *supra* note 47.
- 66 George Joseph, *Queens DA Will Release Secret Records On NYPD Officer Dishonesty*, Gothamist (Nov. 20, 2019, 9:38 A.M.), <https://gothamist.com/news/queens-da-will-release-secret-records-nypd-officer-dishonesty>.
- 67 *Thomas*, 34 N.Y.3d 545.
- 68 App'x 2, Question 11.
- 69 Erik Luna & Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 Wash. & Lee L. Rev. 1285, 1285 (2010).
- 70 App'x 2, Question 9.
- 71 Survey Response #301.
- 72 Survey Response #58.
- 73 Survey Response #338.
- 74 Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County — Technical Report 41(2014)*, <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>.
- 75 Survey Response #140.
- 76 Survey Response #211.
- 77 See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stanford L. Rev. 611 (2014).
- 78 See *id.* at 657.
- 79 See *id.* at 659-60.
- 80 One commentator has noted that “[d]eclining to prosecute cases is the most direct way that prosecutors can mitigate the overreach of the criminal justice system.” See Vera Inst. of Just., *Unlocking the Black Box of Prosecution: Key Questions for Community Members* (2018), <https://www.vera.org/downloads/key-questions-community-members.pdf> (last visited Jan. 20, 2021).
- 81 Survey Response #355.
- 82 Survey Response #193.
- 83 Five percent of those who responded could not identify a specific stage when guilty pleas are generally entered in felony cases. Several of them explained that it depends on the type of case. One practitioner noted that “[f]or less serious felonies, they usually resolve by guilty plea before indictment but for more serious felonies they usually resolve by plea after indictment but before motions or after motions but before hearings.”

- 84** Nearly half of surveyed attorneys said that guilty pleas in misdemeanor cases are generally entered at the latest before pretrial motions are filed. Another 31% said they are generally entered before motions are heard.
- 85** Survey Response #68.
- 86** Survey Responses #366, 337, 319, 301, 253, 231, 103, 92, 82, 77, 74, 58, 19, 15, 12.
- 87** Survey Response #366.
- 88** NYCPL § 245.10(1)(a).
- 89** Survey Response #300.
- 90** Survey Response #118.
- 91** Survey Response #203.
- 92** Survey Response #73, 61.
- 93** Survey Response #78.
- 94** Survey Response #106.
- 95** Survey Response #27.
- 96** *People v. Tejada*, 184 Misc. 2d 75 (Sup. Ct. Bronx Cnty, 2000) (“The statutory limitations imposed on plea bargaining by NYCPL § 220.10 (5) were enacted by the Legislature to prevent the People from consenting to, and the court approving pleas to, lesser offenses in certain selected cases.”).
- 97** "Plea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics or any other intoxicating substance, or any combination thereof, is prohibited, *unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained or a reduction or dismissal would not result in a substantial change in sentence.*" Cal. Penal Code §1192.7(a)(2) (emphasis added).
- 98** Survey Responses # 356, 338, 292, 289, 208, 197, 85, 79, 77, 73, 47, 17, 12, 3, 1.
- 99** Survey Response #292.
- 100** NYCPL § 245.25. *See also* Krystal Rodriguez, *Discovery Reform in New York: Major Legislative Provisions 4* (2020).
- 101** NYCPL § 245.25(1). *See also* Andrea Cipriano, *Taking off the 'Blindfold Law' in 2020*, The Crime Report (Dec. 19, 2019), <https://thecrimereport.org/2019/12/19/taking-off-the-blindfold-law-in-2020/>; Barry Kamins, *Bail, Discovery, and Speedy Trial: The New Reforms*, N.Y.L.J., June 1, 2020, <https://www.law.com/newyorklawjournal/2020/06/01/bail-discovery-and-speedy-trial-the-new-reforms/>.
- 102** *See* Rodriguez, *supra* note 100 at 4.
- 103** More than 40 of the 170 practitioners who provided narrative examples of prosecutors' role in the trial penalty mentioned that prosecutors will seek higher or maximum penalties after trial. Those responses were distributed among 17 counties. *See, e.g.*, Survey Responses #344, 330, 329, 198.
- 104** Survey Response #258.
- 105** Survey Response #54.

- 106** Survey Response #260.
- 107** App'x 2, Question 11.
- 108** Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 Ohio St. L. 565 n. 53-60 J., n. 53-60 (2015). *Id.* at n. 61-65. The case law of a number of states also prohibits or discourages judicial involvement in plea negotiations. *See id.*, at n. 68-78.
- 109** *See generally* NYCPL.
- 110** NYCPL §§ 170.40, 210.40.
- 111** Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 Hofstra L.Rev. 63, 71 (2017).
- 112** Survey Response #316.
- 113** App'x 2, Question 10.
- 114** Survey Response #372.
- 115** Survey Response #322.
- 116** Survey Response #54.
- 117** William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. Times, Apr. 30, 2012, <https://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html>.
- 118** *See generally* N.Y.S. Comm'n on Jud. Conduct Ann. Rep. 2013, at 25-28 (Mar. 1, 2013), <http://www.scjc.state.ny.us/Publications/AnnualReports/nysjc.2013annualreport.pdf>; N.Y.S. Comm'n on Jud. Conduct Ann. Rep. 2007 (Mar. 1 2007), <http://www.scjc.state.ny.us/Publications/AnnualReports/nysjc.2007annualreport.pdf>. *See also* *People v. Cornelio*, 227 A.D.2d 248, (N.Y. App. Div. 1996).
- 119** *People v. Stevens*, 298 A.D.2d 267, 268 (1st Dep't 2002).
- 120** *Id.* (“[A] court wrongly burdens the defendant’s exercise of his right to trial when it indicates he will receive the maximum sentence, or maximum consecutive sentences, after trial, but a significantly lighter sentence after a plea.”) (citation omitted).
- 121** *People v. Cornelio*, 227 A.D.2d 248 (1st Dep't 1996). The Second Department has drawn similar distinctions. *See, e.g., People v. Green*, 240 A.D.2d 513, 514 (2d Dep't 1997) (approving a judge’s remark that he would “impose a sentence close to the maximum allowable under law” if the defendant lost at trial).
- 122** Survey Response #77.
- 123** Survey Response #54.
- 124** Survey Response #247.
- 125** Survey Response #326.
- 126** Survey Response #78.
- 127** Survey Response #337. *See also* Survey Response #47.
- 128** *See Issa Kohler-Hausmann, Managerial Justice and Mass Misdemeanors*, 66 Stan. L. Rev. 611, 663 (2014).

- 129** See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 711 (2017) (also finding that detained defendants are 43% more likely to receive jail sentences and their sentences are more than twice as long on average compared to defendants who are released).
- 130** App'x 2, Question 10.
- 131** See, e.g., Survey Responses #372, 343,
- 132** See Human Rights Watch, *Memorandum of Support for Preservation of the New York Pretrial Reform Law* (Mar. 20, 2020), <https://www.hrw.org/news/2020/03/20/human-rights-watch-memorandum-support-preservation-new-york-pretrial-reform-law>.
- 133** See Jamiles Lartey, *New York Rolled Back Bail Reform. What Will The Rest Of The Country Do?*, The Marshall Project (Apr. 23, 2020), <https://www.themarshallproject.org/2020/04/23/in-new-york-s-bail-reform-backlash-a-cautionary-tale-for-other-states>.
- 134** Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, Brennan Ctr. for Just. (Apr. 16, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.
- 135** Survey Response #216. See also, e.g., Survey Responses #332, 291, 287, 268, 216.
- 136** Nat'l Ass'n of Crim. Def. Laws., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 10, 2018), <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct> (see Robert Rose's video discussion "The Vanishing Trial" at ~28:55-33:35).
- 137** Survey Response #19.
- 138** Survey Response #102.
- 139** Survey Response #275.
- 140** App'x 2, Question 10.
- 141** Survey Response #326.
- 142** Survey Response #54.
- 143** Diamond & Salerno, *supra* note 16 at 121 ("On the criminal side, the dominant perceived source of decline [in jury trials] was mandatory minimums....").
- 144** N.Y. Penal Law § 125.27.
- 145** N.Y. Penal Law § 220.21.
- 146** N.Y. Penal Law § 70.00(3)(a)(i).
- 147** N.Y. Penal Law § 70.00(3)(a)(ii).
- 148** N.Y. Penal Law § 70.02.
- 149** N.Y. Penal Law § 70.04.
- 150** N.Y. Penal Law § 70.08.
- 151** Survey Response #143.

- 152 Survey Response #89.
- 153 William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. Times, (Apr. 13, 2013), <https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html>.
- 154 N.Y.S. Unified Ct. Sys., *2019 Annual Report* 3 (2020), https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.
- 155 N.Y. Crim. Proc. Law § 30.30.
- 156 Survey Responses #240, 214, 208, 146.
- 157 Survey Response #6.
- 158 Survey Response #47.
- 159 Survey Response #114.
- 160 Diamond & Salerno, *supra* note 16 at 157.
- 161 Survey Response #77.
- 162 Survey Response #145.
- 163 See Besiki L. Kutateladze & Victoria Z. Lawson, *Is a Plea Really a Bargain? An Analysis of Plea and Trial Dispositions in New York City*, 64 *Crime & Delinquency* 856, 874 (2018) (“Defendants convicted at trial were more likely to receive custodial sentences (40.7%) than those who pled guilty (25.3%), $\chi^2(1) = 29.03$, $p < .001$, $\Phi = .02$ (note: the analysis was not able to compare sentence lengths due to the high number of missing values and inconsistencies in the data received). By noncustodial measures, those convicted at trial also received harsher penalties: longer probation sentences ($M = 0.01$ years for guilty pleas vs. $M = 0.16$ years for trials), $t(232) = 3.33$, $p = .001$, $d = 0.21$, and higher fines ($M = \$37.91$ for guilty pleas vs. $M = \$92.67$ for trials), $t(234) = 3.85$, $p < .001$, $d = 0.18$.”).
- 164 While this was not investigated statistically, it is possible that these two factors are related. Misdemeanors are more likely to be adjudicated by bench trials while felonies are more likely to be adjudicated by jury trials. Since these two factors are so closely related to each other, it is possible that, while trial type and offense classification have statistically significant relationships to the trial penalty when examined individually, these relationships would not exist or would be weaker if the relationship between the trial penalty, trial type, and offense classification were examined together. Further research is necessary to assess whether type and offense classification have significant relationships to the imposition of a trial penalty on their own.
- 165 See JaneAnne Murray et al., *Second Look = Second Chance: The NACDL Model “Second Look” Legislation*, Nat’l Ass’n of Crim. Def. Laws (2020), <https://www.nacdl.org/getattachment/c0269ccf-831b-4266-bbaf-76679aa83589/second-look-second-chance-the-nacdl-model-second-look-legislation.pdf>; Colleen Grablick, *D.C. Council Gives Final Approval To Second Look Act*, DCist (Dec. 1, 2020, updated Dec. 15, 2020), <https://dcist.com/story/20/12/01/dc-council-approves-criminal-justice-reform-bill/>.

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