

June 30, 2022

The Hon. Joseph R. Biden, Jr.
President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Re: Clemency for Trial Penalty

Dear President Biden:

We write to propose a category of individuals who are deserving of clemency. Specifically, we respectfully request that you consider clemency for (1) individuals who suffered severe sentences as a consequence of having exercised their Sixth Amendment right to trial rather than having pleaded guilty and (2) individuals who accepted severe plea bargains under threat of substantially greater post-trial sentences.¹ These scenarios—routine in our criminal justice system—illustrate a profound constitutional and human injustice: the “trial penalty,” which has fueled mass incarceration,² aggravated racial injustice,³ and virtually eliminated criminal trials from our legal landscape⁴ by imposing much more severe sentences after trial relative to sentences imposed pursuant to guilty pleas.

The trial penalty corrupts the federal criminal legal system. It is important to point out that this is due in large part to mandatory minimum sentencing and the power it grants to prosecutors.⁵ By way of example, those impacted include individuals who received a post-trial sentence three times or more greater than the pre-trial offer,⁶ and those who pleaded guilty under threat of an indictment charging one or more mandatory minimum offenses carrying penalties substantially higher than the plea offer. Quite apart from mandatory

¹ Our request regarding trial penalty clemency is not intended to undermine other categories deserving of clemency.

² The increased reliance on plea bargaining coincides with the explosion of our prison population at both the state and federal levels. See Albert W. Alschuler, *Plea Bargaining and Mass Incarceration*, 76 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW 205 (2021).

³ As discussed below, the trial penalty punishes people of color and the poor hardest due to profound asymmetries of power in the plea-bargaining process. These asymmetries exist for all accused but are exacerbated by inequalities resulting from poverty, systemic racism, and implicit bias.

⁴ The USSC reports that in 2021, 98.3% of cases were resolved through guilty pleas consistent with the pattern over the past 20 years. USSC, *Fiscal Year 2021 Overview of Federal Criminal Cases* (2022) at 8, available at <https://www.uscc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2021>.

⁵ As former District Judge John Gleeson explained in the preface to NACDL’s 2018 Trial Penalty Report, the trial penalty has virtually erased trials from the legal landscape in favor of an assembly line of pleas. National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (2018) (NACDL Report), available at <https://www.nacdl.org/trialpenaltyreport> at 3.

⁶ Data published by the USSC establishes that in 2021 the average sentence for federal drug crimes was five years for cases resolved by plea agreement and 16 years for cases resolved after trial. See also attached PowerPoint slides extracted from the NACDL Report reflecting the disparity between sentences imposed pursuant to guilty pleas compared to those imposed after trial. [Attachment A](#).

minimum statutes, the trial penalty is also manifest in the ways in which prosecutors wield and threaten their power in sentencing guideline determinations. We provide, as attachments, four examples of cases illustrating the trial penalty.⁷

As NACDL has documented, and as reflected in the statistics maintained by the United States Sentencing Commission, our criminal legal system routinely punishes individuals for exercising their constitutional right to trial by imposing much harsher sentences after trial relative to sentences imposed pursuant to guilty pleas—a factor that drives our “system of pleas.”⁸ Sentencing Commission statistics demonstrate that there is a consistent and substantial differential between pre-trial offers and post-trial sentences that not only penalizes the constitutional right to a trial but also coerces guilty pleas to severe sentences. As most federal practitioners can confirm, the trial penalty impacts people of color and the poor hardest, as discussed below. Most perniciously, it can strong-arm guilty pleas from the innocent.⁹

Despite the enduring impact of the trial penalty on our criminal legal system, we are hopeful that you appreciate this constitutional and human tragedy and have the will to offer hope to those facing severe custodial terms because of the trial penalty. This trust is in no small measure because a broad array of stakeholders—from the entire political spectrum—has focused on the need to reverse the trial penalty.¹⁰ We are also inspired because you, a former public defender, publicly recognized this issue during an election-year Town Hall.¹¹

For these reasons, we are not only hopeful, but confident that this Administration has the courage, compassion, and commitment to utilize the power of clemency to remedy the worst of these constitutional and human tragedies.

The Trial Penalty Has Undermined the Framers’ Intent and the Equal Protection Clause of the Fourteenth Amendment.

We respectfully submit that this Administration should pursue “trial penalty clemency” for several reasons of constitutional import.

First, the trial penalty punishes the vulnerable more harshly than others. Studies show, for example, that people of color and the poor suffer disproportionate post-trial sentences more often and more severely than others. This disproportionate impact results from numerous

⁷ See [Attachment B](#) (examples of impacted individuals).

⁸ *Lafler v. Cooper*, 566 U.S. 156, 168 (2012).

⁹ See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013) (discussing the psychology of coerced pleas by the innocent as a result of the trial penalty and providing numerous examples of people who falsely pleaded guilty), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071397.

¹⁰ NACDL has established a coalition to end the trial penalty which includes NACDL, Fair Trials International, the ACLU, the Cato Institute, FAMM, Stand Together, Right on Crime, the Innocence Project, Fair and Just Prosecution, Tzedek Association, The Sentencing Project, the International Legal Foundation, and Federal Public & Community Defenders.

¹¹ See Soo Kim, *Joe Biden’s CNN Town Hall Transcript in Full*, Newsweek.com (February 17, 2021), <https://www.newsweek.com/joe-biden-cnn-town-hall-transcript-full-trump-vaccines-1569872> (criticizing the practice of charge-bargaining “to send people to jail”).

systemic factors including systemic racism and implicit bias. The greater impact on the vulnerable also results from the fact that our criminal code includes many offenses with mandatory minimum sentences for “street crimes,” compared with only one mandatory minimum for white collar offenses (18 U.S.C. § 1028(a)).¹² The higher rate of pre-trial detention for the most vulnerable contributes to this problem because the isolation of detention often breaks the will of the accused.

Second, the evidence indicates that the trial penalty plays a substantial role in sentences imposed after a guilty plea. While we do not have the data on how many federal prisoners pled under threat of a greater post-trial penalty, the statistics at the Bureau of Prisons as of the date of this letter indicate that 45% percent of the federal prison population is incarcerated on drug charges, and, not coincidentally, over 50% of the federal prison population is serving sentences of 10 years or more, and almost 30 percent are serving sentences of 15 years or more.¹³

Third, the trial penalty creates a coercive impact during the plea “bargaining” process, resulting in enormous pressure to accept a plea offer rather than risk a much more severe sentence after trial. Due to this coercive impact, the trial penalty has virtually erased criminal trials from our legal landscape despite the intent of the Framers. In effect, the trial penalty has transformed the Framers’ vision of a system of public trials into an assembly line of pleas in which 98.3% of cases result in guilty pleas.¹⁴

Fourth, the trial penalty has also effectively undermined an array of rights established by the Bill of Rights. Guilty pleas entered into to avoid harsh post-trial sentences routinely require waiver of rights, often including the right to request bail or to suppress evidence secured by police misconduct.¹⁵ In this way, the trial penalty results in routine waivers of virtually every right in the Bill of Rights, effectively eviscerating those rights.

The Trial Penalty Explains Many of the Most Severe Sentences in the Federal System.

Based on studying thousands of trial penalty clemency cases, we have concluded based on this work that the trial penalty operates in most of the cases involving severe sentences either because (1) the individual received a post-trial sentence much higher than the pre-trial offer (in many cases, multiples of the original plea offer); or (2) the individual pled guilty and their final sentence was nonetheless calculated (or “framed”) with reference to the potential post-trial sentence.

“Trial Penalty Clemency” Can Begin to Redress the Injury to Individuals, Families, and Communities.

¹² In this regard, prosecutors often threaten to add charges carrying mandatory minimums during the plea-bargaining process and, where the accused does not accept a plea offer, prosecutors add these charges resulting in much greater post-trial sentences.

¹³ See https://www.bop.gov/about/statistics/statistics_inmate_age.jsp.

¹⁴ See USSC, *supra* n. 3.

¹⁵ By compelling waivers of pre-trial motions, the trial penalty often insulates police misconduct from the scrutiny of courts and juries.

Severe “trial penalty” sentences are perhaps the most demonstrably disproportionate sentences in the federal system. For exercising their constitutional rights, these individuals serve sentences years or decades longer than their similarly situated co-defendants who pled guilty. Put simply, these individuals suffer terms of incarceration that vastly exceed the terms deemed proportionate by the government, as reflected in the plea offer, and by courts in sentencing similarly situated co-defendants who pled guilty.

Moreover, as outlined above, the trial penalty drives mass incarceration, undermines racial justice, and substantially erodes the right to trial and other rights in the Bill of Rights. The trial penalty also exacerbates the enormous costs to the Government resulting from unnecessarily severe prison terms as well as the human costs of incarceration for individuals, their families, and their communities. Restoring impacted individuals to freedom through clemency will begin to redress the profound harm caused by the trial penalty by offering a meaningful chance for impacted individuals to lead law-abiding, productive lives, and to be reunited with their families after years or even decades of imprisonment.

For these reasons, we urge you to use the President’s constitutional clemency powers to do justice for the many who have suffered from sentences driven by the trial penalty. Please feel free to contact Martín A. Sabelli, President of the National Association of Criminal Defense Lawyers, at msabelli@sabellilaw.com to discuss further.

Sincerely,

National Association of Criminal Defense Lawyers (NACDL)
ACLU
Prof. Lucian Dervan*
Fair & Just Prosecution
Fair Trials
FAMM
Federal Public & Community Defenders
Alice Marie Johnson, Taking Action for Good (TAG)
The Sentencing Project
Tzedek Association

* Professor of Law and Director of Criminal Justice Studies at Belmont University College of Law. Signing in his individual capacity. Institutional affiliation is provided for identification purposes only.

U.S. State and Federal Prison Population, 1925-2019

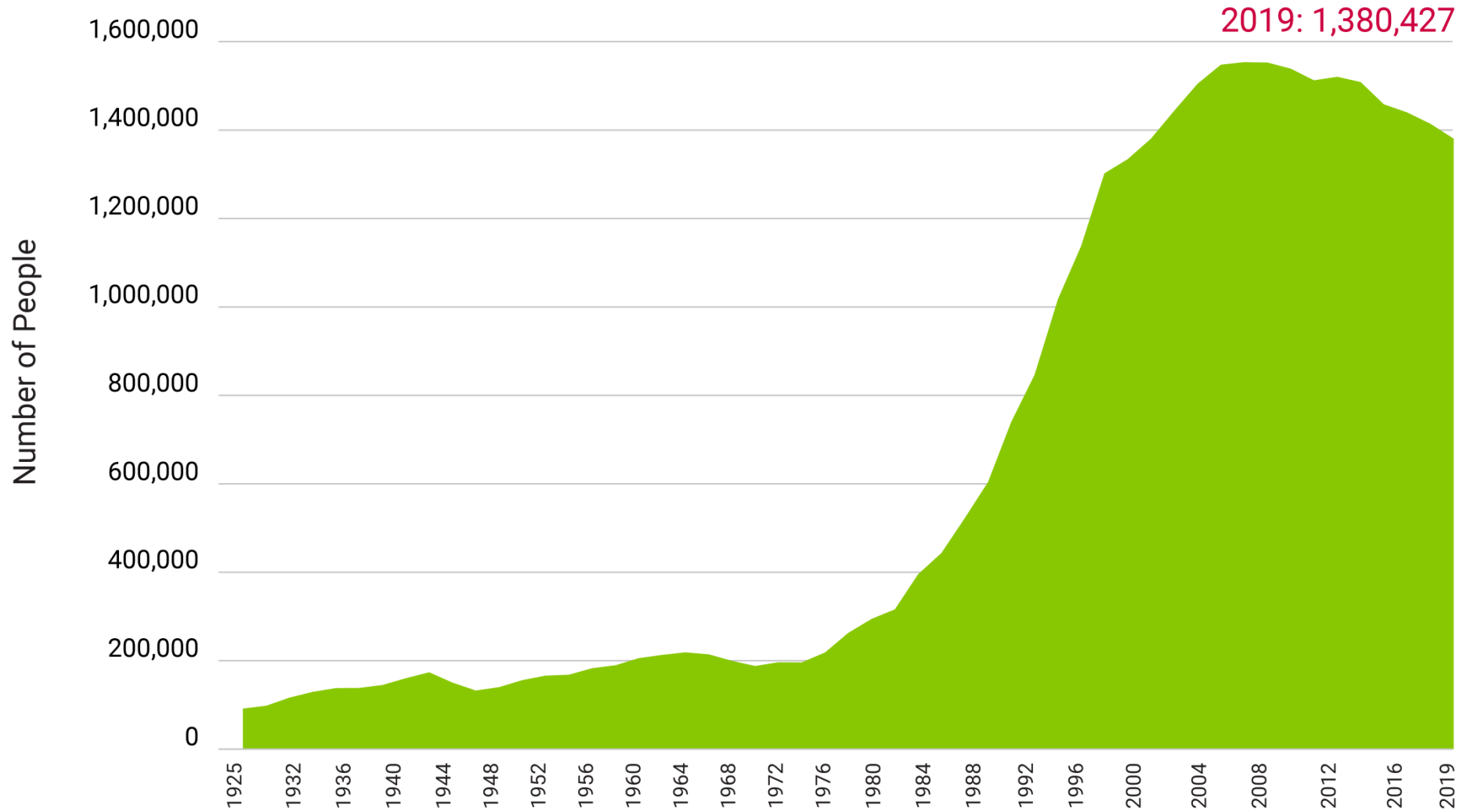


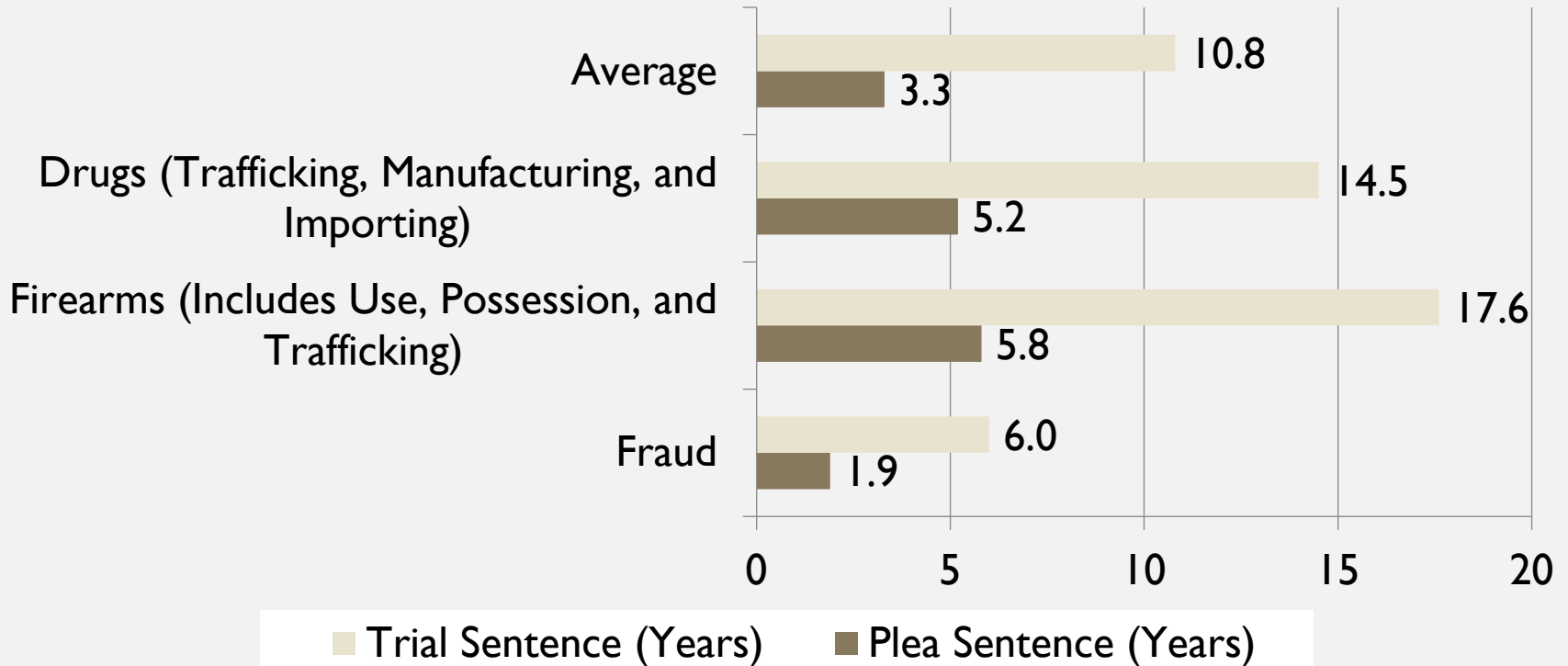
FIGURE 1: AVERAGE SENTENCE FOR FEDERAL DRUG DEFENDANTS BY PLEA/TRIAL (FY 2012)



Source: Human Rights Watch analysis of United States Sentencing Commission FY 2012 Individual Datafiles. http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm

EVIDENCE OF A TRIAL PENALTY

Average Sentence by Federal Offense



National Association of Criminal Defense Lawyers, "The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save it," 2018, Figure 1.

WAY QUOE LONG, 96-CR-5135 (ED CA.)
MANDATORY MINIMUMS

- Charged in 1998 (age 34) for role in marijuana importation conspiracy
- Non-violent; mid-level role
- Similarly-situated co-defendants received **120 months or less**
- Long went to trial and received an additional 30 years consecutive for gun possession
- **Served 24 years of 50-year** sentence prior to commutation



KENNETH FRAGOSO, 90-CR-328 (SD TX)
ADDING RECIDIVIST ENHANCEMENT

- US Navy Veteran, aged 66, convicted in 1991 of selling cocaine to an undercover
- No history of violence
- Elected to go to trial
- § 85I information filed w/ two prior nonviolent drug offenses
- Convicted and sentenced to mandatory life sentence
- Served over 30 years prior to commutation



DERRIN PERKINS, 91-CR-559 (DDC)
THROWING THE GUIDELINES BOOK

- Charged in 1991 (age 26) at state and federal level for role in DC-street crack conspiracy
- Non-violent; unarmed mid-level role
- Pre-trial offer: **Five Years**
- Convicted at trial
- Sentenced to **Life in prison** (1991) based on accumulation of guideline enhancements
- Served 26 years; released through motion practice



RAEANNA PAXTON, 06-CR-247 (SD IA)
COERCING PLEA

- Native American mother of 5 charged in federal drug conspiracy
- Non-violent; low-level, unarmed courier
- Offered pre-trial plea of 21-27 years (no departures) or go to trial and **face mandatory life**
- Δ had no choice but accept plea and judge had no choice but impose **21 years**
- Served 11 years prior to commutation

