



November 17, 2023

Judge Carlton W. Reeves  
Chair, United States Sentencing Commission  
One Columbus Circle, N.E., Suite 2-500  
Washington, D.C. 20002-8002  
Re: Proposed Priorities for the 2023-2024 Amendment Cycle

Dear Judge Reeves:

The undersigned groups are pleased to see that the U.S. Sentencing Commission has made the comparing of sentences imposed in cases disposed of through trial versus plea one of its priorities for the amendment cycle ending May 1, 2024. As groups with significant experience examining the trial versus plea sentencing disparity, we respectfully request a meeting with Commissioners or staff or both who are working on this important issue.

Advocacy organizations generally refer to the often-massive differential between post-trial and post-plea sentences as the “trial penalty,” an additional number of years in prison that defendants face, if convicted, for exercising their constitutional right to go to trial. The National Association of Criminal Defense Lawyers (NACDL) published a research report in 2018 that showed, using Sentencing Commission data, that for most primary offense categories, the average trial sentence in the federal system is three times higher than a plea sentence for the same crime.<sup>1</sup> For some crimes, the prison sentence for a person convicted at trial is as much as eight times greater than for those convicted after a plea.

Because this differential is so significant, it has major impacts on the criminal legal system. To begin, the trial penalty has virtually eliminated trials from the federal system. In 2022, over 97% of convictions in the federal system were the result of pleas with less than 3% occurring after trials.<sup>2</sup> In 2021, less than 2% of convictions were the result of trial and there were fewer than one

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<sup>1</sup> NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018), <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>.

<sup>2</sup> U.S. Sentencing Comm’n, *2022 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 56 table 11, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf> (showing that 97.5% of federal criminal convictions in fiscal year 2022 were the result of guilty pleas).

thousand criminal trials in the entire federal system.<sup>3</sup>

The trial penalty has a major coercive effect, with defendants understandably influenced to accept pleas because of the real threat of a geometrically higher sentence if convicted at trial, even if a defendant has a strong defense. The trial penalty also allows for other coercive tactics including piling on charges, charge bargaining, threats of superseding indictments and sentencing enhancements, and threats to withdraw plea offers if the defendant seeks to assert other constitutional rights under the Fourth or Fifth Amendments.<sup>4</sup> Perhaps most concerning, the trial penalty in our system is often so severe that it coerces even innocent people into pleading guilty.<sup>5</sup>

Advocacy groups, individuals, and academics from across the political spectrum have recognized the pervasiveness and harm of the trial penalty and several recent research and advocacy efforts have formed. First, advocacy groups have formed broad cross-ideological and cross-experiential coalitions to fight against it. Coalition members include prosecutors, defense lawyers, academics, and advocacy groups from across the right-to-left political spectrum. Second, the Plea Bargain Task Force, a task force of the Criminal Justice Section of the American Bar Association, recently published a report with principles urging major changes to plea bargaining including a reduction in the use of trial penalties to coerce pleas.<sup>6</sup> Those principles were later adopted by the ABA's House of Delegates in August of 2023 and are now ABA policy. And third, the Plea Bargaining Institute has launched to foster the sharing of knowledge and research on plea bargaining as well as academic collaboration on reforming plea bargaining practices.

We believe it is urgent that the Commission study the sentencing disparity between defendants convicted after choosing to exercise their right to trial versus those who plea. Comprehensive consideration of this issue would help the Commission to achieve its statutory objective of “avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct.”<sup>7</sup>

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<sup>3</sup> U.S. Sentencing Comm'n, *2021 Annual Report and Sourcebook of Federal Sentencing Statistics*, at 56 table 11, [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021\\_Annual\\_Report\\_and\\_Sourcebook.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2021/2021_Annual_Report_and_Sourcebook.pdf) (showing that 98.3% of federal criminal convictions in fiscal year 2021 were the result of guilty pleas).

<sup>4</sup> Even Department of Justice official policy frowns on the use of these tactics which are largely made possible by the trial penalty. See DOJ, *Justice Manual*, 9-27.260, <https://www.justice.gov/jm/justice-manual> (“Charges or statutory sentencing enhancements may not be filed, nor the option of filing charges or enhancements raised, simply to exert leverage to induce a plea or because the defendant elected to exercise the right to trial.”).

<sup>5</sup> Data from the National Registry of Exonerations shows that 18% of exonerees—people who have been found innocent and completely cleared of the crime 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>. For individual stories of innocent defendants who were coerced to plead guilty, see <https://guiltypleaproblem.org>.

<sup>6</sup> ABA, *2023 Plea Bargain Task Force Report*, <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf>.

<sup>7</sup> See 28 U.S.C. § 991(b)(1)(B).

There are major policy contributors to the trial penalty, such as mandatory minimum sentencing and prosecutorial control of the charging function, which the Sentencing Commission can address with research and analysis. There are also many smaller, but still important, Guidelines amendments the Commission could undertake to reduce the trial penalty and its coercive effects. First, the Acceptance of Responsibility Guideline, Section 3E1.1(b), should be amended to authorize courts to award a third point for acceptance of responsibility if the interests of justice dictate without a motion from the government and even after trial. Second, the Obstruction of Justice Guideline, Section 3C1.1, should be amended to clarify that this adjustment should not be assessed solely for the act of an accused testifying in her or his defense. Third, Section 1B1.3 should be amended to prohibit the use of acquitted conduct as relevant conduct. (Separately, but relatedly, we laud the Commission's decision to once again consider amendments that would overhaul acquitted conduct sentencing this amendments cycle.) Outside of guidelines amendments, we urge the Commission to use its unparalleled research and data capabilities to provide other institutional actors, such as Congress and the Supreme Court, with the information they need to evaluate this problem.

Because we understand that the Commission is or will soon be studying this issue, we are interested in meeting with the staff involved so that we can share our input on potential areas for research and analysis. We are also interested in meeting with the Commissioners about these same issues and, more broadly, about the amendments that could be considered if the Commission's study of the difference in sentences after trials versus pleas reveals a disparity that the Commission is interested in addressing in the future.

Again, we are grateful to see the Commission's interest in examining the trials versus pleas sentencing differential for this amendments cycle. We look forward to the opportunity to discuss this important issue with you. Please contact Nathan Pysno at NACDL (202-465-7627 or [npysno@nacdl.org](mailto:npysno@nacdl.org)) to discuss further arrangements.

Respectfully,

National Association of Criminal Defense Lawyers (NACDL)

American Civil Liberties Union

Americans for Prosperity

FAMM

Right on Crime

The Sentencing Project

Tzedek Association