



October 25, 2022

The Honorable Kathy Hochul
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Dear Governor Hochul,

I write on behalf of the National Association of Criminal Defense Lawyers (NACDL) to express support for current legislative efforts in New York that seek to abolish all mandatory minimums, allow judges to reconsider excessive sentences after a specified amount of time, and strengthen “good time” and “merit time” laws, measures that will mitigate the drivers and consequences of the trial penalty. NACDL has long been committed to advocating for policies which protect the constitutional right to trial and opposing those that contribute to coercion and racial inequities in the administration of justice. This includes sentencing policies that hinder judges’ ability to give individualized sentences, reconsider the appropriateness of decades-old decisions, and account for an individual’s personal growth over time. We therefore urge you, as members of the New York State Legislature, to enact sentencing reforms that address the underlying causes, and devastating impacts, of the trial penalty in New York.

NACDL is the preeminent organization in the United States advancing the mission of the nation’s criminal defense lawyers, ensuring justice and due process for persons accused of crimes or wrongdoing, and promoting the proper and fair administration of justice. A professional bar association founded in 1958, NACDL’s many thousands of direct members – and our 90 state, provincial, and local affiliate organizations’ tens of thousands of members – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has spearheaded groundbreaking research and analysis of the trial penalty – the substantial difference between the sentence offered prior to trial versus the sentence an individual receives after a trial. In 2018, NACDL published *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, which identifies the underlying causes of the decline of federal criminal trials and sets forth recommendations to address this crisis. In 2019, the *Federal Sentencing Reporter* released a double issue focused on the trial penalty, edited by NACDL staff and leaders, entitled, “The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End.” The following year, NACDL and FAMM released “The Vanishing Trial,” an award-winning documentary focused on four individuals facing the trial penalty. In March 2021, NACDL and the New York State Association of Criminal Defense Lawyers (NYSACDL) released *The New York State Trial Penalty: The Constitutional Right to*

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Trial Under Attack, the first-ever report on the decades-long impact of the trial penalty in New York State.

As NACDL's reports on the trial penalty make clear, the severity and prevalence of the trial penalty has contributed to virtual elimination of the constitutional right to a trial in the United States. In New York State, 96 percent of felony convictions and 99 percent of misdemeanor convictions were the result of guilty pleas. Data analysis from New York City showed that in 66 percent of cases, individuals received a more severe sentence at trial than the one offered as part of their plea offer. This percentage rose when longer prison sentences were at stake and, for 89 percent of individuals who received a plea offer of over four years, going to trial resulted in a penalty.¹

Mandatory minimums are a significant driver of the trial penalty and the decline in criminal trials. By requiring a judge to hand down a minimum prison sentence based solely on the prosecutor's charging decision, these laws transfer sentencing power from judges to prosecutors and give prosecutors unfair and overwhelming leverage in plea negotiations. This coercive effect results in individuals pleading guilty, regardless of actual innocence, in order to avoid a more severe sentence at trial.²

The proliferation of convictions secured through plea agreements, a consequence of the trial penalty, fuels mass incarceration, disproportionately impacting communities of color. One study of misdemeanor cases in New York City found that the odds of receiving a plea offer that included incarceration were nearly 70 percent greater for Black people than white people.³ Another study in New York 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.⁴

Racial disparities at the plea-bargaining phase contribute to the overrepresentation of people of color throughout the criminal legal system. The problem is especially acute in New York, which

¹ *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack*. National Association of Criminal Defense Lawyers. 2020.

<https://www.nacdl.org/Document/NewYorkStateTrialPenaltyRighttoTrialUnderAttack>

² The threat of severe sentences coercing innocent defendants into guilty pleas is not hypothetical. Data kept by the National Registry of Exonerations shows that 18% of exonerees—people who have been found innocent and completely cleared of the crimes they were once convicted of—pleaded guilty. *See* The National Registry of Exonerations, Browse Cases,

<https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View=%7BF6AF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=Group&FilterValue1=P>.

³ Subramanian, Ram, et. al. *In the Shadows: A Review of the Research on Plea Bargaining*. Safety + Justice Challenge. 2020. <https://safetyandjusticechallenge.org/wp-content/uploads/2021/06/In-the-Shadows-A-Review-of-the-Research-on-Plea-Bargaining.pdf>

⁴ *The Trial Penalty*, supra note 2



has the third highest Hispanic/white disparity in the country, and the tenth highest Black/white disparity.⁵ Nearly three quarters of the individuals in New York state prisons are Black or brown.⁶

One of the key underlying causes of mass incarceration in the United States is the dramatic increase in the length of prison terms over the past several decades, despite the fact that researchers continue to find that lengthy sentences have no impact on recidivism rates.⁷ Between 1994 and 2014, the number of people in prison who had served more than 15 years rose 526 percent.⁸ As of 2016, over 206,000 individuals—or one out of every seven people in prison—are serving life or de facto life sentences. For Black people in prison, the proportion is even starker; one out of five Black incarcerated individuals is serving a life or de facto life sentence.⁹ Addressing extreme sentences is particularly urgent in New York State, which has the third-largest population of people serving terms of life imprisonment in the country. Furthermore, research has demonstrated that as individuals age, their tendency to reoffend after being released from incarceration decreases significantly. While nearly half of individuals released before age 24 are reconvicted, by ages 35-39 that rate has dropped to 31.3 percent, and by ages 50-54, it has dropped to only 15.9 percent.¹⁰

Overincarceration brings serious repercussions for the economy, with significant financial costs to taxpayers and state governments alike. With an approximate cost of nearly \$70,000 per person in state prison, New York spends at least \$3 billion taxpayer dollars annually on prisons.¹¹ These costs only grow as incarcerated individuals age, increasing their need for specialized medical attention and support services.¹² Between 2007 and 2016, the number of individuals incarcerated in New York State prisons aged 50 or older increased by 46 percent, to more than 10,000

⁵ *State-by-State Data*. The Sentencing Project. <https://www.sentencingproject.org/the-facts/#rankings>

⁶ *Under Custody Report: Profile of Under Custody Population as of January 1, 2019*. New York State Corrections and Community Supervision. 2019. <https://doccs.ny.gov/system/files/documents/2021/05/under-custody-report-2019.pdf>

⁷ The Pew Center on the States, “Time Served: The High Cost, Low Return of Longer Prison Terms,” (June 2012), <https://www.pewtrusts.org/en/research-and-analysis/reports/2012/06/06/time-served-the-high-cost-low-return-of-longer-prison-terms>.

⁸ *Second Look Act Fact Sheet*. Communities Not Cages. 2021. https://assets.website-files.com/6150e908914d66ce067076e1/6204327b3411fa476bacff42_Communities%20Not%20Cages_Second%20Look%20Act%201-Page.pdf

⁹ Nellis, Ashley. *Still Life: America’s Increasing Use of Life and Long-Term Sentences*. The Sentencing Project. 2017. <https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/>

¹⁰ United States Sentencing Commission, “The Effects of Aging on Recidivism Among Federal Offenders,” (December 2017), <https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders>.

¹¹ *The Price of Prisons*. Vera Institute of Justice. 2017. <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/>

¹² *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*. Department of Justice Office of the Inspector General. Revised February 2016. <https://oig.justice.gov/reports/2015/e1505.pdf>



individuals.¹³ In the final three years of that period, health care costs for individuals incarcerated in New York State prison increased by over \$64 million.¹⁴

The choice to allocate billions of dollars towards incarceration puts New York at odds with the majority of crime survivors, who prefer investments in education, mental health treatment, job creation, and prevention and rehabilitation programs over investments in prisons and jails.¹⁵ The prioritization of incarceration over other non-carceral interventions is not aligned with research on what makes communities safe.¹⁶ For example, a study in Texas found that each additional year that a person is incarcerated makes them 4 to 7 percent more likely to recidivate within three months after release.¹⁷

In addition to the fiscal costs of incarceration are the devastating human costs for families, particularly for the more than 105,000 children with an incarcerated parent in New York State.¹⁸ Children suffer emotionally and developmentally from the incarceration of a parent, many struggling with expulsions from school, behavioral problems, poor health, and increased risk for future convictions.¹⁹

NACDL's trial penalty reports outline several policies and legislative recommendations to address the drivers and consequences of the trial penalty, including eliminating mandatory minimum sentencing statutes and implementing judicial "second looks."²⁰ These policy interventions uphold the constitutional right to trial, stem the tide of mass incarceration, and safely return individuals to their families.

Over the past two decades, states across the country have increasingly recognized the damaging impacts of mandatory minimums on the administration of justice. Since 2001, more than 35 states have enacted reforms to their mandatory minimum sentencing laws in order to reduce

¹³ *New York State's Aging Prison Population*. Office of the New York State Comptroller. 2017.

<https://www.osc.state.ny.us/files/reports/special-topics/pdf/health-aging-prison-2017.pdf>

¹⁴ *New York*, supra note 11

¹⁵ *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*. Alliance for Safety and Justice. 2016. <https://allianceforsafetyandjustice.org/crimesurvivorsspeak/>

¹⁶ Cullen, Francis et. al. *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*. *The Prison Journal* 91 (3) 48S. 2011. <http://dx.doi.org/10.1177/0032885511415224>

¹⁷ *Earned Time Act Fact Sheet*. Communities Not Cages. 2021. https://assets.website-files.com/6150e908914d66ce067076e1/6204326e53ff67e346cfa3ba_Communities%20Not%20Cages_Earned%20Time%20Act%201-Page.pdf

¹⁸ *Children of Incarcerated Parents*. New York State Office of Children and Family Services.

<https://ocfs.ny.gov/programs/fostercare/incarcerated-parents.php>

¹⁹ *Hidden Consequences: The Impact of Incarceration on Dependent Children*. National Institute of Justice. 2017.

<https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children>; Scommegna, Paola. *Parents' Imprisonment Linked to Children's Health, Behavioral Problems*. Population Reference Bureau.

2014. <https://www.prb.org/incarcerated-parents-and-childrens-health/>.

²⁰ *New York*, supra note 11



overincarceration and restore judicial discretion.²¹ Since mandatory minimum statutes provide prosecutors with the leverage to extract guilty pleas under the threat of dramatically harsher sentences for those who exercise their right to trial, eliminating mandatory minimums is an essential front-end intervention to alleviating the impact of the trial penalty.

A different kind of intervention is needed to alleviate the consequences of the trial penalty for individuals currently serving long sentences of incarceration. In December 2020, NACDL released model “Second Look” sentencing legislation and an accompanying report, *Second Look = Second Chance: Turning the Tide Through NACDL’s Model “Second Look” Legislation*.²² Second look legislation provides a vehicle that legislatures can use to safely reduce the number of individuals serving excessive, counter-productive sentences by permitting individuals to petition for resentencing after serving a specified period of time in prison. This type of legislation creates opportunities for judges to reevaluate the proportionality of an individual’s sentence compared to other similarly situated individuals and to assess whether the sentence is still appropriate given changed laws and norms. It also allows individuals to demonstrate that they have changed and can safely return to their communities and provide for their families. In recent years, momentum around second look legislation has grown considerably, with lawmakers in at least 25 states and at the federal level introducing second look legislation as of 2021.²³

Another key mechanism for alleviating extreme sentences is to strengthen “good time” and “merit time” legislation. New York is substantially behind other states in allowing incarcerated people to earn time off their sentences through good behavior, completion of programming, or otherwise demonstrating rehabilitation. For example, Alabama, Nebraska, and Oklahoma all permit incarcerated people to earn over 50 percent earned time.²⁴ Increased opportunities for individuals to gain earned time credits incentivizes participation in programming, which research has demonstrated can benefit communities by increasing post-release employment, reducing recidivism, and ultimately cutting correctional costs.²⁵ Strengthening and expanding New York’s “good time” and “merit time” laws, including by allowing all individuals to earn credits regardless of conviction, will encourage personal transformation and enhance public safety.

²¹ *State Reforms to Mandatory Minimum Sentencing Laws*. FAMM. Updated October 30, 2020.

<https://famm.org/wp-content/uploads/Chart-STATE-REFORMS-TO-MANDATORY-MINIMUM-SENTENCING-LAWS-2018.pdf>

²² *Second Look = Second Chance: The NACDL Model “Second Look” Legislation*. National Association of Criminal Defense Lawyers. 2020.

<https://www.nacdl.org/Document/SecondLookSecondChanceNACDLModelSecondLookLegis>

²³ Ghandnoosh, Nazgol. *A Second Look at Injustice*. The Sentencing Project. 2021.

<https://www.sentencingproject.org/publications/a-second-look-at-injustice/>

²⁴ *State Good Time and Earned Time Laws*. National Conference of State Legislatures. 2021.

<https://www.ncsl.org/research/civil-and-criminal-justice/state-good-time-and-earned-time-laws.aspx>

²⁵ Duwe, Grant. *The Use and Impact of Correctional Programming for Inmates on Pre- and Post-Release Outcomes*. U.S. Department of Justice. <https://www.ojp.gov/pdffiles1/nij/250476.pdf>



The enactment of legislation to eliminate mandatory minimums, implement second look opportunities, and strengthen earned time laws in New York is critical to advancing racial justice and fairness in the criminal legal system, meaningfully addressing the trial penalty, and working toward the end of mass incarceration. For these reasons, NACDL strongly urges the New York State Legislature to pass these reforms.

Sincerely,

Nellie L. King, President
National Association of Criminal Defense Lawyers