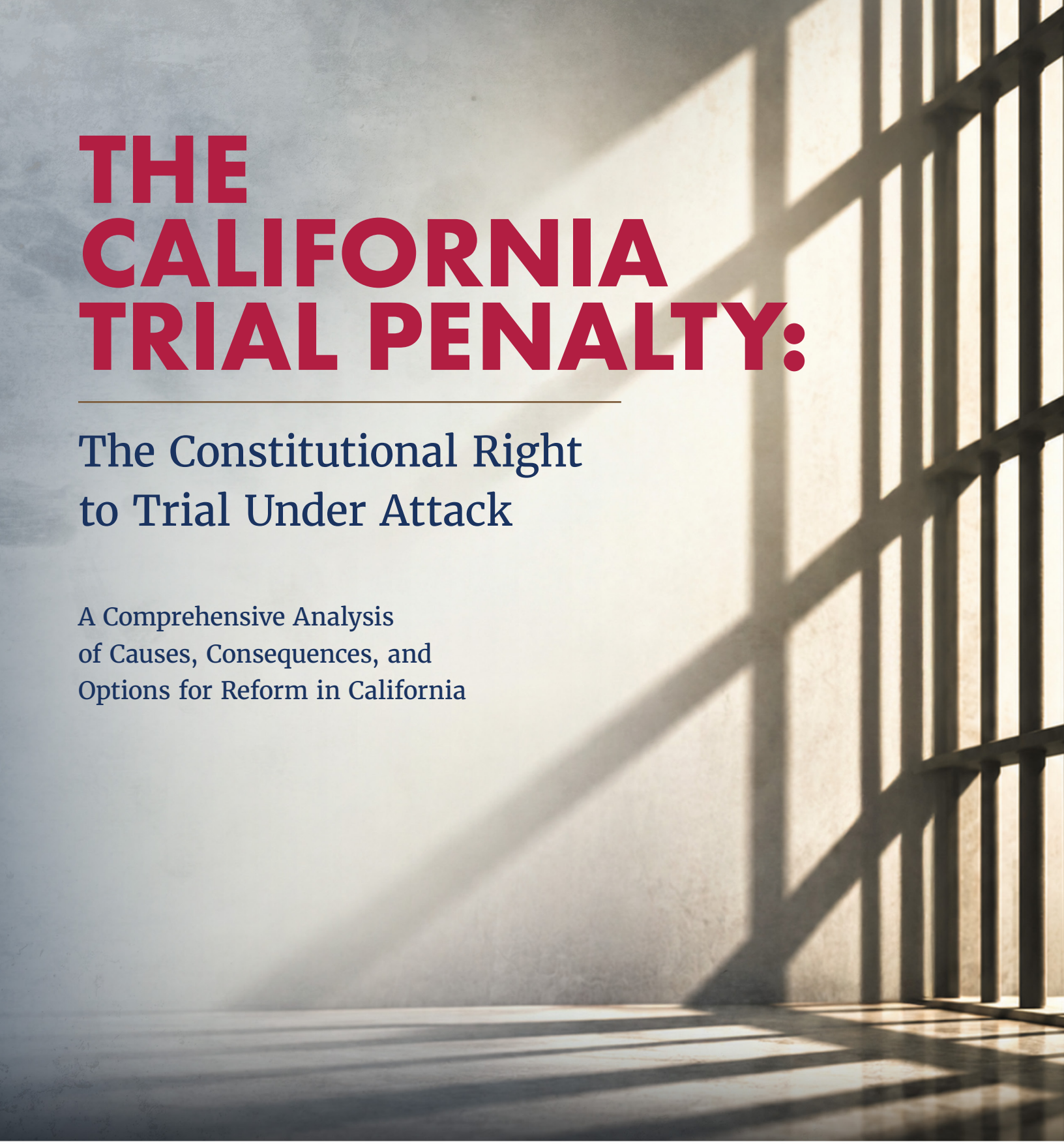


THE CALIFORNIA TRIAL PENALTY:

The Constitutional Right to Trial Under Attack

A Comprehensive Analysis of Causes, Consequences, and Options for Reform in California

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS | NACDL FOUNDATION FOR CRIMINAL JUSTICE

CACJ California Attorneys for Criminal Justice Foundation

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THE CALIFORNIA TRIAL PENALTY:

The Constitutional Right to Trial Under Attack

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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, 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's over 10,000 direct 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.

Curtailment of the trial penalty and elimination of coercion in plea bargaining are core advocacy objectives of NACDL.

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* (July 10, 2018). In 2021, NACDL and the New York State Association of Criminal Defense Lawyers published a report analyzing the trial penalty in the state of New York — *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack* (Mar. 26, 2021). In early 2026, NACDL, the Connecticut Office of Chief Public Defender, and the Connecticut Criminal Defense Lawyers Association published *The Trial Penalty in Connecticut: Are People Being Punished for Exercising Their Constitutional Rights?*, a report on the trial penalty in Connecticut state cases. 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 nonprofit 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.

ABOUT THE CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

California Attorneys for Criminal Justice (CACJ) is an NACDL affiliate made up of criminal defense lawyers, both public and private, along with allied professionals throughout the most populous state in the nation. CACJ defends the rights of persons accused of crimes, as well as the interests of those convicted. CACJ's work centers on empowering defense attorneys with the support they need to champion justice, whether through extensive training programs, active legislative advocacy, or the sharing of resources and insights among its members to ensure that every individual receives the rigorous and fair defense to which they are entitled under the state and federal constitution.

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS | NACDL FOUNDATION FOR CRIMINAL JUSTICE

CACJ California Attorneys for Criminal Justice Foundation

FOREWORD

The Honorable LaDoris Hazzard Cordell

Judge of the Superior Court, Santa Clara County, California (Ret.)
Author of *Her Honor: My Life on the Bench. . . What Works, What's Broken, and How to Change It*

In 2012, Associate Justice Anthony Kennedy lauded the practice of plea bargaining, writing for the court, "to note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.[1]

Ah, Justice Kennedy, would that it were so and that the prevalence of pleas in the criminal justice system reflected a reality of fair-minded prosecutors and well-represented accused negotiating for mutual benefit. Unfortunately, my experience as a Superior Court trial judge, and this report, speak of a very different reality.

For nearly 20 years (1982–2001), I was a California trial court judge who presided over hundreds, if not thousands of plea bargains, but only a handful of jury trials. My situation was not unique. Throughout the Golden State, trial judges dispose of the vast majority of criminal cases with guilty pleas, while knowing full well that many, if not most of those individuals who do not accept plea bargains and insist on going to trial, will pay a price—a trial penalty.

The constitutional right to a jury trial in criminal prosecutions is guaranteed by the Sixth Amendment. Yet, I routinely saw prosecutors overcharge defendants only to promise to drop some charges in return for their guilty pleas. And I heard judges declare to defendants that should they go to trial and be convicted, they would face harsher sentences than had they pled guilty. Sadly, the trial penalty is alive and well in California.

As noted in the groundbreaking report, The California Trial Penalty: The Constitutional Right to Trial Under Attack, recent research shows the significant use of pleas to resolve criminal cases, with approximately 97% of federal criminal convictions resulting from pleas,[2] and, in certain jurisdictions, resolving all of their criminal cases through pleas,[3] and that phenomena is mirrored in California where, in the most recent data from 2023/2024, just 2.2% of felony dispositions resulted from jury trials. The extensive use of pleas to resolve criminal cases undermines the important role that jury trials play in our criminal justice system.

The California Attorneys for Criminal Justice Foundation (CACJ Foundation) and the National Association of Criminal Defense Lawyers (NACDL), authors of The California Trial Penalty: The Constitutional Right to Trial Under Attack, have given to policy makers, judges, prosecutors and defense attorneys an important, in-depth analysis of the trial penalty that has almost disappeared jury trials in California. As importantly, they have given us recommendations that will disappear the trial penalty entirely from our criminal legal system.

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1. *Missouri v. Frye*, 566 U.S. 134 (2012).
2. *See* 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.* at 14 (2018).
3. *See* Am. Bar Ass'n, Crim. Just. Section, *2023 Plea Bargain Task Force Report* (2023), at 6 (hereinafter "2023 Plea Bargain Task Force Report").

ACKNOWLEDGMENTS

This report is the result of a multi-year collaboration of the National Association of Criminal Defense Lawyers (NACDL) and California Attorneys for Criminal Justice (CACJ) as well as a dedicated team of pro bono lawyers and data analysts.

The project team was led by Jacqueline Goodman, former President of CACJ; Stephen Munkelt, CACJ's longtime Executive Director (now retired); Martín Sabelli, former President of NACDL; Nathan Pysno, Director of Procedural Justice & Senior Counsel at NACDL; and Donald P. Salzman and Robert W. Warnement, both of Skadden, Arps, Slate, Meagher & Flom LLP, the team's pro bono counsel. Other members of the Skadden team who made significant contributions to the report included Khalil N. Maalouf, Elisa M. Klein, Brian Bak, Christopher Mohr, Samantha Lasley, Samuel Clark-Clough, Drew O'Gwynn, Anika Deodhor, Ava Boghosian, Jacob Callahan, Harry Whitman, and Beverly Freidenrich.

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Special thanks are owed to Patricia Lee of the San Francisco Public Defender's Office for her hard work and valuable contributions, as well as to Martin Schwartz, former Orange County Public Defender (now retired), Yotam Shem-Tov, Graham Donath, and Arlene Speiser.

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We extend particular thanks to Toni Hoechlin and Sarah Goodman, whose careful work collating data and coordinating the public records requests at the heart of this report was indispensable, and to Ryan Jones, Natalia Romero and Daisy Loya for their valued assistance.

The Task Force is profoundly grateful for the expert support it received in the form of invaluable pro bono data analysis from a highly qualified team of experts at a premier consulting firm.

At NACDL, we thank Lisa M. Wayne, Kyle O'Dowd, Shuli Carroll, and Julian Giles for their contributions to this report.

We honor the memory of Jeff Adachi (1959–2019), Public Defender of the City and County of San Francisco. Two decades ago, he began collecting the data that would come to form part of the empirical foundation of this study—work he undertook on his own initiative, and which we discovered only later. We are proud to carry on his legacy of defending the accused and championing the constitutional right to trial.

EXECUTIVE SUMMARY

Jury trials have all but vanished in California and across the country. What we have instead isn't the system of trials the Framers imagined. Our criminal legal system has become an assembly line of plea deals. And there's a name for what's driving it: the "trial penalty"— the gap, often a wide and punishing one, between the sentence someone gets after pleading guilty and the sentence they would get for exercising their right to a trial. Since 2018, NACDL has been tracking this penalty in the federal system and in state systems across the country. This report is about the trial penalty in California state cases.

Let's be clear about what's at stake. The trial penalty doesn't just punish people for using their right to trial—it chips away at it. And because guilty pleas almost always require the accused to give up claims that their constitutional rights were violated, it quietly undermines the Fourth, Fifth, and Sixth Amendments too. It also takes something away from all of us: the public's ability to see how our courts and prosecutors are actually doing their jobs — something the Framers cared about deeply.

In 2021, NACDL and CACJ created a Task Force of pro bono lawyers and data analysts to examine the trial penalty in California, its causes, and potential solutions. Over five years, the Task Force gathered and analyzed a decade of data from more than 1.5 million records statewide. Based on this data, the Task Force identified ten policy recommendations to limit and reverse the trial penalty's damage to the individual and public rights the Constitution guarantees.

The Task Force studied the problem using both subjective and objective data. First, the Task Force conducted a statewide survey of criminal defense lawyers and prosecutors which found that nine in ten California defense lawyers believe defendants are penalized for exercising their right to trial. The survey also found that some prosecutors held that view, but far less uniformly than did defense counsel.

The quantitative data told the same story. Drawing on sentencing outcomes from more than 1.5 million criminal cases in 14 of California's 58 counties over ten years, the Task Force found that defendants are punished harshly for going to trial—in both felony and misdemeanor cases alike. In six counties with sufficient data for statistical comparison, felony defendants convicted at trial received sentences roughly three times longer than those who pled guilty, while in one rural county there was no disparity between the average sentences after guilty pleas and trials. In those counties, misdemeanor defendants convicted at trial fared even worse, with average sentences ranging between two-and-a-half times to a staggering 22 times longer than those for defendants who pled. Only one rural outlier county broke the pattern, with plea sentences running slightly longer than the sentences for defendants who went to trial.

This differential represents a substantial trial penalty and explains why criminal trials have virtually vanished from California's courts. In 1979-80, roughly 12.4% of felony cases in the Superior Courts in California went to trial. Less than 20 years later, by 1997-1998, the figure had fallen to just 4%. Since then, even that reduced number has been cut nearly in half. In 2023-24, just 2.2% of felony convictions in the California Superior Courts came from trial verdicts.

Unsurprisingly, the data documenting the disappearance of misdemeanor trials are starker still—an astounding 99.2% of misdemeanor convictions are the result of pleas. Fewer than 1% of misdemeanor cases go to trial.

Here's what we want people to understand: none of this had to happen this way. The trial penalty isn't some natural, unavoidable feature of our justice system. It's the product of choices, made by people, at every level of state and local government. And choices can be unmade. That's why the Task Force put together ten policy recommendations: to help restore the right to trial to the people of California.

INTRODUCTION

Since the 1980s, crime rates in California have dropped substantially[1] and our prison population has soared.[2] During the same 45-year period, jury trials have all but vanished from California, leaving in their place an assembly line of pleas rather than the system of trials envisioned by the Framers. Legal professionals and observers attribute the disappearance of trials to the "trial penalty"—the substantial and often extreme difference between the sentence received pursuant to a guilty plea and the sentence received after trial.

NACDL has studied the trial penalty across the country and, through this report, in California. NACDL has found that, across the country and in California, many factors contribute to the trial penalty, including mandatory sentencing, highly punitive sentencing, abuse of pre-trial detention, underfunding of public defense systems, and systemic racism.[3] This Report endeavors to identify the policy choices that drive the trial penalty in order to propose reforms that might restore the system of trials established in the Constitution to protect individual liberty and limit government power.

The Disappearance of Jury Trials in California Since 1980

While the reduction in trials has occurred in both misdemeanor and felony cases, the plunging felony trial rate over 45 years illustrates the evisceration of the right to trial. As reflected below, felony trial rates have plummeted approximately 83% since 1980, calling into question the integrity of an adversarial criminal legal system based on the constitutional premises that the criminally accused can challenge prosecutorial power and that the public can oversee this process as jurors serving in public trials.

As the following charts demonstrate, felony trial rates dropped from 12.4% in fiscal year 1979/80 to 4.0% in 1997/98 to 2.2% in fiscal year 2023/24, representing a reduction of more than 67% over the first two decades and 83% over all four decades:[4]

1979/1980 Disposed Felony Cases[5] 51,190	**1979/1980 Guilty Pleas in Disposed Felony Cases** 38,631 (75.5%)	**1979/1980 Trials in Disposed Felony Cases** 6,338 (12.4%)	**1979/1980 Other Dispositions of Felony Cases** 6,221 (12.1%)
1997/1998 Felony Dispositions[6] 146,570	**1997/1998 Felony Guilty Pleas** 132,742 (90.5%)	**1997/1998 Trials in Felony Cases** 5,880 (4.0%)	**1997/1998 Other Felony Dispositions** 8,926 (6.0%)
2023/2024 Disposed Felony Cases[7] 123,063	**2023/2024 Guilty Pleas in Disposed Felony Cases** 89,440 (72.6%)	**2023/2024 Trials in Disposed Felony Cases** 2,682 (2.2%)	**2023/2024 Other Dispositions of Felony Cases** 30,941 (25.1%)[8]

The Impact of the Disappearance of Jury Trials

The extensive use of guilty pleas comes at a significant cost to criminal defendants, who are required in nearly all circumstances to waive their fundamental constitutional rights as a condition of pleading guilty—these include not only their right to a trial but also their Fourth, Fifth and Sixth Amendment rights to seek pretrial release; to obtain discovery, receive exculpatory evidence and meaningfully investigate; to challenge unlawfully obtained evidence; and even to appeal. The waiver of these fundamental constitutional rights, and the absence of transparency inherent in a public trial, not only harms defendants but also removes the public's opportunity to check government overreach and abuse of individual rights—abuses that trials are designed to expose.

The driving force behind an individual's decision to accept a plea rather than pursue a trial is the trial penalty.[9] The trial penalty refers to the substantial difference between the sentences received by those convicted through guilty pleas and the greater sentences, on average, imposed on those convicted at trial. The potential for significantly longer and stricter sentences acts as a strong deterrent to an individual's exercise of their constitutional rights, and such disparate outcomes suggest that the sentence prosecutors recommend after trial is a punishment for exercising those rights, rather than an accurate reflection of a defendant's culpability. Simply put, criminal defendants are often coerced into pleading guilty rather than exercising their right to trial, given the outsized risk that conviction at trial poses.

This report of the California Attorneys for Criminal Justice Foundation (CACJ Foundation) and the National Association of Criminal Defense Lawyers (NACDL) explores the trial penalty in California. In June 2021, the California Trial Penalty Project Task Force (the Task Force), a joint effort between the CACJ Foundation and NACDL, began a process to evaluate the extent and impact of the trial penalty in the California criminal legal system. This report explores those concerns on the basis of surveys of the criminal defense community and of prosecutors; Public Records Act requests and records requests pursuant to court rules; practitioner interviews; and analysis of data on case processing, convictions and guilty plea practices.

The report begins with an overview of prior research and reporting on the scope and extent to which pleas are used in criminal proceedings in federal and state courts. It then examines the key drivers of the trial penalty in California, supported by survey responses and interviews from defense attorneys across the state and, to a significantly lesser extent, from prosecutors. In addition to the qualitative data, the report offers a quantitative analysis of the trial penalty through a review of conviction and sentencing data provided by the California courts, district attorney offices, and a public defender agency. Finally, the report provides policy recommendations to reduce the harm of the trial penalty and to allow individuals charged with criminal offenses in California to more freely exercise their constitutional rights.

THE TRIAL PENALTY: RESEARCH AND BACKGROUND

The decrease in criminal trials in California is not an isolated occurrence. Over the past 45 years, criminal trials in the United States have withered from a fairly common phenomena in 1980 when about one in five federal convictions resulted from trials to only about three percent today.[10] Recent research shows the significant use of pleas to resolve criminal cases, with approximately 97% of federal criminal convictions resulting from pleas,[11] with certain jurisdictions resolving all of their criminal cases through pleas.[12] The extensive use of pleas to resolve criminal cases undermines the important role that jury trials play in our criminal justice system. Concerns about the near disappearance of criminal jury trials have been elevated as a result of numerous reports over the past decade highlighting the negative effects that coerced pleas have on both criminal defendants and the public's oversight of prosecutors and law enforcement.

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 (5 years and 4 months)."[13] 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."[14] The threat of such severe penalties after trial inevitably pressures criminal defendants to take pleas,[15] which has led to the virtual disappearance of criminal jury trials.[16] As one prosecutor bluntly stated: "The key function of the trial penalty is to encourage pleas."[17] According to HRW, "this historically low rate of trials reflects an unbalanced and unhealthy criminal justice system."[18]

In July 2018, the 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." The report found that federal criminal defendants in non-drug prosecutions—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. According to the report, as of 2018, a trial "now occurs in less than 3% of state and federal criminal cases." NACDL found that additional factors contributed to the disappearance of the trial, including prosecutorial discretion, informational inequalities between prosecutors and defendants, rigid federal Sentencing Guidelines and an inability or unwillingness on the part of judges to exercise their discretion at sentencing. 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." The report also noted that the immense pressure to plead guilty 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.

In March 2021, NACDL and the New York State Association of Criminal Defense Lawyers ("NYSACDL") published a report on the trial penalty in New York State, "The New York State Trial Penalty: The Constitutional Right to Trial Under Attack," which included a survey of more than three hundred criminal defense attorneys from across the state and a statistical analysis of a sample of 79 criminal convictions in Manhattan. The report found that 94% of practitioners in the state agreed that the trial penalty plays a role in criminal practice in New York State, and that the trial penalty manifested in longer sentences after trial compared to earlier plea offers, with defendants being forced to waive various appellate rights and the ability to challenge the government's case through motion practice to obtain more favorable pleas. The data analysis supported the observations of practitioners, showing that in 66% of defendants in the sample experienced a trial penalty and that increased plea offers were associated with increased eventual sentences (e.g., a plea offer of 5 years was associated, after conviction at trial, with a sentence of 7.5 years and a plea offer of 20 years was associated with a sentence of 28 years). The report also found that the trial penalty is driven by numerous factors, including 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, as well as defense counsels' excessive caseloads contributing to the pressure on defendants to take pleas and forgo exercising their statutory and constitutional rights because their defense counsel did not have the time and resources to mount a potential meritorious defense.

In February 2023, the American Bar Association's (ABA) Criminal Justice Section's Plea Bargain Task Force published a report, "2023 Plea Bargain Task Force Report," to analyze and address persistent criticism of the plea bargain system in the United States. The report found that while the benefits of plea bargaining (managing limited judicial resources, incentivizing defendants' cooperation with the government, providing clear and certain resolution of criminal proceedings and providing alternatives for defendants to avoid some of the most severe aspects of the criminal system) in moderation may have merit, the overuse of pleas undermines fundamental values of the criminal legal system. In particular, the report highlighted that "defendants—including innocent defendants—are sometimes coerced into taking pleas and surrendering their right to trial." Further, the report noted that "the integrity of the criminal justice system is negatively affected by the sheer number of cases resolved by pleas" and that misconduct by police and the government often goes unchecked because cases resolved by pleas do not proceed to pretrial hearings where such misconduct would be litigated. The report highlights that the "loss of trials in favor of plea bargains is a profound loss for civic engagement" and that jury trials provide "critical oversight" to the criminal justice system, remaining "one of the only ways for citizens to shape how prosecutors enforce laws" and that the "voice of the community is almost entirely lost in a system dominated by pleas." Further, the trial penalty can fail to discourage police misconduct, by shielding police actions from the public scrutiny of a trial. By encouraging pleas early in the trial process, police are insulated from any accountability for their day-to-day, street-level decisions that might arise through suppression hearings and trial proceedings. Further, pleas often require the defendant to waive their right to pursue civil actions for potential police misconduct, preventing further public scrutiny of police actions.[19]

In March 2026, NACDL, in conjunction with the Connecticut Office of Chief Public Defender and Connecticut Criminal Defense Lawyers Association, published "The Trial Penalty in Connecticut: Are People Being Punished for Exercising Their Constitutional Rights?" [20] This statewide study of the trial penalty in Connecticut over a 5-year period compared the sentences in criminal cases that were tried to verdicts of guilty to the best plea offer in the same case. For this report, data analysis was performed by the Institute for Municipal and Regional Policy, School of Public Policy, University of Connecticut. This study found that defendants experienced a trial penalty in 62% of convictions. Among all cases with a trial penalty, the average trial penalty was a stunning 14.6 years. Post-trial sentences were roughly 1.5 times longer than guilty plea sentences.

These studies document that, because prosecutors and police almost never have to prove that arrests, prosecution decisions, and convictions are justified and supported by the evidence, there is little incentive against over-policing, particularly in low-income communities and communities of color. Indeed, a 2022 study of prosecutorial discretion in plea bargaining in Philadelphia engaged in a three-pronged approach of plea bargain policy review, interviews and surveys of both assistant district attorneys ("ADAs") and defendants who accepted pleas, and case data analysis as well as detailed review of sample cases, and concluded that not only do ADAs feel that they exercise wide discretion in the plea bargaining process, but also there do not seem to be many official mechanisms for checking decision-making after a plea bargain is accepted.[21] The study also found that the ADAs surveyed acknowledged that they received limited training on plea bargaining.[22] Numerous studies establish the devastating impact of over-policing on these communities.[23] As a result, advocates against discriminatory policing outcomes identify a lack of accountability with respect to prosecutorial discretion, and recommend that "prosecutors should state their reasons for plea offers on the record to create transparency, and should be required to collect and share data about plea offers in order to expose any disparities."[24]

Research has also confirmed that defendants' fear of a lengthier sentence post-trial 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.[25] 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."[26] These and other studies[27] 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.[28]

The critiques of these aspects of guilty plea resolutions span the ideological and political spectrum. In 2019, the Federal Sentencing Reporter journal dedicated a double issue to the trial penalty. Critiques of the practice came in from all quarters across the ideological gamut, including the ACLU, Right on Crime, the Cato Institute, Families Against Mandatory Minimums, The Charles Koch Institute and Americans for Prosperity. Additionally, a coalition of advocates and groups from across the political spectrum and including prosecutors, defense lawyers, and academics has formed that is committed to mitigating the trial penalty and the harmful effects it has on the criminal legal system.[29]

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:

> [S]ecrecy 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.[30]

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. Judge Goodwin rejected another plea on similar grounds in 2018. 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."

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 involving 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.[31]

CALIFORNIA'S DISAPPEARING TRIAL

The Committee on Revision of the Penal Code (the "Committee"), established by the California Legislature and Governor, has acknowledged that "[a]n overwhelming majority of criminal convictions are resolved by plea bargaining," and that "[t]he severity of punishment . . . can often push people to plead guilty to avoid or be freed from incarceration, not because it is a fair resolution."[32] Between 2021 and 2022, across California counties reporting data, 75% of felony cases resulted in guilty pleas while 20% of the felony cases reported were dismissed or transferred. Less than 3% of the felony cases reported went to trial.[33] The Committee also found that defendants who plead guilty typically receive shorter sentences than those convicted at trial, adding further pressure for defendants to agree to guilty pleas.[34]

In testimony provided to the Committee, it was explained that "[p]retrial detention can . . . exert a lot of pressure for people to plead guilty, especially if a guilty plea is going to get them out of detention,"[35] and that the emotional and financial hardships of incarceration influence decision-making because people will do anything to avoid staying in jail.[36] Accordingly, the Committee recommended that steps be taken to lessen the undue pressure to plead guilty by limiting part of the uncertainty of what sentence a court may impose after trial. Recommended measures included: revisiting rules surrounding pretrial detention and expanding the grounds upon which detention can be reduced to include existence of a plea offer, reducing the instances in which the same fact can be used for conviction and enhancement, instructing jurors on lesser-related offenses if those may be considered instead, and creating a presumption of probation instead of incarceration for certain offenses.[37]

SUMMARY OF IMPORTANT CALIFORNIA SENTENCING PROVISIONS

California's Determinate Sentencing Law creates a framework to guide judges when considering and imposing sentences. When the Determinate Sentencing Law was enacted in 1977, the vast majority of felonies were given three distinct terms of incarceration, lower, mid and upper, which are colloquially called the "triads." The default terms were 16 months, two years and three years. The legislature set the triads for individual crimes over the following years for violent and sex crimes. Life and life without parole were also set as alternatives to the triad in the most serious crimes (murder, violent rape, etc.).

California Penal Code §§ 1170 and 1170.1 set the basic rules for sentencing and selecting the term from the triad. The provisions required imposition of the middle term unless the circumstances in aggravation or mitigation outweighed that choice and required the upper or lower term.[38] In 2007 the U.S. Supreme Court found this sentencing scheme unconstitutional in *Cunningham v. California*, 549 U.S. 270, 863–64 (2007), saying that "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." The legislature (over the objections of CACJ and many other civil rights players) amended § 1170 as recommended by the Attorney General and the California District Attorneys Association. They claimed the new wording removed the preference for any term and left the court free to choose the upper term without any facts proven to the jury. Each amendment had a sunset date.

Some legislators, defense attorneys, and advocates believed the amended language actually called for imposition of the lower term in all cases except where aggravating factors were used. They advocated for extension of the sunset date on § 1170 every time it came up. In 2021, the legislature passed a bill (SB 567) to amend §§ 1170 and 1170.1 to require that aggravators be pled and proved to a jury, or admitted by the accused. The bill did not include a sunset date. The State Supreme Court in 2024 held, per the intent of the legislation, that California courts cannot go above the midterm of the triad unless facts supporting the enhancement are proven to the jury or admitted by the defendant. *People v. Lynch*, 552 P.3d 877 (Cal. 2024).

Consecutive sentencing is also determined by statute and the Rules of Court. Cal. Penal Code § 1170.1; Cal. Rules of Court, rule 4.425. For most crimes it is up to the court to apply the Rules, but the legislature has set many requirements of consecutive sentencing, for some crimes and all enhancements. California Penal Code § 1170.1 establishes the principal term and subordinate terms for additional felony convictions sentenced.

Finally, California has sentencing enhancements based on some eligible prior convictions, which are referred to as "strikes." Defendants can receive enhanced sentences based on the number of prior strikes—one, two, or three (or more) prior strikes. Plea offers are sometimes conditioned on accepting (by defendants) a certain number of strikes or, alternatively, conditioned on agreements that prior strikes will not be used to enhance a sentence.

DEFINING THE TRIAL PENALTY: PRACTITIONER EXPERIENCES AND SURVEY RESULTS

The Task Force conducted an extensive survey followed by interviews with members of the criminal defense community which clearly showed the California defense bar's belief that the trial penalty exists and is a significant issue in California. The trial penalty directly impacts those criminal defendants who elect to pursue their defense through trial, with those individuals receiving significantly longer and stricter sentences compared to those offered in pre-trial pleas. This, in turn, influences future criminal defendants, who are aware of the risks of pursuing their defense at trial regardless of their criminal culpability, coercing them to accept pleas and undermining their ability to assert potential defenses and exercise their fundamental rights, such as the right to receive discovery, including *Brady* material,[39] to challenge unlawfully obtained evidence, and the right to appeal, all of which a criminal defendant is typically required to waive as part of the plea process. This report includes both a broad review of survey and data analysis showing the extent to which the trial penalty exists in California, as well as individual case studies that present the real impact that the trial penalty has had on individual criminal defendants.[40]

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 CACJ Foundation, California Criminal Bar Association, and NACDL to encourage participation from a diverse group of practitioners. In total, 738 defense attorneys from 53 of California's 58 counties responded to the survey. Of the 53 counties where practitioners responded, 30 counties had at least five participants, with Los Angeles, Orange and San Diego Counties having the largest number of participants. For purposes of county-specific findings, only data from the 30 counties from which five or more responses to any particular question were received are being reported.[41]

The survey included both narrow and open-ended questions, designed to obtain information about whether, and how, the trial penalty impacts criminal defense practice and outcomes for defendants in California.

This online survey consisted of 80 questions about each attorney's experiences with the trial penalty in California. A copy of the defense counsel survey is included in Appendix 1. The survey provided the following definition of the trial penalty:

> The "trial penalty" refers to the substantial difference between the sentence offered in a pre-trial plea bargain versus the sentence an accused receives after trial. Many believe this penalty is so severe and pervasive that it has virtually eliminated the constitutional right to a trial by effectively coercing guilty pleas. The trial penalty has not only eliminated trials, it has also undermined other rights established in the Constitution and which are essential to the adversarial system by requiring waivers of rights embedded in the Fourth, Fifth and Sixth Amendments. Most notably this includes waivers of the right to

Douglass W.

Douglass W. was charged with carjacking in a Northern California county near San Francisco. After the preliminary hearing, the prosecutor offered a plea deal of 364 days in county jail if Douglass pled guilty to an offense that would constitute a strike. Douglass declined the offer, went to trial, and was eventually convicted and sentenced to 4 years in state prison. No additional facts came to light between the time the prosecutor had made the offer and the time of sentencing. Nonetheless, Douglass received a sentence 4-times longer than what the prosecutor had offered before trial.

seek pre-trial release, the right to discovery, the right to receive exculpatory 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.

To provide further context and details on the experiences of individual practitioners with the trial penalty, the survey included open-ended questions for practitioners to describe specific cases they believe provide examples of the trial penalty. Additionally, two dozen survey participants participated in follow-up interviews to provide further details on cases and practitioner experiences with the trial penalty.

DEFENSE COUNSEL PERSPECTIVE: TRIAL PENALTY AND COERCION

One defense counsel's response captures the essence of the trial penalty in California:

> *The client did not want to take the plea but even the judge iterated that if he did not accept the plea, she would have to sentence him to life in prison if he lost at trial. DA threatened enhancements.*

The survey responses and corresponding interviews capture the perspectives of hundreds of practitioners across the state of California. The vast majority of respondents reported the existence of the trial penalty and cited the coercive role played by prosecutors, judges, or both.

Respondents also provided further insights into a range of other aspects of the trial penalty including how it manifests, the populations it is most likely to affect, and its impact on procedural and rights-based issues.[42] Subsequent narrative interviews were conducted with a subset of practitioners. These narrative interviews provide additional specificity and supplementary context to the way the trial penalty is imposed across the state.

Statewide survey responses were received in 53 counties out of 58 counties in California, representing a mix of urban, suburban, and rural communities.

Existence and Occurrence of the Trial Penalty

Defense practitioners across California affirmed that the trial penalty is both real and pervasive, though its severity and consistency vary across jurisdictions.

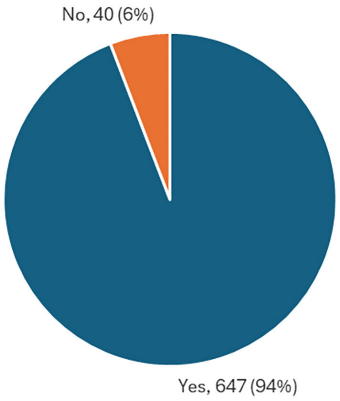
Responses from across the state point overwhelmingly to the existence of the trial penalty. When asked, "Do you believe the trial penalty is a factor in this county?", an overwhelming majority of respondents answered "Yes." Specifically, over 90% of survey respondents said the trial penalty was a factor in their county. In 12 of 30 counties for which more than five responses were recorded, 100% of respondents answered "Yes." The lowest average affirmative response rate to the question from a county was 83%.

A homeless man suffering from a drug addiction, who had a history of minor robberies, was accused of stealing a ring from another man in a train station. The officer who was on the scene stated that she thought she saw the homeless man take the ring, but the defendant maintained that it was a legitimate exchange. The officer was not wearing a bodycam, there were no other witnesses, and there was minimal investigation after the fact. The ring was returned to the alleged victim, and he did not participate in the criminal proceedings.

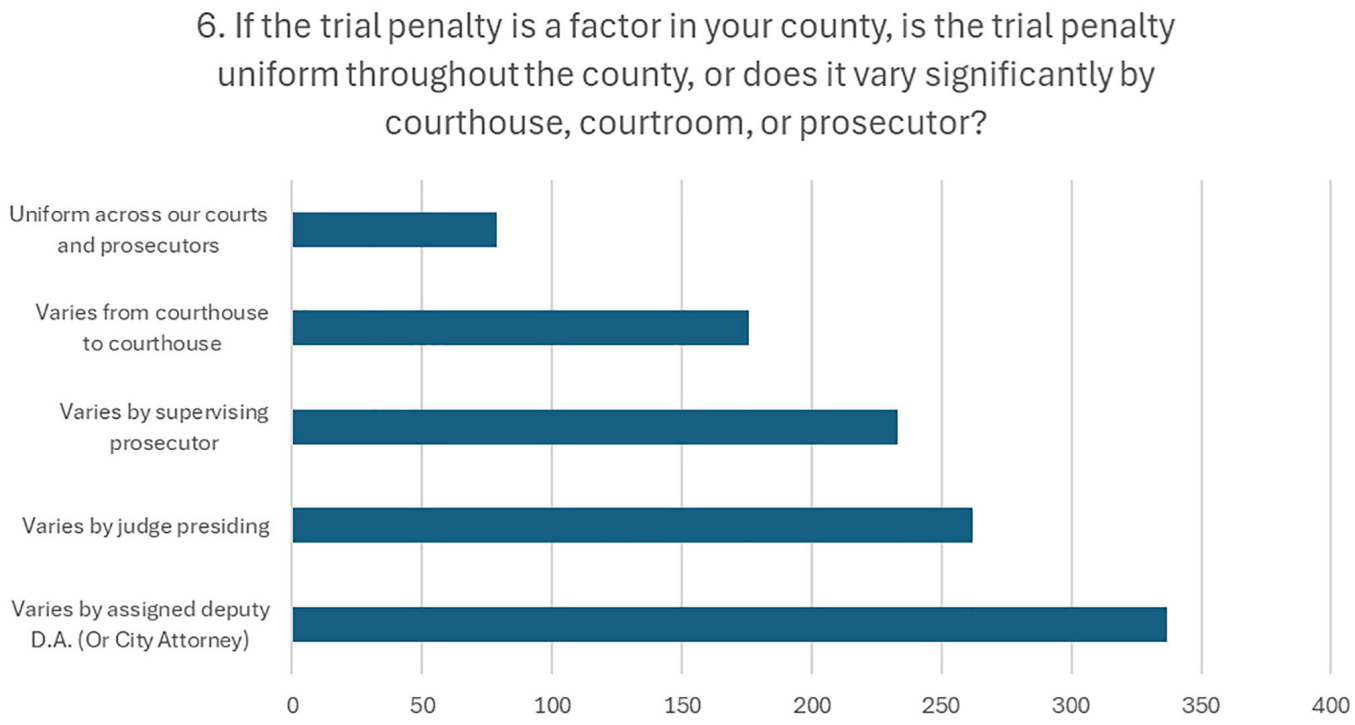
The prosecutor charged the homeless man with a third strike, which would mean a sentence of 25 years to life. The defendant's counsel suggested a plea deal to misdemeanor theft, but the prosecutor insisted on the 25 to life sentence.

After pre-trial motions, where counsel detailed the facts, the judge questioned the prosecutor why there had been no plea agreement. It was only at that point that the prosecutor was willing to negotiate. He agreed to lower the charge to a misdemeanor, and the defendant was sentenced to time served.

2. Do you believe the trial penalty is a factor in this county?



While survey respondents overwhelmingly reported that the trial penalty existed in their county, they also said that it varied from courthouse to courthouse and case to case. Respondents were asked in Q23-6, "If the trial penalty is a factor in your county, is the trial penalty uniform throughout the county, or does it vary significantly by courthouse, courtroom, or prosecutor?" Respondents were encouraged to check each answer that applied and only roughly nine percent of the responses provided



indicated that the trial penalty occurred uniformly across courts and prosecutors. The most common responses suggested that the manifestation of the trial penalty varied based on the deputy DA or City Attorney (69.77%), the presiding judge (54.24%), the supervising prosecutor (48.24%), and from courthouse to courthouse (36.44%).

Respondents provided numerous examples illustrating how the trial penalty operates in practice.

> *On the day of jury selection the DA offered 7 years to settle the case before trial, the offer had been about 14 years, we went to trial, client didn't want to plea, after trial he was convicted and the court gave him 29 years, all same charges for the plea offer of 7, found not guilty on one count but not the most serious.*
>
> * * *
>
> *The DA offered 14 years but then pursued a life count at trial.*
>
> * * *
>
> *Client rejected the prosecutor's offer. Client went to trial and was acquitted of the charge with the most exposure. Nonetheless, he was sentenced to MORE time than the prosecutor's offer. In other words, client was punished for going to trial, where he was acquitted of the most serious charge, yet received a harsher sentence than he would have received had he pleaded guilty to the prosecutor's offer.*

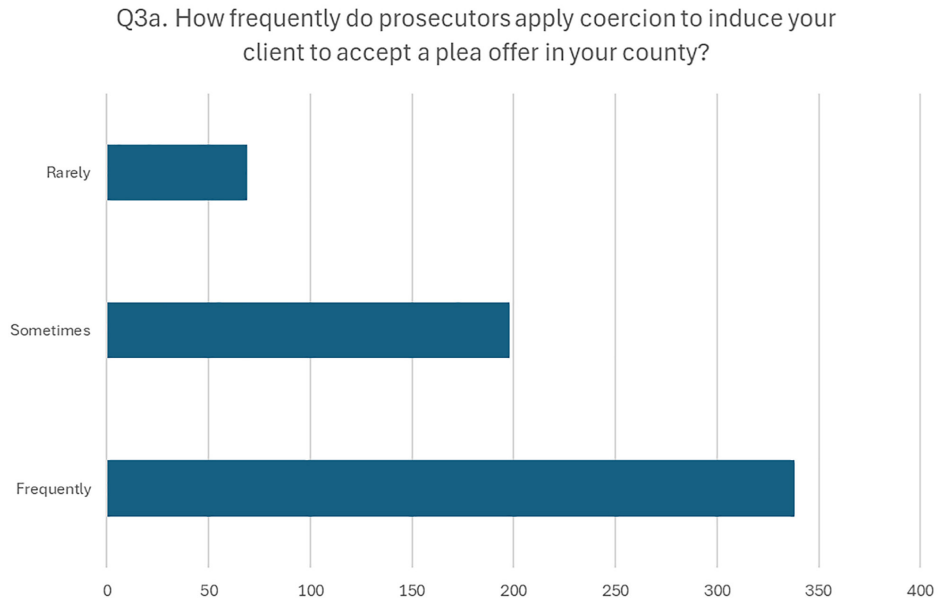
Taken together, both the quantitative findings and practitioner narratives establish a clear consensus among California defense counsel that the trial penalty is a pervasive reality that varies in degree but not in existence. It is shaped by prosecutorial discretion, judicial practices, and local court culture.

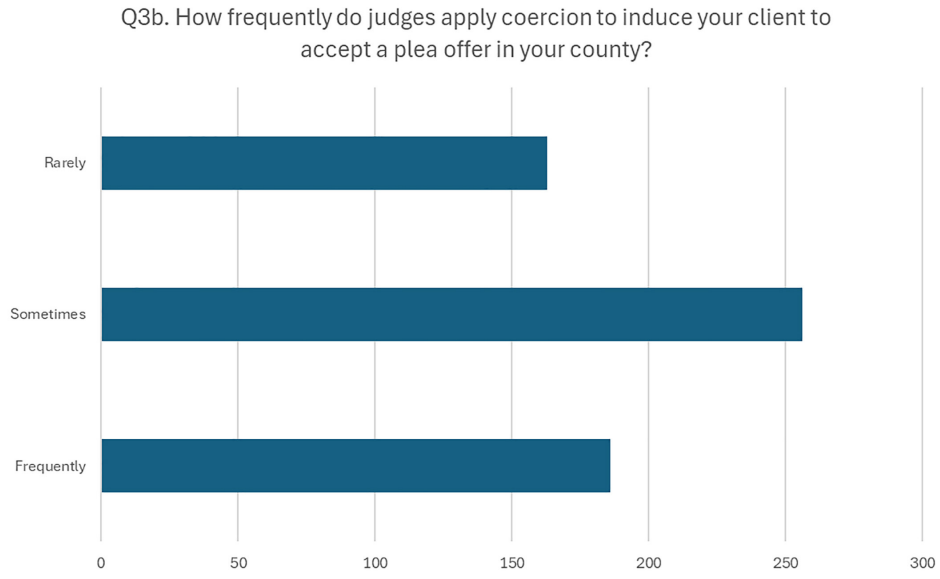
Coercion

In addition to acknowledging the existence of the trial penalty, a noteworthy majority of respondents reported a belief that the state coerces defendants to accept plea offers.

Approximately 72% of respondents replied that prosecutors "frequently" or "sometimes" apply coercion to induce clients to accept a plea offer. Omitting missing responses,[43] that number increased to roughly 89%, as shown in the chart below for Q4–3a. Approximately 60% of respondents reported the same of judges; which increased to roughly 73% when accounting for missing responses, as shown in the chart below for Q5–3b. These responses varied by county.

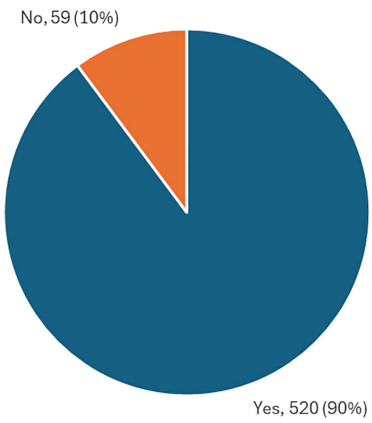
In felony cases, roughly 70% of respondents reported a belief that prosecutors often "use direct or implied threats to encourage acceptance of offers." Omitting missing responses,[44] that number increased to 90%. In comparison, only 31% of respondents cited judges as using





direct or implied threats to encourage acceptance of offers; 47% responded that judges do not. When asked what forms coercion takes, the most frequent responses were "[a]dding charges and/or enhancements," "[e]xploding offer" (30.42%), and "[i]ncreased sentence in future offers" (29.74%). Notably, when asked whether there is a "disparity in the application of coercion with respect to plea offers based on race, gender, ethnicity, or other unconstitutional classification," more respondents answered "no" than "yes." A majority of respondents answered that judges do not "often support the application of coercion based on race, gender, ethnicity, or other constitutional classification." Roughly 25% of respondents answered that they do.

Q4d. Do prosecutors often use direct or implied threats to encourage acceptance of offers?



In misdemeanor cases, roughly 54% of respondents reported a belief that prosecutors often "use direct or implied threats to encourage acceptance of offers." Omitting missing responses, that number increased to roughly 80%. When asked what forms coercion takes, the most frequent responses were: exploding offers (26.95%),[45] increased sentences in future offers (24.56%), adding charges or enhancements (24.08%), and adding felony charges (18.90%).

Respondents also provide examples of how judges apply coercive pressure on defendants to accept plea offers:

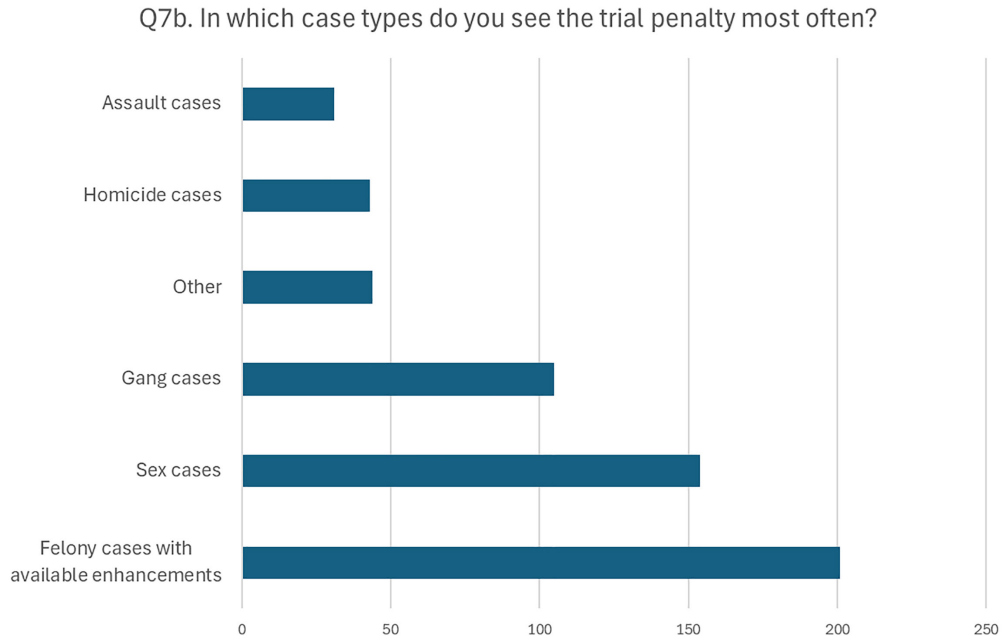
> *The judges make a point of telling the client his maximum sentence if he refuses to plea; indicates they are likely to give a higher sentence, and typically give higher sentences after trial.*
>
> * * *
>
> *Judges deny our request to release our clients during the pendency of a case, but accept a plea deal on the same client that allows them to get out that day. They threaten to max them out on a probation violation if they move forward with trial on a new case. They impose harsher punishments if client takes the stand at trial.*
>
> * * *
>
> *Prosecutors in our county routinely use the threat of increased penalties or additional charges or enhancements if the client won't plead prior to Prelim or at PTC. Prosecutors who engage in this type of conduct are often more likely to do so against Defense Attorneys who challenge prosecutors more through motion work and aggressive defense tactics.*

These findings show that defendants face significant pressure, from both prosecutors and judges, to accept plea offers to avoid the risk of increased sentences and additional charges or enhancements.

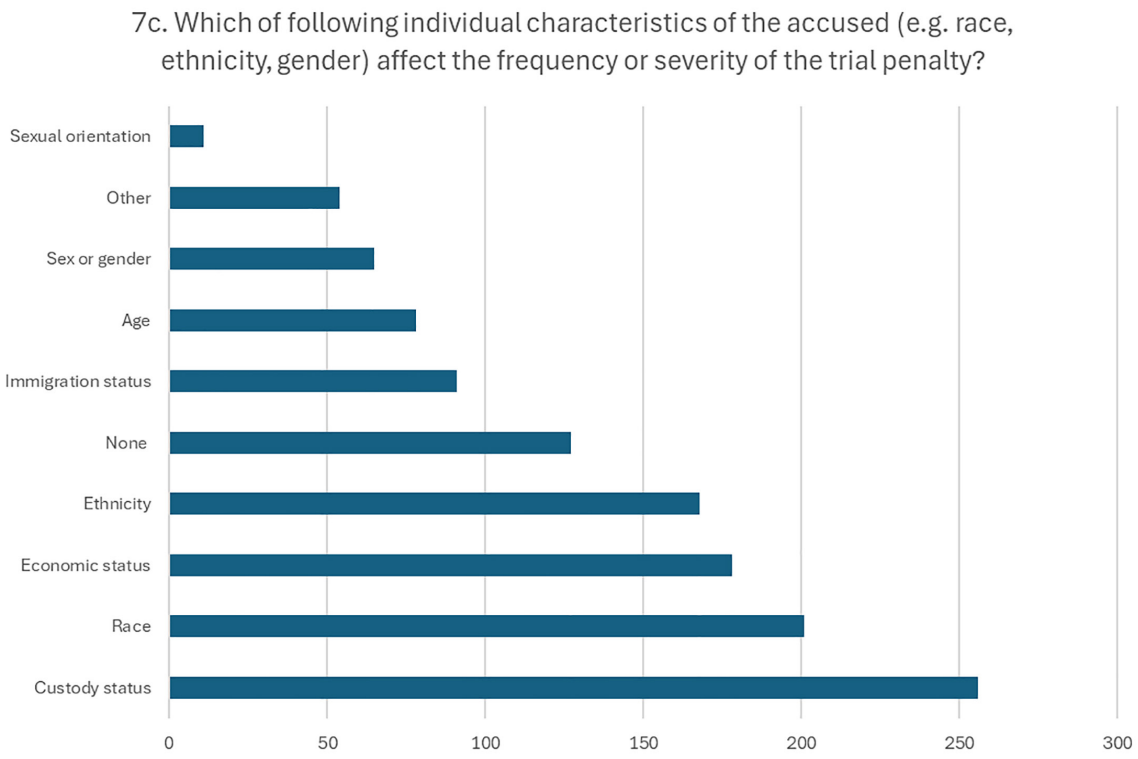
DEFENSE COUNSEL PERSPECTIVE: CASE CHARACTERISTICS AND DEFENDANT DEMOGRAPHICS

Surveyed defense counsel also provided instructive responses regarding the types of cases in which they were most likely to observe the trial penalty, and the extent to which the demographics of the accused may be associated with the trial penalty, showing a wide range of factors underlying the trial penalty.

When asked whether the trial penalty varies by type of case, roughly 67% of respondents who responded to the question answered that it did. Respondents then had the opportunity to select up to two options from a list of case types — homicide cases, sex cases, gang cases, felony cases with available enhancements, assault cases, and others—in which a trial penalty was likely to be observed. The most regularly reported, statewide case types were "felony cases with available enhancements" (37.64%) followed by sex crime cases (28.83%).

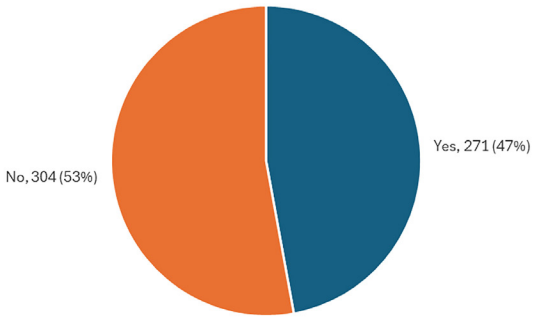


Respondents cited a variety of individual characteristics of the accused which might affect the frequency or severity of the trial penalty, including custody status (53.11%), race (41.70%), economic status (36.93%), ethnicity (34.85%), immigration status (18.88%), age (16.18%), and sex or gender (13.49%).

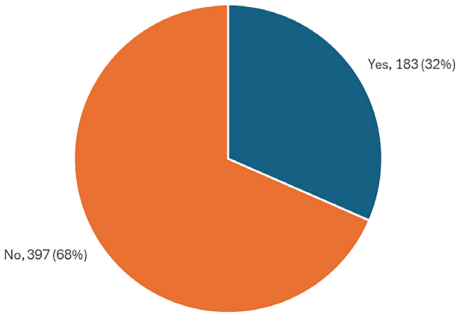


Respondents were generally divided as to whether they perceived a disparity in the application of coercion with respect to plea offers in felony cases based on race, gender, ethnicity, or other unconstitutional classification. A slim majority (52.87%) said they did not, while 47.13% said they did.

4g. Do you perceive a disparity in the application of coercion with respect to plea offers based race, gender, ethnicity, or other unconstitutional classification?



4h. Do judges often support the application of coercion based on race, gender, ethnicity, or other constitutional classification?



For misdemeanor cases, respondents were similarly divided regarding perceived disparities, with a large minority of respondents (43.71%) answering that they did perceive a disparity based on race, gender, ethnicity, or other unconstitutional classification, and a small majority (56.29%) answering that they did not. For misdemeanor cases, the county-by-county answer mirrored the statewide response more closely.

The responses show a variety of factors underly the trial penalty, with certain case types and defendant characteristics (most notably a defendant's custody status) more frequently resulting in the trial penalty manifesting for a defendant.

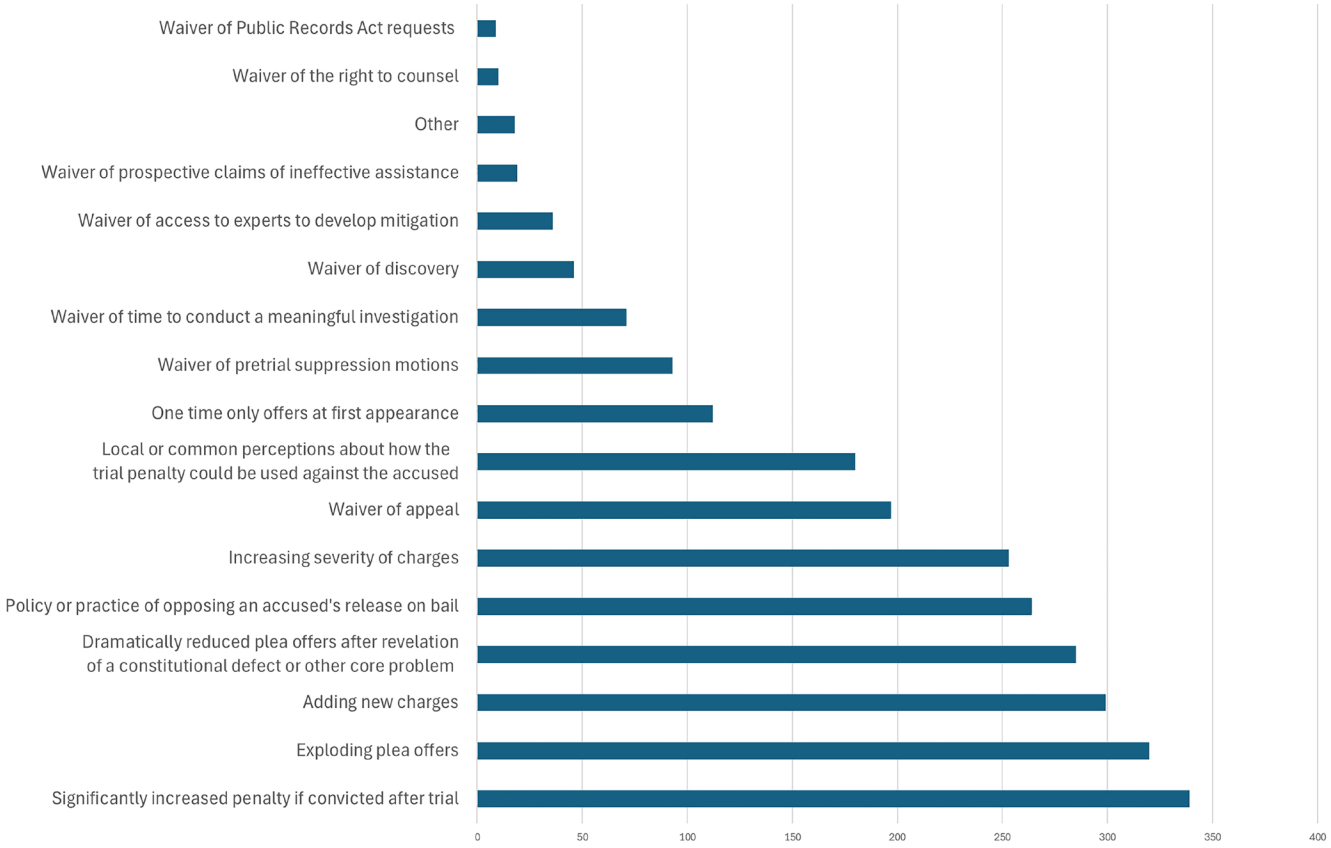
DEFENSE COUNSEL PERSPECTIVE: MANIFESTATION OF THE TRIAL PENALTY & POLICY IMPACTS

Responses to the survey suggest that the trial penalty takes a number of different forms and is driven by numerous factors.

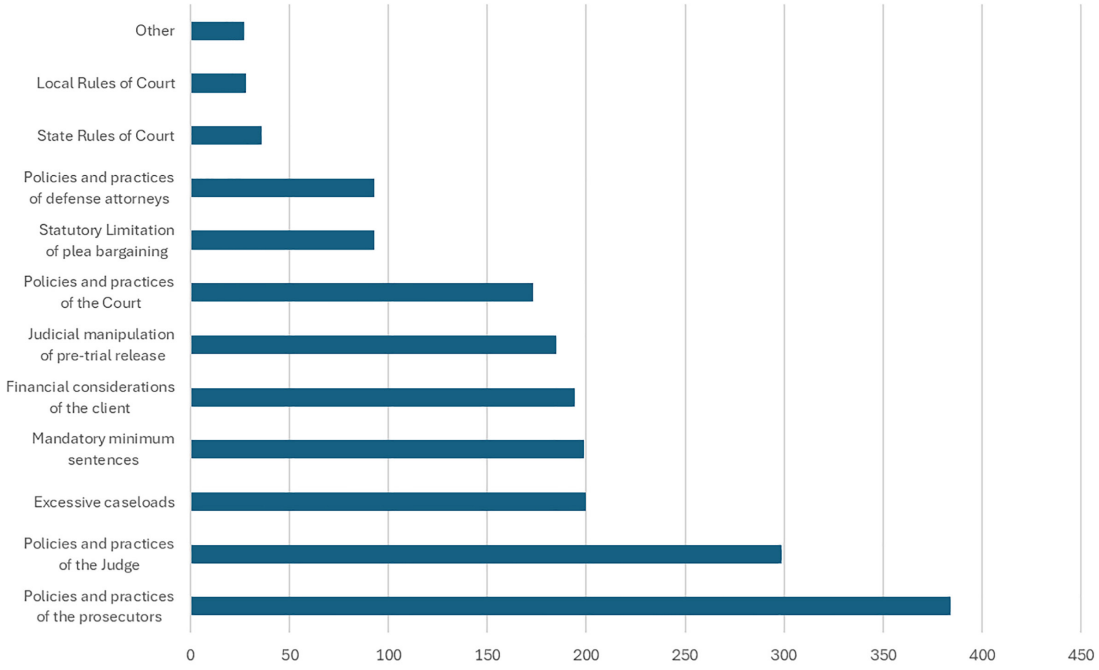
When asked the ways in which the trial penalty manifests, the most frequently selected answers were: significantly increased penalty if convicted after trial (72.75%), exploding plea offers (68.67%), adding new charges (64.16%), dramatically reduced plea offers (as opposed to dismissal) after revelation of a constitutional defect or other core problem (61.16%), and policy or practice of opposing an accused's release on bail (56.65%).

Respondents also cited a number of factors in the occurrence of the trial penalty. From a provided list of options, the most-cited factors were policies and practices of the prosecutors (87.27% of responses) and policies and practices of the Judge (67.95% of responses), as well as excessive caseloads (45.45% of responses), mandatory minimum sentences (45.23% of responses), financial considerations of the client (44.09% of responses), and judicial manipulation of pre-trial release (42.05% of responses). The latter factor is particularly worthy of future study. Since 2021, the California Supreme Court has repeatedly held that bail must be set an amount that is attainable in order to effectuate defendants' right to release on bail under the Constitution of California.[46] The survey period for defense counsel, however, was in 2022 so these decisions may not be fully taken into account by respondents and, of course, opinions on law and practice may have changed in time.

8. In what ways does the trial penalty manifest itself in your county?



9a. Do you believe that any of the following are a factor in the trial penalty as it occurs in your jurisdiction?



In addition to the quantitative responses above, respondents provided several specific examples of how the trial penalty manifests in their practice.

> *Waiver of appeal is required in every negotiated disposition. Prosecutors love to offer strikes for probation. Then if we lose at trial, they ask for years of state prison, and judges often impose it. The judges do little to undercut the DAs when negotiating. Some judges almost never let people out, knowing it will resolve the case faster.*
>
> * * *
>
> *The most common is the threat of additional strikes, commonly through enhancements on existing charges. This is coupled with an exploding offer. "Accept today or I am making count X a strike."*
>
> * * *
>
> *Client was made to stay away from family until he pled guilty; suffered great financial and emotional distress; committed suicide.*

The survey results show that the trial penalty manifests in a variety of ways (most frequently through significantly increased penalties if convicted after trial, exploding plea offers, addition of new charges, dramatically reduced plea offers, as opposed to dismissal, after revelation of a constitutional defect, and opposing an accused's release on bail) and is driven by numerous factors (most notably the policies and practices of prosecutors and judges, excessive caseloads, mandatory minimum sentences, financial considerations of the defendant, and judicial manipulation of pre-trial release).

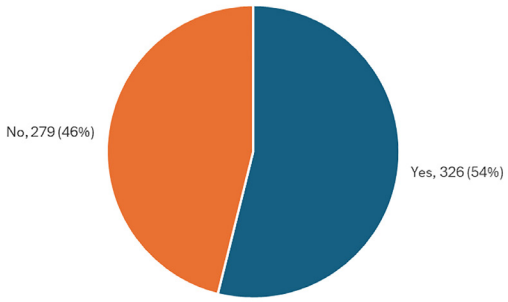
Procedural Issues

Respondents indicated that the plea offers often require foregoing or waiving fundamental procedural rights that would otherwise be available to defendants at trial or during pre-trial proceedings.

A plurality of respondents reported conditions being imposed on the defense in felony cases. Defense counsel were asked, "Are prosecution offers conditioned on the defense foregoing discovery, refraining from bringing motions, or waiving appellate rights?" Roughly 44% responded "yes" in felony cases. Omitting missing responses, the percentage of yes responses increases to 54%. The most frequent responses from a provided list of conditions were:

- plea must be entered before preliminary examination (16%),
- plea must include admission of strikes or other sentence enhancements (15%),
- plea must include waiver of appeal generally (15%),
- plea must include admission to elements necessary for a future prosecution — prosecutor (15%).
- plea must include waiver of appeal of denial of requests pursuant to California Penal Code § 1538.5 for return of seized property[47] or other constitutional issues (~10%),
- plea must be entered before litigating some defense motion (~10%),
- plea must include admission to elements necessary for a future prosecution — judge (~10%).

4b. Are prosecution offers conditioned on the defense foregoing discovery, refraining from bringing motions, or waiving appellate rights?



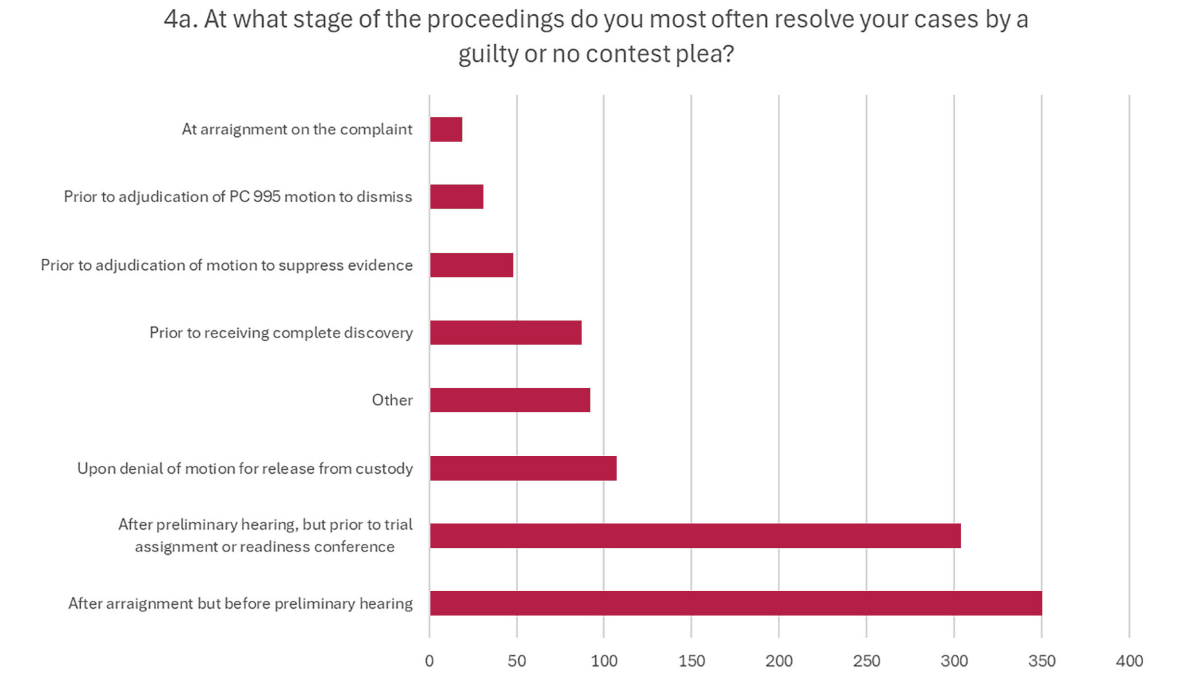
Unlike in felony cases, a plurality of respondents, 39%, answered that pleas in misdemeanor proceedings were not often conditioned on waiving rights (beyond the right to trial), such as foregoing discovery, refraining from bringing motions, or waiving appellate rights. The most frequent responses from a provided list of conditions were:

- plea must include waiver of appeal generally (30%),
- plea must be entered before litigating some defense motion (22%),
- plea must include waiver of appeal of denial of 1538.5 or other constitutional issues (21%), and
- plea requires foregoing a non-criminal disposition (14%).

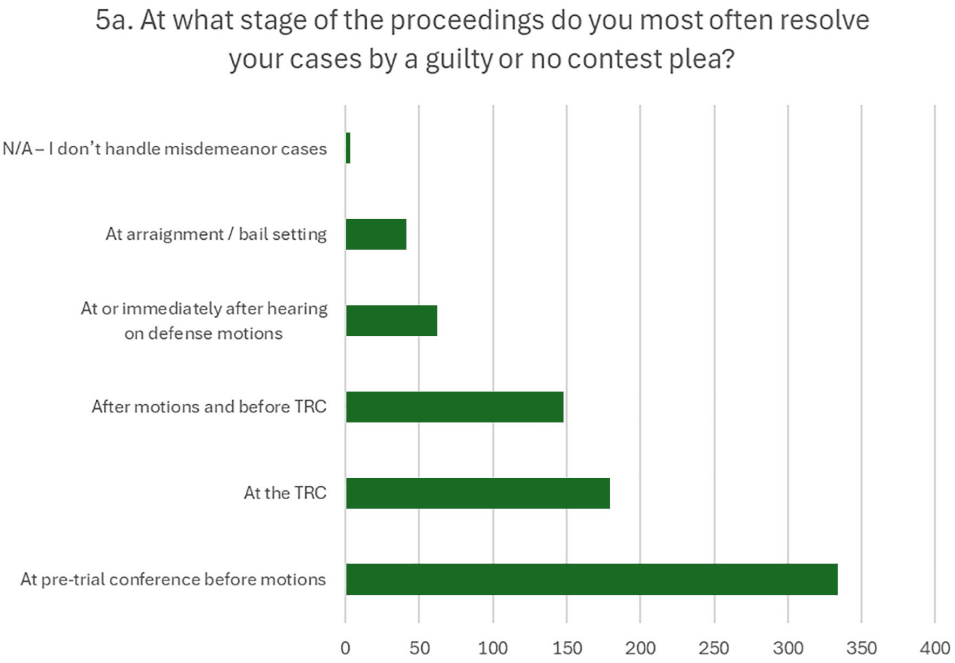
Cases can resolve at various stages of a proceeding. With respect to felony cases, respondents were asked: "At what stage of the proceedings

do you most often resolve your cases by a guilty or no contest plea?" The most frequently selected options—from a provided list of options—were "[a]fter arraignment but before preliminary hearing" (57.85%) and "[a]fter preliminary hearing, but prior to trial assignment or readiness conference" (50.25%). Additional responses included "[u]pon denial of motion for release from custody" (17.69%), "[o]ther" (15.21%), and "[p]rior to receiving complete discovery" (14.38%). With respect to misdemeanor cases, the most frequently selected options were "[a]t pre-trial conference before motions" (60.95%), "at TRC" (32.66%), and "[a]fter motions and before TRC" (27.01%).[48]

FELONY



MISDEMEANOR



One survey respondent highlighted that waiver of specific procedural and constitutional rights results in defendants losing fundamental rights and protections.

> *I don't specifically have an issue with the "trial penalty" however my issue is when the negotiations hinge on the Defendant waiving due diligence (e.g. discovery review), 4th Amendment (1538.5 Mx), or other rights. Those are a greater abridgment of basic rights IMO. As a practical matter, there is a sentencing factor that rightly permits a greater sentence after trial.*

The survey responses show that defendants, in accepting plea offers, are often required to forego or waive key procedural protections that might otherwise produce mitigating evidence that would benefit the defendant.

PROSECUTORS' PERSPECTIVE: PROSECUTOR SURVEY RESULTS

Substantial efforts were also made to obtain prosecutors' input related to their plea offer policies and the prosecutorial perspective on the existence and impact of the trial penalty. These included multiple letters to every district attorney listed in the California District Attorney's Association 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. A copy of the prosecutors' survey is included in Appendix 2.

In total, 25 prosecutors from eight of California's 58 counties responded to the survey.[49] Of the eight counties where prosecutors responded, Orange county had 16 respondents, San Francisco county had three respondents, and each of Alpine, Los Angeles, San Benito, Siskiyou, Tehama and Yolo county had one respondent. The survey included questions related to both felony prosecutions and misdemeanor prosecutions and covered topics regarding when plea offers are generally accepted by defendants, general policies and practices regarding plea offers and respondents' views on the trial penalty.

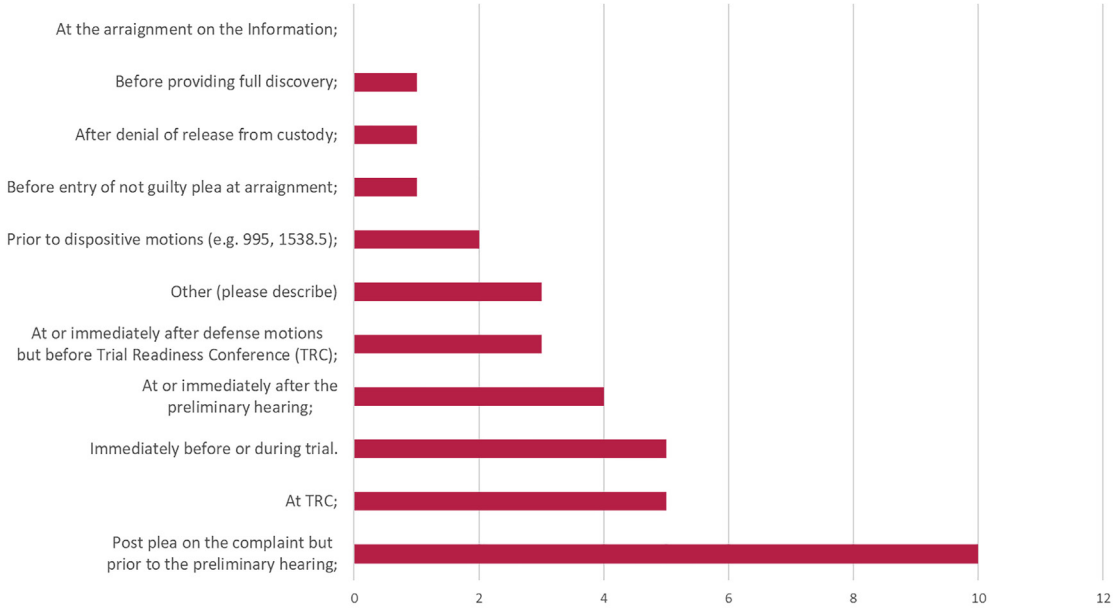
Resolution of Cases by Plea

Prosecutors were asked to provide details as to the timing of when plea offers are accepted by defendants. For felony cases, the first significant time in the process where plea offers are generally accepted is following the plea on the complaint and prior to the preliminary hearing. Following that time, acceptance of plea offers by defendants are more evenly spread out. For misdemeanor cases, the two most common times for plea offers to be accepted are at the pre-trial conference before defense motions and the period after defense motions and before the trial readiness conference.

More specifically, for felony cases that do not proceed to trial, over one-third of prosecutor respondents indicated that cases were resolved by a guilty or no-contest plea prior to the preliminary hearing and before providing full discovery, with another one-third of respondents indicating that cases were resolved after the trial readiness conference up to immediately before or during the trial. For misdemeanor cases that do not proceed to trial, over one-third of respondents indicated that cases were resolved by a guilty or no-contest plea at or prior to the pre-trial conference and before motions, with nearly one-half of respondents indicating that cases were resolved at or immediately after hearing on defense motions but before the trial readiness conference and one-quarter of respondents indicating that cases were resolved at the trial readiness conference.

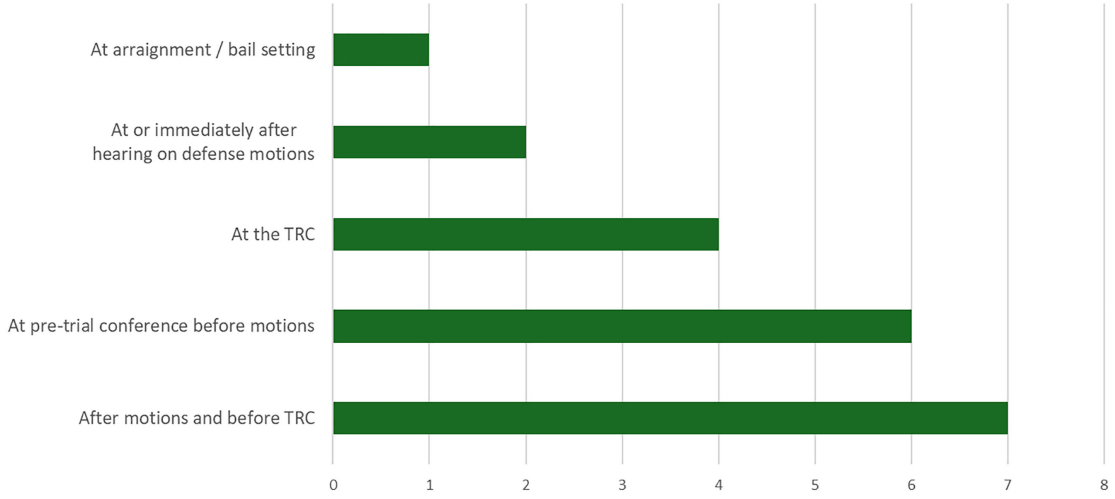
FELONY

2a. At what stage of the proceedings do you most often resolve your cases by a guilty or no contest plea, when cases do not proceed to trial?



MISDEMEANOR

3a. At what stage of the proceedings do you most often resolve your cases by a guilty or no contest plea, when cases do not proceed to trial?

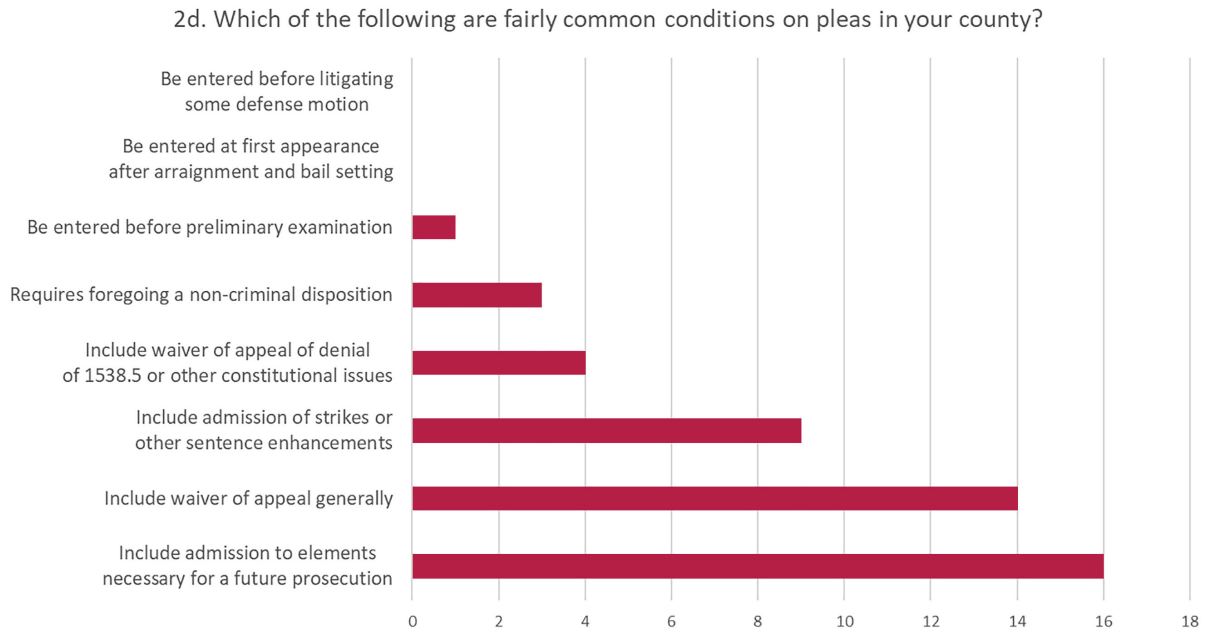


Policies and Practices for Plea Offers

Prosecutors were also asked to comment on both formal policies and their general practices regarding conditions placed on plea offers and changes made to subsequent plea offers following a defendant's rejection of an initial plea offer. Prosecutors were nearly unanimous in responding that there are no formal policies regarding conditions of plea offers or changes made to subsequent plea offers if a defendant rejects an initial plea offer; however, subsequent plea offers generally are less favorable to the defendant than the initial plea offers presented by prosecutors. Respondents reported that certain conditions are commonly placed on plea offers, including the waiver of the right to appeal and admission of strikes or other sentence enhancements. In felony cases, nearly one-third of prosecutors indicated that they require admission of strikes or other sentence enhancements and two-thirds require waiver of appeal generally and admission to the elements necessary for future prosecution (i.e.,

"*Watson*[50] waivers"), and in misdemeanor cases, nearly one-third require foregoing a non-criminal disposition (e.g., diversion) or waiver of appeal of denial of 1538.5[51] rights or other constitutional issues. Respondents were nearly unanimous in responding that they do not have general policies that condition plea offers on the defendant not filing motions or agreeing to enter a plea before discovery, and that they rarely or never condition plea offers on waiving rights or foregoing discovery or defense motions.

FELONY



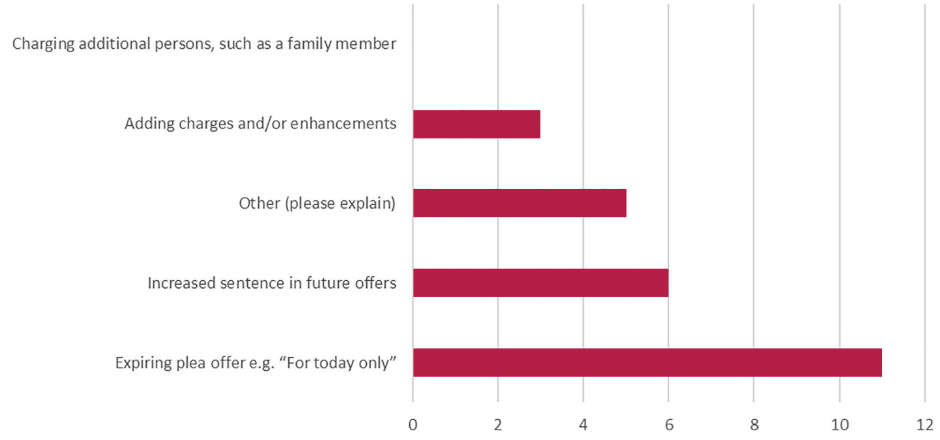
MISDEMEANOR



Nearly all respondents indicated that their offices do not have a general policy that if a defendant, in either a felony or misdemeanor case, rejects an initial plea offer that the defendant will be told that any future plea offers will be less favorable.[52] Despite the lack of an official policy, nearly one-third of respondent prosecutors, with respect to felony cases, and nearly one-quarter of respondents, with respect to misdemeanor cases, indicated that they do tell defendants that any future plea offers will be less favorable if the initial plea offer is rejected, with the remaining respondents indicating that they rarely or never make such comments to defendants. Further, with respect to felony cases, nearly one-third of prosecutors indicated that they have added additional charges and/or enhancements following a defendant's rejection of an initial plea offer and one-third of respondents indicated that future offers have increased sentencing. With respect to misdemeanor cases, nearly one-quarter of respondents indicated that they add felony charges following a defendant's rejection of an initial plea offer, with over one-third of respondents indicating that they have added additional charges and/or enhancements and over one-half of respondents indicating that future offers have increased sentencing. Additionally, nearly two-thirds of respondents, with respect to felony cases, and over one-half of respondents, with respect to misdemeanor cases, indicated that they offer expiring plea offers (e.g., "for today only"). Respondents were split evenly as to whether judges in felony cases encourage or support such conditions to plea offers and were split approximately two-to-one as to whether judges in misdemeanor cases encourage or support such conditions to plea offers, with most indicating that judges did not encourage such conditions.

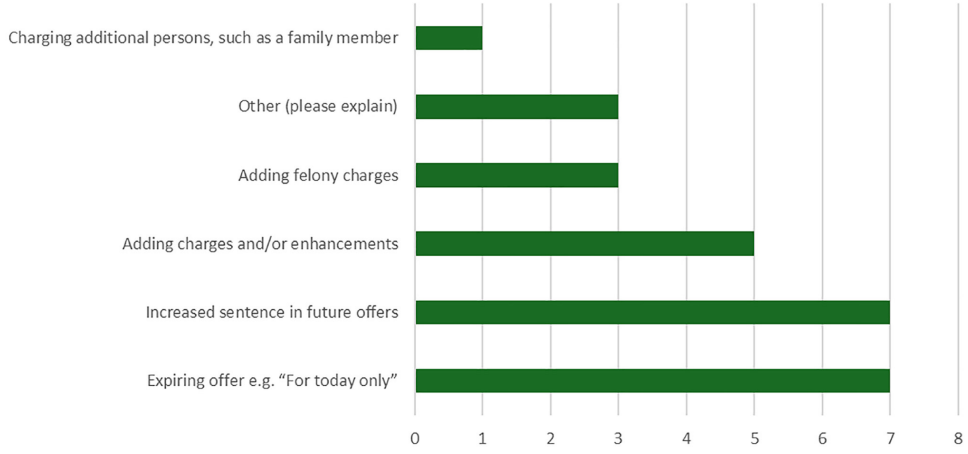
FELONY

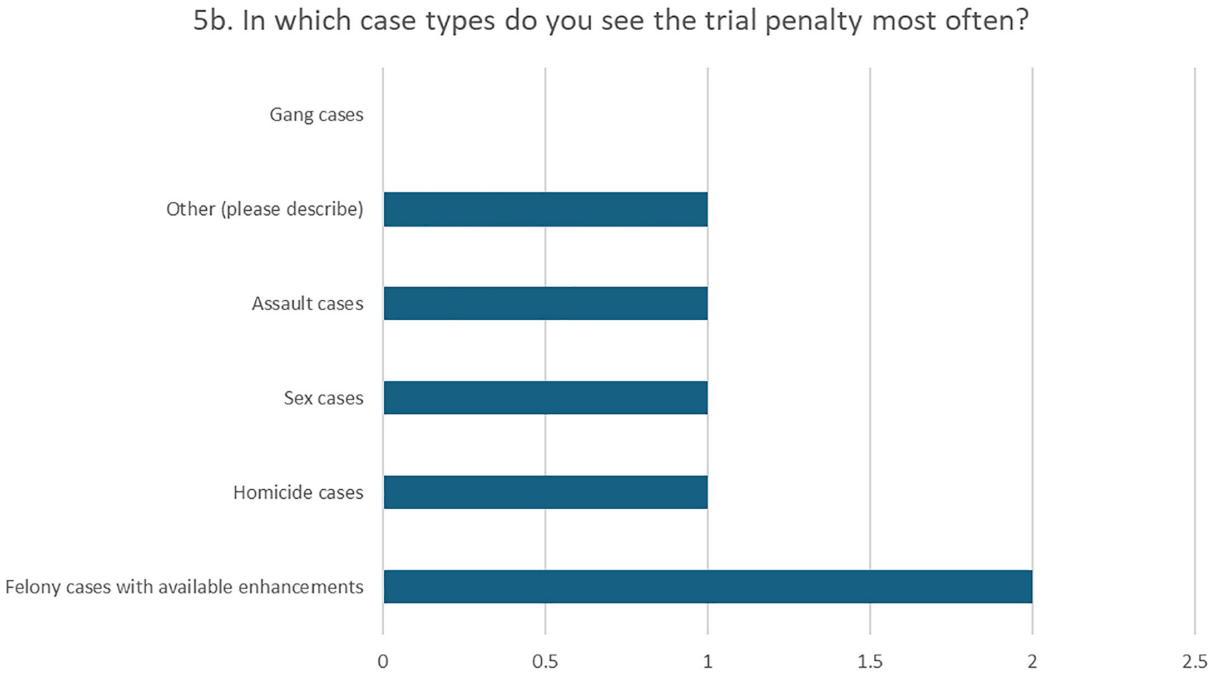
2g. Which of the following actions have you taken after a defendant has rejected an initial plea offer?



MISDEMEANOR

3g. Which of the following actions have you taken after a defendant has rejected an initial plea offer?





Sometimes cases are undercharged to encourage a plea. If [defendant] doesn't plead, then we charge him for what he actually did which is more than his initial charges.

* * *

I've stated that future offers may or may not be the same. I'm not going to make an offer with a promise that it will never change.

* * *

We don't punish defendants or add anything if they reject an offer in my unit. We may change the offer at a later point, but it usually means they want trial. Up until trial assignment, they can usually accept the offer. Other times, offer expires at day of trial calling and no further negotiations are had because defense rejected or let it expire.

The Trial Penalty

Prosecutors were also asked to comment on the existence of, and factors driving, the trial penalty in their county. More than two-fifths of respondents indicated that the trial penalty is a factor in their county and were split nearly evenly as to whether the trial penalty varied due to the presiding judge or from courthouse to courthouse (none indicated that it was uniform across all courts in their county). Slightly more than half of respondents indicated that the trial penalty varied by the type of case, indicating that the trial penalty was most common in felony cases with available enhancements (strikes, priors, etc.), homicide cases, sex cases and assault cases.

> *What I really see is not a trial penalty, but an intentional pre-trial "discount" especially by certain judges in [my county], who "give away" cases to get them off the docket.*

Prosecutors indicated that the trial penalty manifests itself through dramatically reduced plea offers (as opposed to dismissal) after the revelation of a constitutional defect or other core problem with the prosecution, the addition of new charges if a plea offer is not accepted, increased severity of charges, increased sentence in subsequent plea offers, waiver of appeals, significantly increased penalty if convicted after trial and local or common perceptions about how the trial penalty could be used against the accused. Respondents further indicated that mandatory minimum sentences, policies and practices of prosecutors, specific offices and courts, and judges (e.g., the court actively engaging or not engaging in the bargaining process), pre-trial release status of the defendant, policies and practices of defense attorneys and excessive case load were all factors in the occurrence of the trial penalty. The vast majority of respondents that provided responses[53] indicated that judges will impose concurrent sentences, dismiss charges under Penal Code 1385 or take other actions after trial so that

post-trial sentences are equal to or less than the pre-trial offer. Most respondents indicated that this happens occasionally, with a few respondents indicating that this happens either rarely or frequently. Similarly, the vast majority of respondents that provided responses[54] indicated that they have argued at sentencing for the same sentence post-trial as their last pre-trial offer.

> *For us, the first step towards rehabilitation is accepting responsibility. When [defendant] doesn't do that when the evidence is clearly stacked against him, he [demonstrates] that he continues to be a liability to the community. Our job is to protect the community. We accomplish this goal if [defendant] rehabilitates or is incarcerated and can't [commit] more crimes.*
>
> * * *
>
> *If [a] judge feels mandatory minimums are too harsh, they may offer pre-trial discount and 1385[55] parts of the case. Judge[s] are much less likely to do that after trial.*

ANALYSIS OF DATA COLLECTED FROM CALIFORNIA COURTS AND DISTRICT ATTORNEYS

As discussed in detail above, the defense counsel survey results and defense counsel interviews revealed the strong belief held by an overwhelming majority of California defense attorneys that defendants who take their cases to trial risk, and if convicted often receive, longer sentences than individuals who accept guilty pleas. Defense counsel attributed the trial penalty to many factors, including prosecutors' decisions and judges' sentencing actions, among other reasons. To a lesser extent, the prosecutor survey revealed a significant minority of prosecutors agreed that a trial penalty exists in California, although they suggested different reasons than those identified by many defense counsel; for example, prosecutors suggested that the trial penalty is explained by significantly discounted plea offers that do not necessarily reflect the gravity of offenses and judges' lenient sentencing practices for defendants entering guilty pleas rather than prosecutorial coercion or judicial punishment for defendants choosing jury trials as common explanations.

Regardless of lawyers' subjective opinions, a robust set of quantitative data collected from California Superior Courts and District Attorneys and analyzed by the Task Force provide strong confirmation for the defense counsel impressions about the existence of a trial penalty.[56]

The data described in detail below show that defendants who took their cases to trial between 2013 and 2023 often received harsher average sentences than defendants charged with the same crimes who chose to plead guilty.

Specifically, data received from seven urban, suburban, and rural California counties—representing hundreds of felony defendants who went to trial compared to thousands of felony defendants who pled guilty—showed that the average sentences for a significant majority of the felony defendants who went to trial ranged up to three times longer than the average sentences for defendants charged under the same penal codes who pled guilty. In contrast, only a fraction of the defendants in the datasets analyzed who went to trial received average sentences that were shorter than defendants charged under the same penal codes who pled guilty.

A significantly smaller set of data from two counties also allowed for an assessment of the likelihood for felony defendants to receive life sentences. The data for defendants charged under the same penal code reflected a greater prevalence of life sentences imposed on defendants who took their cases to trial compared to those who pled guilty.

The sentencing discrepancy found in the data for misdemeanor offenses was even more dramatic than the felony data. When the average sentences imposed under the same penal code were compared, the vast majority of the hundreds of misdemeanor defendants in California who chose to go to trial received average sentences that were up

Seth Cravens

Seth Cravens was charged with second-degree murder, following a bar fight with several of his friends that quickly escalated to fatal consequences. After a drunken dispute over a spilled drink at the bar, Cravens and four other co-defendants, all known as the "Bird Rock Bandits," followed the victim to his home to continue the confrontation. The altercation broke out into a full physical fight between all the men outside victim's home. During the fight, the victim confronted Cravens, who responded by throwing the final punch to the head, causing victim to fall backwards and hit his head on the pavement. The victim suffered a severe fractured skull and died from his brain injuries a few days later.

Cravens was offered a plea deal of 18 years if he pled guilty to involuntary manslaughter, but he chose to go to trial, was found guilty and was sentenced to 20 years to life. His four co-defendants each accepted a plea offer for involuntary manslaughter and were sentenced to probation.

to 22 times longer than sentences received by thousands of defendants who pled guilty. Like felony defendants, only a fraction of misdemeanor defendants who opted for a trial received sentences on average that were shorter than the sentences imposed on defendants charged under the same penal code subsections who entered guilty pleas. The findings described in this section are statistically significant.

DATA COLLECTION EFFORTS AND DATA ANALYSIS METHODOLOGY

Public records data requests and responses

In June 2023, the Task Force sent California Public Records Act requests to District Attorney offices and to Public Defender and other institutional defender offices in each of the 58 counties in California. The Task Force also sent records requests pursuant to the California Rules of Court, Rule 10.500 to the Superior Courts in all 58 California counties. Each request sought records from 2013 to 2023 containing the following information:

> For each crime for which data is available, any data, including aggregated data, showing the sentences for convictions upon guilty or "no contest" pleas, as compared to, or in addition to, data showing sentences upon conviction after trial for that same crime.

Many of public records request recipients indicated that they were not providing records in response to the Task Force's request for one of several common reasons:

- they did not have any responsive records;
- their record systems were not configured to make it possible for them to generate responsive records;
- they could not generate the requested records without significant expense to the Task Force; or
- the records requested are exempt from disclosure by the applicable public records provisions.

In addition, a number of Public Defenders responded that they were not permitted to provide responsive data due to client confidentiality restrictions.

A number of respondents provided data that did not contain sufficient information to conduct any sort of trial penalty analysis for a range of reasons, and the Task Force excluded those datasets from its analysis. Among the reasons that the Task Force excluded datasets from its analysis were:

- the datasets did not identify the penal code or contain a narrative description of the crime charged;
- the datasets did not distinguish between cases that were tried versus those in which guilty pleas or nolo contendere pleas were entered;
- the datasets did not include the sentence lengths; or
- the datasets only included aggregate sentences and did not distinguish the sentences imposed upon individual counts.

Dwayne Frampton

Dwayne Frampton was at home, drinking with friends when a shooting took place. Having heard the gunshots, Frampton and his friends drove by the scene and asked questions about what had happened. An eyewitness identified Frampton by photograph as the shooter, and Frampton was charged with first degree murder. Frampton was 5-foot, 3-inches and 125 pounds. The eyewitness described the shooter as a 5-foot, 11-inch tall, 230 pound man. Although Frampton matched certain other aspects of the police composite sketch, the eyewitness told the artist and the investigating detective that the sketch was inaccurate. Frampton had been arrested previously but had never been convicted of anything.

The prosecutor initially offered to drop the charge to manslaughter and offered a sentence of 6 years imprisonment. Because he insisted that he was innocent, Frampton rejected the offer and took the case to trial. When Frampton attempted to call 3 of his friends as defense witnesses to corroborate his alibi, Judge William Pounders, who oversaw the case in Los Angeles County Superior Court, criticized Frampton's counsel for not disclosing the witnesses sooner. Ultimately, only one of them testified.

The jury initially returned as a hung jury. Instead of allowing counsel to reargue the entire case, Judge Pounders merely permitted the defense to present argument on a specific question that the jury had raised. The jury returned a second time with a guilty verdict, and the judge sentenced Frampton to 50 years to life.

After Frampton was sentenced, the eyewitness contacted Frampton's counsel and admitted that the detective on the case and her mother had both convinced her to identify Frampton as the shooter because he was a bad guy and this was the only way to get him off the street.

Because he chose to contest his innocence at trial, Frampton is serving a sentence more than 8 times longer than what he was offered if he had agreed to plead guilty.

Usable data sets

However, a significant subset of data the Task Force received contained sufficient information to assess whether or not a trial penalty existed. The Task Force focused on datasets that identified each of the following types of specific case information: (1) the California Penal Code charge number for each count charged; (2) disposition information for each count charged, including whether the charge resulted in a guilty plea, a nolo contendere plea, a trial verdict, or some other disposition; and (3) the individual sentence imposed for each charged count. Datasets that included all of the above information were deemed to contain "usable data" because they permitted at least one type of data analysis relevant to the potential existence of a trial penalty.

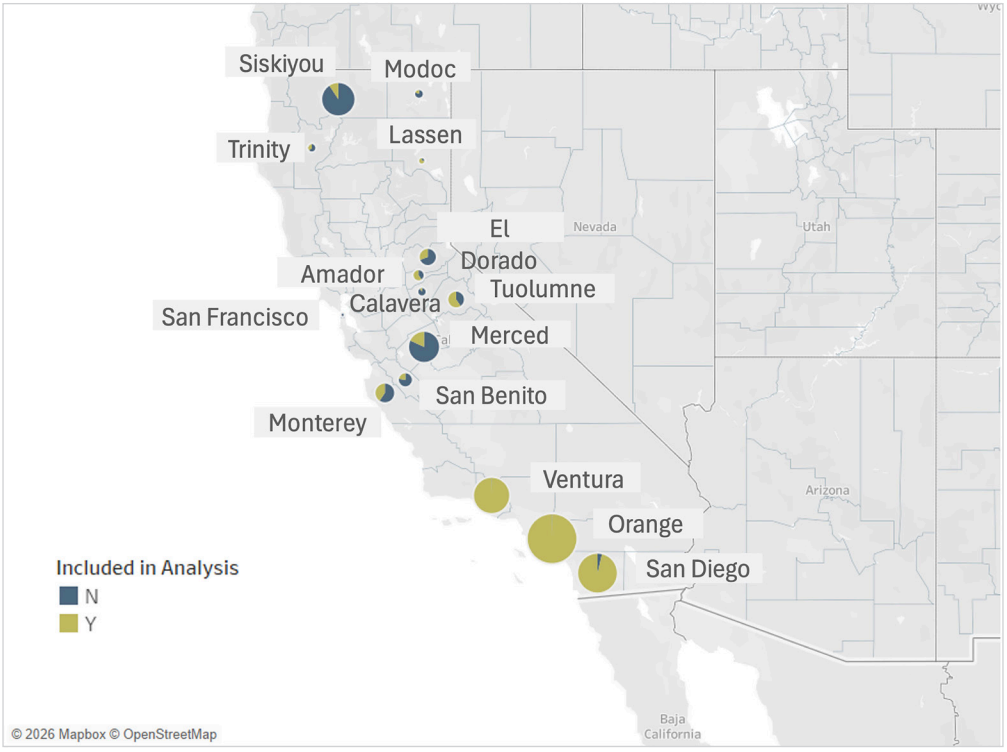
The Task Force received usable data from five Superior Courts of California: Amador County, El Dorado County, Orange County, Trinity County, and Ventura County. The datasets from these five Superior Courts contained a combined total of 716,358 records. Similarly, the Task Force received usable data from District Attorney's offices in ten counties: Calaveras County, Lassen County, Merced County, Modoc County, Monterey County, San Benito County, San Diego County, Siskiyou County, Trinity County, and Tuolumne County. The datasets from these ten District Attorney offices contained a total of 802,054 records. Overall, the datasets from the five Superior Courts and ten District Attorney offices contained 1,518,412 records from 14 different counties between January 2013 and August 2023, although not every county produced data for the entire ten-year period.

The chart below shows the 14 jurisdictions that provided usable data from Superior Courts and District Attorneys that the Task Force subsequently analyzed, and the number of records contained in the datasets from each provider.

County	Date Range		Number of Records		Records Source	
					Superior Court	District Attorney
Amador	1/13 to 6/23		18,311		X	
Calaveras	2/21 to 7/23		9,698			X
El Dorado	1/13 to 6/23		44,041		X	
Lassen	11/13 to 12/23		3,072			X
Merced	1/15 to 12/22		163,479			X
Modoc	9/15 to 7/23		10,496			X
Monterey	6/18 to 5/23		62,847			X
Orange	1/13 to 6/23		428,980		X	
San Benito	9/16 to 11/22		30,269			X
San Diego	1/13 to 6/23		270,859			X
Siskiyou	1/09 to 8/23		188,624			X
Trinity	1/13 to 5/23	1/13 to 7/23	1,285	6,963	X	X
Tuolumne	1/15 to 6/23		55,747			X
Ventura	1/18 to 8/23		223,741		X	
Total			**1,518,412**			

The following map shows the wide geographic range of the 15 sets of data from the 14 counties listed above that contained sufficient data to perform at least one analysis.

14 Counties with Sufficient Data for at Least One Analysis



The data files provided by different counties were considerably diverse. Each one has its own unique mix of columns, data values, and range of records. Generally, the Task Force isolated the records to felony and misdemeanor cases that are associated with the guilty plea, nolo contendere plea,[57] and trial disposition types based on keyword searches in the Disposition Type column.[58] In cases where duplicate records are prevalent, redundancies were removed, and each unique entry was included only once.

Finally, the Task Force received data from the San Francisco Public Defender's Office consisting of 64 felony and 158 misdemeanor cases from 2015 in which the Office documented some information related to plea offers made to clients that had been rejected in cases that later went to trial.

PREVALENCE OF GUILTY PLEAS VERSUS TRIALS

On aggregate, across thirteen counties[59] for which the Task Force received usable data, 97.4% of felony cases resulted in a guilty plea and 2.6% proceeded to trial. Focusing on the data from the individual counties, the percentage of guilty pleas in felony cases ranged from 94.9% in Trinity County on the low end to 98.4% in Amador and Calaveras counties on the high end.

For misdemeanors, on aggregate, 99.2% of defendants entered guilty pleas compared to .8% of misdemeanor defendants who went to trial. On an individual county basis, 98% of cases were resolved in Modoc County by guilty pleas on the low end, and 99.6% of misdemeanor cases were resolved by guilty pleas in San Benito County on the high end.

The following chart shows the percentage of felony and misdemeanor guilty plea cases versus trial cases by county.

			(1) Felony				(2) Misdemeanor			
#	County	Date Range	# of Records	# of Cases	Guilty/ Nolo Plea	%	# of Records	# of Cases	Guilty/ Nolo Plea	%
1	Amador	1/2/2013 ~ 6/28/2023	4,218	2,323	2,286	98.4%	6,550	3,816	3,787	99.2%
2	Calaveras	2/23/2021 ~ 6/13/2023	321	250	246	98.4%	568	497	494	99.4%
3	El Dorado	10/18/2021 ~ 6/29/2023	4,036	761	736	96.7%	9,593	2,011	1,991	99.0%
4	Lassen	11/18/2013 ~ 12/12/2023								
5	Merced	1/2/2015 ~ 12/30/2022	10,822	8,247	8,095	98.2%	18,854	15,827	15,701	99.2%
6	Modoc	9/28/2015 ~ 5/31/2023	607	502	478	95.2%	1,358	1,136	1,113	98.0%
7	Monterey	6/7/2018 ~ 7/5/2023								
8	Orange	1/2/2013 ~ 6/30/2023	105,432	105,432	103,388	98.1%	322,108	322,108	320,346	99.5%
9	San Benito	9/12/2016 ~ 11/9/2023	1,166	988	970	98.2%	5,678	4,560	4,540	99.6%
10	San Diego	1/2/2013 ~ 6/29/2023	92,810	92,810	90,816	97.9%	163,225	163,225	162,054	99.3%
11	Siskiyou	7/15/2009 ~ 8/23/2023	5,769	5,769	5,649	97.9%	8,888	8,888	8,812	99.1%
12	Trinity County	1/2/2013 ~ 4/4/2023	467	467	443	94.9%	578	578	574	99.3%
13	Ventura	1/2/2018 ~ 8/31/2023	35,450	8,625	8,383	97.2%	174,576	48,740	48,280	99.1%
						97.4%				**99.2%**
						(Avg)				*(Avg)*

PENAL CODE ANALYSIS

Another way to understand how pervasive guilty pleas were in the data analyzed by the Task Force is to sort the data by analyzing sentences separately for specific criminal offenses. To do this, the Task Force isolated individual California Penal Code subsections contained in the datasets. Data from nine counties contained penal code information—specifically, the datasets identified a total of 3,324 penal code subsections. Of that total, 2,710 penal codes subsections, or fully 81.5% of the penal code subsections in the aggregate data, were associated exclusively with guilty pleas; this means that there was not a single trial associated with more than four-fifths of the subsections representing charges in the datasets. In contrast, only 120 penal code subsections, or 3.6%, were associated exclusively with trials. The remaining 14.5% of the subsections (483), or merely one in seven, had cases associated both with guilty pleas and trials.

			# of Penal Codes[60]			
#	County	# of Penal Codes	Guilty/Nolo Plea Only	Trial only	Both	Life Sentence
1	Amador	132	120	5	7	
2	Calaveras	153	139	10	4	
3	El Dorado	288	244	7	37	PC187(a) - Murder
4	Lassen	293	254	9	30	
5	Modoc	181	152	8	21	
6	Monterey	857	692	34	131	
7	San Benito	280	255	6	19	
8	Siskiyou	360	320	3	26	11
9	Ventura	780	534	38	208	
	Total	*3,324*	*2,710*	*120*	*483*	*11*
	Total as a Percentage		*81.5%*	*3.6%*	*14.5%*	*0.3%*

1. Probability of Misdemeanor Versus Felony Conviction

For each penal code subsection associated with both guilty pleas and trials, the Task Force calculated the percentage of cases where defendants opted to enter a guilty plea and received a misdemeanor conviction rather than a felony conviction. Similarly, the Task Force calculated the number of cases where the defendant went to trial and was convicted of a misdemeanor rather than a felony. Among cases involving the same Penal Code, overall, over 77% of defendants who opted to enter a guilty plea received a misdemeanor conviction, compared to only 53% of those who opted for a trial. This suggests a higher likelihood of a misdemeanor conviction for individuals who chose to plead guilty, compared to individuals who chose to go to trial.

				# of Records – Guilty/Nolo Plea			# of Records – Trial		
#	County	# of Penal Codes	# of Records	Felony (p1)	Misdemeanor (p2)	% Misdemeanor p2/(p1+p2)	Felony (t1)	Misdemeanor (t2)	% Misdemeanor t2/(t1+t2)
1	Amador	7	182	36	135	78.9%	8	3	27.3%
2	Calaveras	4	44	19	21	52.5%	3	1	25.0%
3	El Dorado	37	1,029	414	518	55.6%	76	21	21.6%
4	Lassen	30	1,478	*(No charge type data to support this comparison)*					
5	Modoc	21	441	109	296	73.1%	14	22	61.1%
6	Monterey	131	18,695	*(No charge type data to support this comparison)*					
7	San Benito	19	519	152	342	69.2%	13	12	48.0%
8	Siskiyou	26	1,344	952	341	26.4%	43	8	15.7%
9	Ventura	208	62,104	12,571	48,123	79.3%	615	795	56.4%
		483		*14,253*	*49,776*	*77.7%*	*772*	*862*	*52.8%*

2. Methodology for Identifying a Trial Penalty Using Sentencing Comparisons by Penal Code

A significant subset of the data received by the Task Force allowed for an apples-to-apples comparison of the average sentences received by defendants charged under specific individual subsections of the California Penal Code. This means that the Task Force was able to calculate the average sentences received by defendants who pled guilty under specific penal code subsections and compare those average sentences to the average sentences received by defendants who went to trial and were convicted of the identical subsections. More specifically, the data made it possible to calculate an average sentence ratio for specific penal code subsections. An average sentence ratio equal to 1 indicates that the average sentence for individuals who went to trial and were convicted pursuant to a specific subsection was the same as the average sentence for individuals who pled guilty. An average sentence ratio of greater than 1 for a specific penal code subsection means that individuals convicted at trial on average received longer sentences than individuals charged pursuant to the same subsection who entered a guilty plea. Therefore, an average sentence ratio greater than 1 represented a trial penalty. An average sentence ratio less than 1 means that individuals who went to trial on average received shorter sentences than individuals charged pursuant to the same penal code subsection who entered guilty pleas. In other words, an average sentence ratio less than 1 reflected a trial sentencing benefit.

3. Statistical Analyses of Sentencing Duration Across Seven Counties

The datasets from seven counties contained sufficient information—including penal code subsection information for each count charged, whether the disposition for each charged count was via guilty plea or trial, and the sentence imposed for each charged count—to compare the sentence lengths for defendants charged under identical subsections that were associated with both guilty pleas and trials. Using that data, the Task Force was able to calculate the average sentence duration for cases resulting in guilty pleas and cases that went to trial. The Task Force then calculated the ratio of sentence durations across the two scenarios: guilty pleas and trial cases.

For felony cases across the seven counties, the average sentence duration for a significant majority of trials ranged between 1 to 3 times longer than the average sentence duration for guilty pleas. These average sentencing calculations were derived from a large and statistically significant number of cases. There were 100 different penal code subsections in the aggregate datasets analyzed by the Task Force which exhibited a trial penalty, meaning the average sentence for trial cases was longer than the average sentence for plea cases. There were a total of 14,084 felony plea cases among those 100 code subsections and a total of 688 felony trial cases.[61]

In one county, Amador County, the average sentence duration was the same for felony guilty pleas as for trials. In the six other counties, the average sentence duration ranged from 2 times to 3.3 times longer in felony cases in which individuals chose to go to trial, compared to the sentence duration for individuals who entered guilty pleas.

For misdemeanor cases, the average sentence duration for trials ranged from 0.8 times the duration for guilty or nolo contendere pleas to 22 times longer for trial cases versus guilty plea or nolo contendere cases. For misdemeanors, there were 68 penal codes that exhibited a trial penalty, representing a total of 49,800 guilty plea cases and 775 trial cases.[62]

Ratio of Avg Sentence Duration: Trial vs. Guilty/Nolo Deal

			Felony		Misdemeanor	
#	County	# of Penal Codes	Range	Average	Range	Average
1	Amador	7	0.5 ~ 1.3	1	0.8 ~ 7.6	3.5
2	Calaveras	4	0.9 ~ 3.1	2.3	16.9 ~ 16.9	16.9
3	El Dorado	37	0.3 ~ 34.3	3.3	0.1 ~ 10	3.2
4	Lassen	30	*(No charge type data to support this comparison)*			
5	Modoc	21	0.7 ~ 14.2	3.3	0.1 ~ 83.3	9.3
6	Monterey	131	*(No charge type data to support this comparison)*			
7	San Benito	19	0.2 ~ 8.1	2.5	0.1 ~ 1.6	0.8
8	Siskiyou	26	1.2 ~ 4	2.2	0.2 ~ 71	22
9	Ventura	208	0 ~ 16.7	2	0 ~ 27.4	2.5

4. Sentencing Comparison Snapshots by Discrete California Penal Code Subsections

The datasets the Task Force analyzed provide a rich array of possibilities for examining the existence of a trial penalty using specific penal code subsections.

The dataset for the combined seven counties (Amador, Calaveras, El Dorado, Modoc, San Benito, Siskiyou, and Ventura) contained a total of 1,062 distinct California Penal Code subsections. Of those, there were 150 code subsections for which there was at least one felony trial case and at least one felony plea case. Of those 150 felony penal code subsections, 100 of them exhibited a trial penalty (a sentencing ratio greater than 1, meaning the average trial sentence exceeded the average plea sentence). Five subsections reflected no disparity between the sentence length for felony cases that went to trial versus the sentencing length for cases that resulted in a guilty plea (a sentencing ratio of 1). In the remaining 45 felony penal code subsections, a trial benefit was reflected in the data (a sentencing ratio of less than 1).

Similarly, the dataset contained 111 misdemeanor penal code subsections for which there was at least one trial and at least one guilty plea. Of those 111 code subsections, 68 penal codes exhibited a trial penalty (sentencing ratio greater than 1). Four penal code subsections reflected no disparity between the sentence length for cases that went to trial compared to the sentencing length for guilty plea cases (a sentencing ratio of 1). In the remaining 39 penal code subsections, there was a trial sentencing benefit, meaning the average sentence length in the trial cases was less than the average sentence length in cases in which individuals entered guilty pleas (a sentencing ratio of less than 1).

a) Analysis of Penal Code Subsections by Felony Trials

The Task Force sorted the data to determine which felony offenses had the highest number of cases that went to trial in order to take a snapshot of the trial versus plea sentencing differential in these common cases. The penal code subsections with the most trials were: Lewd Act Upon a Child (§ 288(A)); Attempted Murder (§ 187(A)); 2nd Degree Robbery (§ 211); Burglary (§ 459); and Domestic Violence — Injury (§ 273.5(A)). We then analyzed the sentencing differential for these five offenses and learned that defendants experienced a trial penalty for 4 out of the 5. The trial penalty associated with those four penal code subsections ranged from 1.5 to 3.6 times the average sentences in trial cases compared to guilty plea cases. For one of the offenses, 2nd Degree Robbery, the average sentence for guilty pleas was longer than the average sentences in the trial cases. This data is displayed in greater detail in the table below:

Penal Code	Penal Code Description	# of Trial Cases	Avg. Sentence Trial Cases (days)	# of Guilty/ Nolo Cases	Avg. Sentence Guilty/Nolo Cases (days)	Ratio
288(A)	Lewd Act Upon Child	112	5480	197	1541	3.6
664/187	Attempted Murder	37	14,089	30	9220	1.5
211	2nd Degree Robbery	37	2089	414	3163	0.7
459	Burglary	32	1167	1525	605	1.9
273.5(A)	Domestic Violence — Injury	30	1343	688	644	2.1

b) Analysis of Penal Code Subsections by Number of Misdemeanor Trials

The Task Force then conducted the same analysis in misdemeanor cases by identifying the misdemeanor offenses that had the most cases go to trial. These were: DUI (§ 23152(a)); Driving with a .08 blood alcohol content (§ 23152(b)); Petty Theft (§ 484(a)); Resisting/Obstructing (§ 148(a)(1)); and DUI Drugs & Alcohol (§ 23152(f)). Again, of the five misdemeanor offenses with the most trials, four of them showed a trial penalty. For one of the five offenses, the average sentences were longer for the guilty pleas when compared to the trials, reflecting a trial benefit.

Penal Code	Penal Code Description	# of Trial Cases	Avg. Sentence Trial Cases (days)	# of Guilty/ Nolo Cases	Avg. Sentence Guilty/Nolo Cases (days)	Ratio
23152(a)	DUI	153	49	4394	20	2.4
23152(b)	Driving with .08 BAC	125	40	12,811	21	1.9
484(a)	Petty Theft	53	380	2834	43	8.9
148(a)(1)	Resisting/Obstructing	47	144	3438	59	2.4
23152(f)	DUI drugs & alcohol	37	26	1143	33	0.8

A young man with no prior offenses was charged in Santa Clara County with performing lewd acts with a minor and faced a potential life sentence. The prosecutor made an initial offer of 8 years, but the defendant rejected it, vigorously denying the allegations. After the preliminary hearing, but before trial, the defendant attempted to get the 8-year offer back. No new evidence had been found at the preliminary hearing. But the prosecutor said he would only settle at 18-20 years.

During a conference with the judge, defense counsel argued that 8 years would be reasonable, the judge suggested 10 and the probation officer suggested splitting the difference at 14. The prosecutor eventually reduced the offer to 12 years. The judge commented that 12 years was more reasonable than 18-20. Finding himself otherwise facing a life sentence if he went to trial, the defendant accepted 12 years, 50% higher than the original offer.

c) Analysis of Penal Code Subsections by Largest Trial Penalty — Felonies

The five felony penal code subsections that resulted in the greatest sentencing disparity each produced sentences more than six times longer for felony trial cases when compared to felony guilty plea cases. The chart below shows the most severe trial penalty in the datasets in felony cases:

Penal Code	Penal Code Description	# of Trial Cases	Avg. Sentence Trial Cases (days)	# of Guilty/ Nolo Cases	Avg. Sentence Guilty/Nolo Cases (days)	Ratio
11366	Maintaining Place for Drug Distribution	5	2091	12	269	7.8
311.4(c)	Using Minor for Sex Acts	1	9125	13	1175	7.8
137.1(b)(1)	Dissuading Witness from Testifying	3	3528	33	471	7.5
30605(a)	Possession of Assault Weapon	1	2190	51	317	6.9
22810(g)(1)	Use of Tear Gas	1	1460	15	237	6.2

d) Analysis of Penal Codes Subsections by Largest Trial Penalty — Misdemeanors

The five misdemeanor penal code subsections that resulted in the greatest sentencing disparity each produced sentences more than 13 times longer for misdemeanor trials cases when compared to misdemeanor guilty plea cases. The Task Force notes that the data may be somewhat skewed by the relatively low number of tried cases. However, these cases indicate the extreme risk that defendants face if they exercise their constitutional right to trial. The chart below shows the most severe trial penalty in the datasets in misdemeanor cases:

Penal Code	Penal Code Description	# of Trial Cases	Avg. Sentence Trial Cases (days)	# of Guilty/ Nolo Cases	Avg. Sentence Guilty/Nolo Cases (days)	Ratio
1203.2	Arrest While on Probation	4	250	1	3	83.3
4326(a)	Violation of a Posted Order	1	200	13	7	27.4
22210	Possession of Blackjack	2	638	183	41	15.5
25850(a)	Carrying Loaded Firearm in Vehicle	2	638	95	43	14.9
H&S 11634(a)	Possession Controlled Paraphernalia	19	456	2174	33	13.9

Stephen Maffy

The defendant who was charged with oral copulation and digital penetration of an intoxicated, unconscious person received a plea offer to a sexual battery charge and a non-sexual felony. The plea offer contemplated 3 years felony probation and a 10-year registration requirement (i.e., no jail time). Defense counsel made one counter-offer to simple battery, which the prosecutor immediately rejected.

The defendant went to trial. The jury deliberated for seven days. After three holdout jurors finally changed their votes to guilty, the defendant was convicted. He received the maximum sentences on the charges, which ran consecutively. After rejecting a sentence involving no jail time before trial, the defendant received 12 years in prison and is subject to lifetime registration requirement.

e) Life Sentence Probability Comparison[63]

Two of the datasets contained information that allowed the Task Force to calculate the likelihood of an individual receiving a life sentence if they chose to enter a guilty plea compared to their likelihood of receiving a life sentence for the same penal code subsection if they went to trial. In El Dorado County, there were nine cases in which defendants were charged with murder pursuant to California Penal Code § 187(a). Four of the individuals entered guilty pleas and none of those four defendants received a life sentence. In contrast, five defendants in El Dorado County were convicted at trial of murder under § 187(a) and two of the defendants, 40% of those convicted at trial, received life without parole sentences.

In Siskiyou County, there were 11 penal codes that resulted in life sentences in cases associated both with guilty pleas on the one hand and convictions at trial on the other hand. In five of 124 cases (or four percent) in which individuals facing life sentences entered guilty pleas, the defendants received life sentences.

In contrast, eight of the nine Siskiyou County defendants facing life sentences who went to trial received life sentences, constituting 89% of those defendants.

In the Siskiyou County data, 14 defendants were charged with murder pursuant to § 187(a). Ten of those defendants pled guilty but only three received life sentences. In contrast, three out of the four defendants charged with murder pursuant to § 187(a) who were convicted at trial received a life sentence.[64]

% of Cases Defendant Sent Life Sentence						
County	**Charge Type**	**# of Penal Codes**	**Guilty/ Nolo Plea**	**Trial**	**Admitted**	**Note**
El Dorado	(1) Felony	1	0 of 4 (0%)	2 of 5 (40%)	N/A	
Siskiyou	(1) Felony	11	5 of 124 (4%)	8 of 9 (89%)	1 of 3 (33%)	*In the Siskiyou data, there are 11 penal codes associated with a life sentence. Our analysis shows that defendants who pled guilty or nolo contendere have a smaller chance of receiving a life sentence.*

Capital Murder Defendant

A 19-year old man was charged in Alameda County with abduction, robbery and murder along with two accomplices after a robbery resulted in the killing of another man.

Although the defendant was originally charged with capital murder, the prosecutor removed the death penalty request after the preliminary hearing, but still charged a special circumstance that meant the defendant would not have an opportunity for parole.

The prosecutor offered a plea deal of 50 years to life. Under 26 years old at the time, the defendant qualified as a youthful offender under California's Youthful Offender Law, which meant that he would be eligible for parole after 25 years under the terms of the plea offer. However, facing at least 25 years in prison (when he was not yet 25 years old himself), the defendant rejected the plea offer and exercised his right to trial.

The defendant was convicted and sentenced as a matter of law to life in prison without the possibility of parole. At sentencing, the prosecutor emphasized that the defendant had rejected a plea deal.

The sentencing judge acknowledged that he had sympathy for the man's situation and believed the man to be remorseful. The judge said during the sentencing hearing that, "I know my hands are tied. Once the law says I got to do something, I'm going to do it. ... And I just wish I didn't have to do this to this young man at this time, but that's what I have to do. ... And I just – I'm just, as I say, it pains me, but this is what I have to do. And you know, I wish there was another way, but the law doesn't allow me to do it another way. I have to do what's right under the law right now because, now, this is the only choice I get. Before, I had choices. I don't have that any further."

The first co-defendant agreed to six years and eight months in prison and the second co-defendant was never found.

2015 SAN FRANCISCO OFFICE OF THE PUBLIC DEFENDER PLEA OFFER AND TRIAL DATA ANALYSIS

In 2015, the San Francisco Public Defender's Office ("SF OPD") tracked the plea offers, verdicts, and sentences for its clients who announced to the court and prosecutors that they wanted to go to trial. Specifically, the SF OPD kept data in 2015 for 222 felony and misdemeanor clients who rejected the State's plea offers and chose to go to trial.

FELONY TRIAL DATA ANALYSIS

The following chart shows the outcome of 64 felony cases[65] for SF OPD that went to trial in 2015.

Dismissal	Hung Jury	Mistrial	Not Guilty[66]	Mixed Verdict[67]	Guilty
1 (1.5%)	6 (9.3%)	2 (3.1%)	11 (17.1%)	31 (48.4%)	13 (20.3%)

Eleven of the 64 felony cases in 2015 (nearly 17%) ended with not guilty verdicts on the sole count or with not guilty verdicts on all counts for the SF OPD clients. An additional nine cases—over 13%—ended with a hung jury, some other form of mistrial, or the dismissal of the charges. This means that nearly one-third of all felony cases in which SF OPD clients elected to go to trial in 2015 resulted in a hung jury, mistrial, or a not guilty verdict on the sole or all counts (including one dismissal after the defendant announced ready for trial).

Forty-four felony cases handled by SF OPD lawyers in 2015—over 68% of the 64 trial cases—resulted in guilty verdicts on at least one count. Thirty-one of those 64 cases—over 48% of the total cases or the equivalent of 70% of the guilty verdict cases—involved a mixed verdict (guilty on one or more counts and not guilty on others, including some cases with guilty verdicts only for misdemeanor offenses). Only 13 cases—just over 20% of the 64 total cases and about one-quarter of the guilty verdict cases—ended with a guilty verdict on the sole charge or on all counts.

Turning to the sentences imposed by judges in the 44 cases that ended with guilty verdicts on at least one count, eight cases resulted in a trial penalty. For purposes of this analysis, a trial penalty means that the defendants were convicted of at least one felony offense and were sentenced to longer terms of actual incarceration than the maximum sentences the defendants faced if they accepted the plea offer. Those eight cases are further described below. Before analyzing the trial penalty in those eight cases, it is helpful to explain why no trial penalty conclusion can be reached in the remaining 36 cases using this methodology.

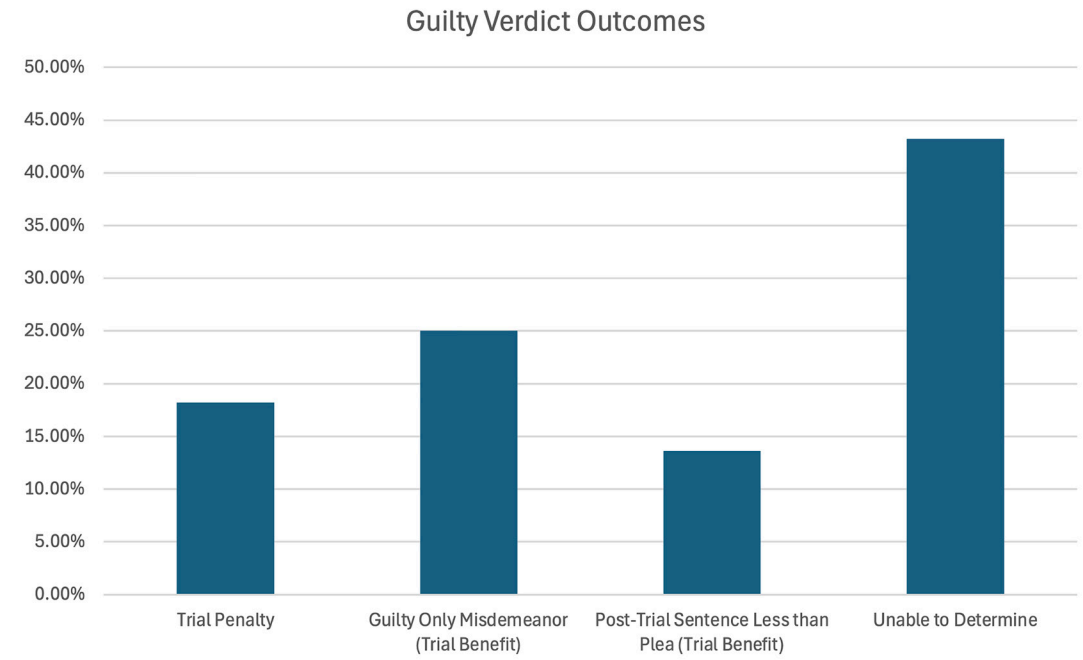
In some of the 36 cases, prosecutors did not make any plea offers. In other instances, prosecutors simply offered guilty pleas to specific counts or charges but did not offer any limitations on the length of the sentences or merely indicated that the State would request sentences to an undetermined number of years in state prison. In a handful of additional cases, the SF OPD did not record the sentences imposed by the courts after their clients were convicted at trial. Therefore, in the cases described in this paragraph, 19 felony cases in all, it is not possible to determine whether the SF OPD clients suffered a penalty by choosing to go to trial.

Moreover, in 11 of the 36 cases, the SF OPD clients were charged with felonies but found guilty only of misdemeanors. Finally, in six of the cases, the post-trial sentence was less than the plea offer. Therefore, rather than suffering a trial penalty, 17 SF OPD clients (just over a quarter of those who went to trial and nearly 40% of all defendants in the SF OPD dataset

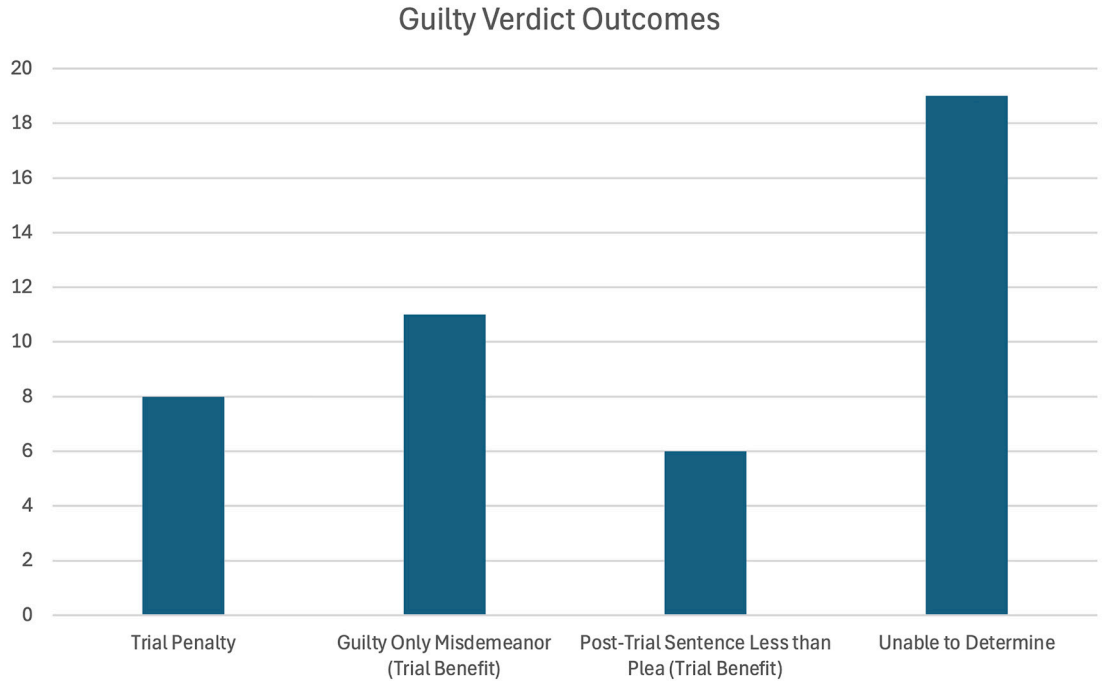
who were convicted of any offense) received a more favorable result (and a shorter sentence) in their cases by going to trial than they faced had they pled guilty. These defendants, therefore, experienced a trial benefit. The following chart shows the sentencing outcomes for these 44 SF OPD cases that went to trial in 2015:

Felony Trial Guilty Verdict Outcomes

BY PERCENTAGE:



BY NUMBER:



Felony Trial Penalty Cases

As noted above, a trial penalty occurred in eight SF OPD felony cases. The lead or most serious felony counts in these eight cases were: felony driving under the influence of alcohol or drugs; burglary; second degree burglary; first degree burglary; assault with a deadly weapon; oral copulation; assault with intent to commit felony (rape/sexual offense); and first degree murder.

The least severe trial penalty among the eight cases involved sentences that were 1.5 times greater than the plea offers, which occurred in two burglary cases. In one of those cases, the pretrial plea offer was to 16 months in state prison and the defendant, after being convicted at trial, was sentenced to two years in state prison. In the other case the defendant was offered 32 months in state prison if they pled guilty and instead received a sentence of four years in state prison after being convicted of second degree burglary.

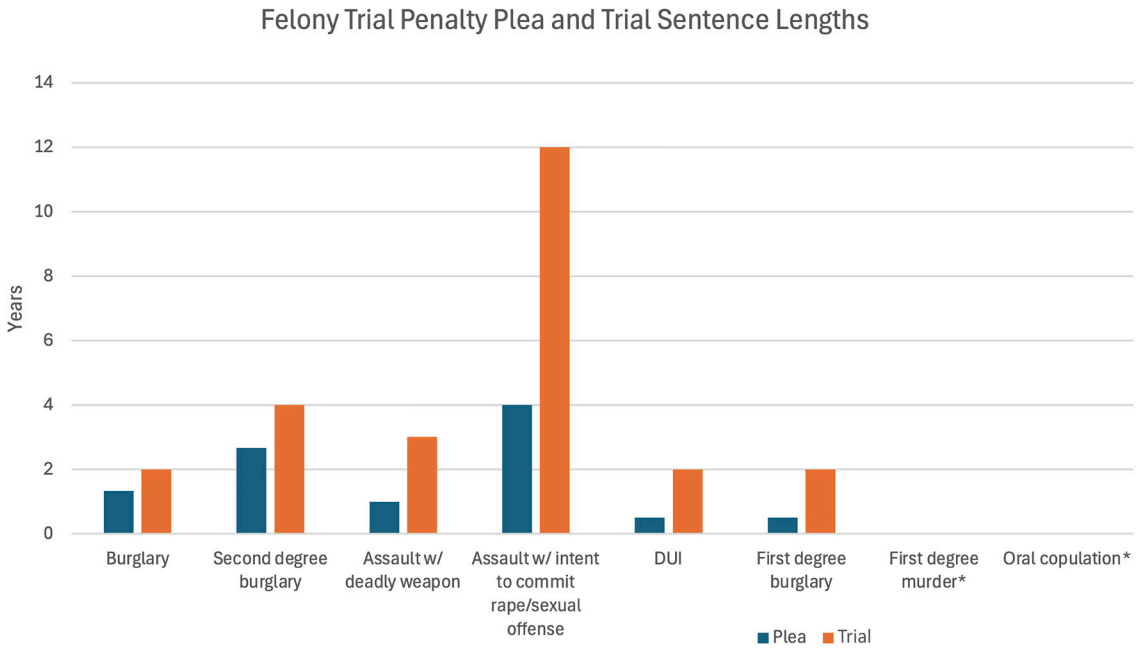
Two felony cases led to trial penalties that were three times longer than the pretrial guilty plea offers. In one of those cases, the defendant was offered a plea with a maximum sentence of one year in the county jail but was convicted at trial of assault with a deadly weapon, after rejecting the plea offer, and was sentenced to three years in state prison. The second defendant, convicted of assault with intent to commit rape/sexual offense, was sentenced to 12 years in prison after their trial after they rejected a plea offer with a maximum sentence of four years in prison.

In two cases, the courts imposed post-trial sentences that were four times the maximum jail time that the defendants faced if they accepted the pretrial plea offers. In one of those cases, the defendant was offered a plea with a maximum of 180 days in the county jail but, after rejecting the plea and being convicted of felony driving under the influence of drugs/alcohol, was sentenced to two years in state prison. Similarly, in the second case, a defendant charged with first degree burglary was offered a guilty plea to six months in the county jail but was sentenced, after trial, to two years in state prison.

The following chart depicts the six felony trial cases that demonstrated a trial penalty in the SF OPD data from 2015:

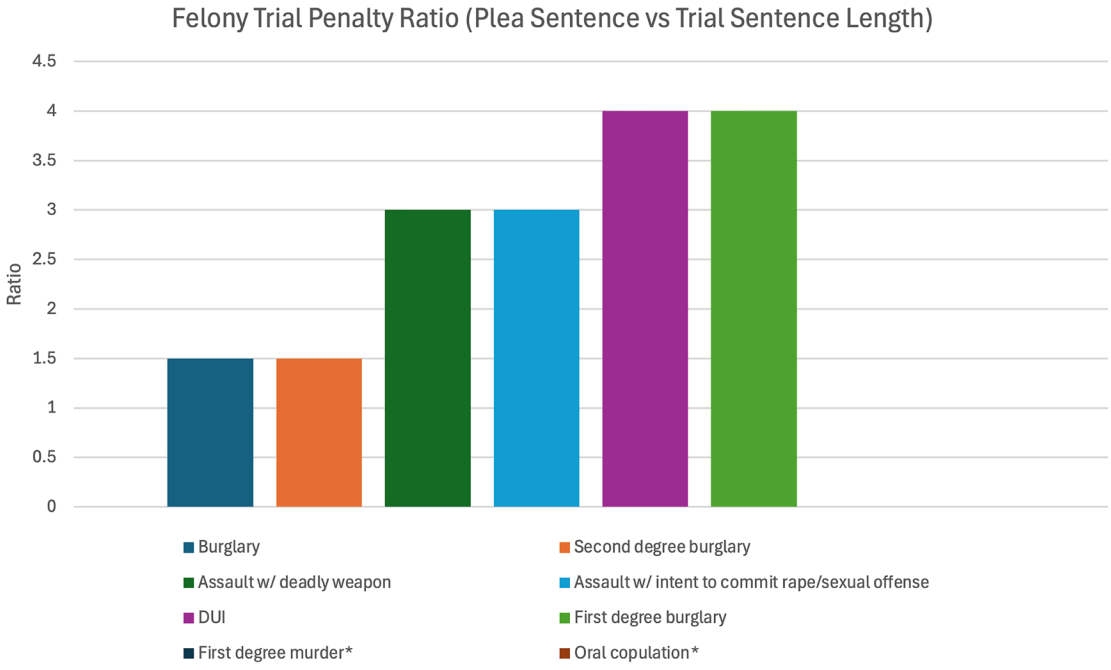
Felony Trial Penalty Outcomes

PLEA AND SENTENCE LENGTHS:



*This chart and the following chart exclude data for the two trial penalty cases that ended in a life sentence since it is difficult to quantify the life sentence in comparison with the other cases.

RATIO OF PLEA OFFER TO ULTIMATE SENTENCE LENGTH:



Finally, two defendants received life sentences after rejecting plea offers that exposed them only to a term of years in the state prison. In a first-degree murder case, the prosecutor offered a plea to voluntary manslaughter with a sentencing enhancement for use of a weapon, and to discharge of a weapon inside an occupied dwelling with an additional sentencing enhancement, with a base sentence of 24 years. (One of the enhancements may have constituted a strike prior, which would have the effect of doubling a felony sentence.) The defendant who rejected the plea offer

instead was convicted of first-degree murder and sentenced to life with the possibility of parole after serving at least 25 years in prison. Another defendant was offered a guilty plea to oral copulation with a minor with a maximum penalty of 12 years in prison and was convicted of all charges at trial and was sentenced to 25 years to life.

MISDEMEANOR TRIAL DATA ANALYSIS

The following chart shows the outcome of 158 misdemeanor cases tracked by the SF OPD in 2015 for their clients who rejected plea offers and indicated they wanted to go to trial.

Dismissal	Hung Jury	Mistrial	Not Guilty	Mixed Verdict	Guilty	Trial Penalty % Total Cases	Trial Penalty % Guilty Verdicts
5 (3.1%)	14 (8.8%)	10 (6.3%)	26 (16.4%)	55 (34.8%)	48 (30.3%)	15/158 (9.4%)	15/103 (14.5%)

Twenty-six of the SF OPD's 158 misdemeanor cases (16.4%) resulted in not guilty verdicts on the sole count or not guilty verdicts on all counts for their clients. Fourteen other cases (8.8%) ended with a hung jury, ten cases (6.3%) led to a mistrial, and five cases (3.1%) were dismissed by prosecutors after the defendants announced ready for trial. Overall, 55 of the total 2015 misdemeanor cases (34.8%) in which SF OPD clients rejected the plea offers and announced that they wanted to go to trial did not lead to any conviction.

In contrast, just over 65% of the total misdemeanor cases brought by prosecutors against SF OPD clients who elected a jury trial ended in a guilty finding of some sort. Specifically, 48 of 158 cases (30.3%) ended with guilty verdicts on all counts while an additional 55 cases (34.8%) resulted in a mixed verdict.

An examination of the sentences imposed on SF OPD clients convicted of misdemeanor offenses in the 103 cases with a guilty verdict on at least one count reveals that a trial penalty[68] occurred in 15 cases when the SF OPD clients rejected the plea offers, representing 9.4% of the 158 total cases. As a proportion of the cases that ended with a guilty verdict on at least one count, the 15 trial penalty cases constituted 14.5% of the 103 cases in that category.

MISDEMEANOR DUI TRIAL PENALTY CASES

The most common substantive crime among the 15 trial penalty cases involved DUI offenses. Nine of the 15 trial penalty cases were Driving Under the Influence charges in some form.[69]

In two of the DUI cases, prosecutors offered the defendants the opportunity to plead guilty to the lesser charge of reckless driving involving alcohol with no potential executed jail time, which is colloquially known as a "wet reckless" charge. After rejecting the plea offers, going to trial, and being convicted of DUI, these defendants received sentences that included 10 days in the county jail performing community service (known as "SWAP"[70]) and 30 days in the county jail with credit for one day time served, respectively.

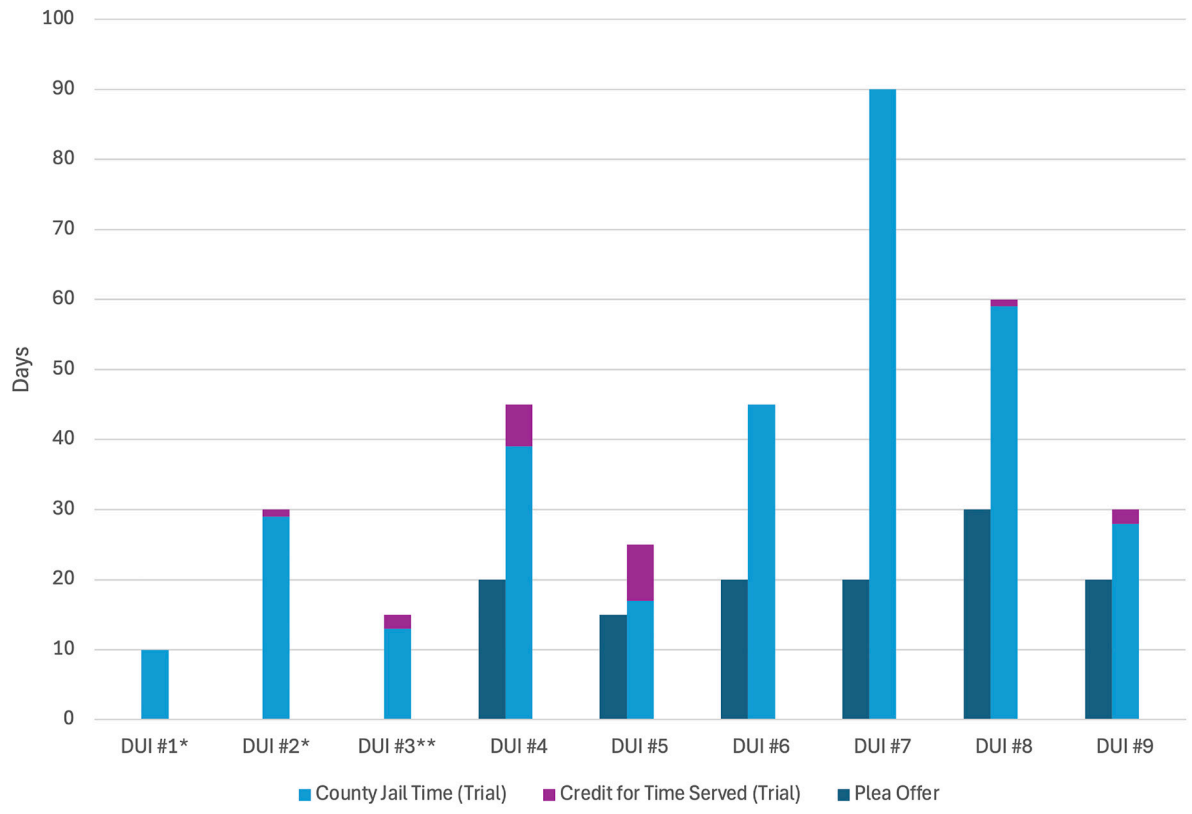
In two cases, the SF OPD clients received standard first DUI offers (which ordinarily guarantee no jail time) but in the second of the two cases the offer also included 20 days of SWAP community service. However, after rejecting the plea offers, the defendants received sentences, after being convicted at trial, that included 15 days in the county jail with two days credit for time served and 45 days in the county jail with credit for six days time served respectively.

One defendant in the SF OPD misdemeanor dataset was charged with DUI and received an offer to plead guilty to DUI with 15 days of SWAP. After being convicted of DUI at trial, the court sentenced the defendant to 25 days in the county jail with credit for eight days time served.

In two other DUI cases, the SF OPD clients were offered a guilty plea involving 20 days at the county jail performing community service (a SWAP offer). After rejecting the plea offer and going to trial, their sentences included 10 days in the county jail and 35 days of SWAP, for the first defendant, and 90 days performing SWAP while at the county jail for the second defendant. Another client received a pretrial plea offer involving 30 days of SWAP, but after rejecting the plea and going to trial, they received a sentence including 60 days in the county jail with one day credit for time served.

Finally, one of the misdemeanor DUI cases involved an SF OPD client who was offered a plea to a second DUI with a sentence of 20 days SWAP. But after trial and conviction for DUI, the court sentenced the defendant 30 days in the county jail with two days credit for time served.

The following chart depicts the nine misdemeanor DUI trial cases that demonstrated a trial penalty in the SF OPD data from 2015:



**Plea offer was a wet reckless charge*

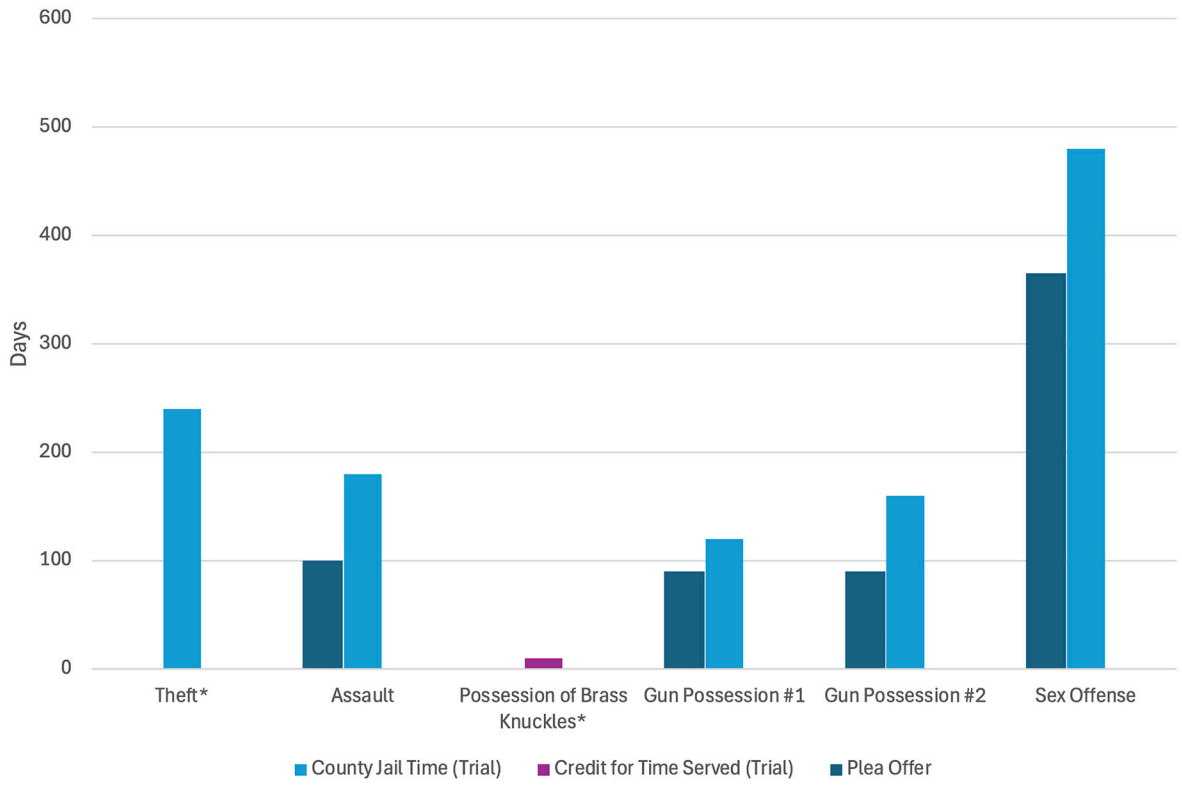
***Plea offer was a standard DUI offer with no jail time*

MISCELLANEOUS MISDEMEANOR TRIAL PENALTY CASES

The remaining six misdemeanor cases in which a trial penalty was imposed by courts at sentencing involved a range of other substantive offenses. In a theft case,[71] the defendant received a plea offer to theft with no jail but, after conviction at trial, the court imposed a sentence that included eight months in the county jail. In an assault case under a statute that specifically applies to victims who are in the transportation industry (bus, streetcar, taxi etc.),[72] after the defendant rejected a plea offer including 100 days in the county jail, they went to trial, were found guilty, and the court imposed a sentence that included 180 days in the county jail.

Three misdemeanor trial penalty cases involved weapons charges. The prosecutor offered a guilty plea in a case involving the possession of brass knuckles[73] with a deferred entry of judgment for a year (an offer contemplating no incarceration). When the defendant instead chose to go to trial, the court imposed a sentence of ten days in the county jail with credit for ten days time served. In two gun possession cases,[74] the pretrial offers were identical and included 90 days in the county jail. After the defendants rejected the plea offers and were convicted at trial, the courts sentenced them to 120 days and 160 days in the county jail respectively. Finally, in a sex offense case involving touching an intimate part of a person against their will,[75] the defendant rejected a plea offer to indecent exposure with a maximum sentence of one year in the county jail, was convicted of all of the charges, and received an eighteen-month sentence in the county jail by the trial court.

The following chart depicts the remaining six miscellaneous misdemeanor trial cases that demonstrated a trial penalty in the SF OPD data from 2015:



**Plea offer included no jail time*

CONCLUSION

The research, surveys, interviews, data collection, and analysis conducted by the Task Force confirm that a trial penalty exists in California criminal cases. Data shows that at the same time that the California crime rate has fallen over the past 45 years since 1980, the prison population has swelled. Concurrently, the number of criminal defendants entering guilty pleas to felony charges has skyrocketed and the proportion of felony cases resolved by guilty pleas has also risen. In contrast, the percentage of criminal defendants who have exercised their constitutional right to trial over the past 45 years has dropped from 12.4% in 1979/1980 to 2.2% in 2023/2024.

The Task Force's survey of over 700 California defense counsel, from 53 out of California's 58 counties, shows that criminal defense lawyers firmly believe that a trial penalty exists in California. Their view was explained in follow-up interviews with nearly two dozen survey respondents. The consensus expressed in the survey and interviews was that the trial penalty exists due to a variety of factors, including: (1) structural sentencing features (including mandatory minimum sentences, other sentencing enhancements, and California's Determinate Sentencing Law) that remove or limit judges' discretion in sentencing or create presumptions for specific sentencing ranges that are widely followed by judges; (2) plea practices by line-level district attorneys, specifically offering reduced sentences in exchange for guilty pleas and seeking enhanced sentences for defendants choosing to go to trial; (3) in some locations, apparent plea offer policies by elected District Attorneys or their supervisory assistants to seek enhanced sentences after trial compared with sentences sought after guilty pleas; (4) in some cases, the involvement by judges in plea negotiations and/or comments made by judges before sentencing indicating their sentences will be more severe for defendants if convicted after trial; and (5) sentencing practices by judges imposing lengthier sentences on defendants who exercise their constitutional right to trial compared to those who forego trials and enter guilty pleas. Defense counsel observed the trial penalty regardless of case type (in misdemeanor and felony cases and for less serious substantive offenses and the most serious crimes) and across a range of demographic factors (gender, race, ethnicity, citizenship/immigration status, and age). Defense counsel respondents were more definitive in their belief that a trial penalty existed in felony cases versus misdemeanors. And respondents had differing views on the role that their clients' demographic factors played with majority of respondents reporting judges do not impose trial penalty based on race, gender, ethnicity, or other constitutional classification. Indeed, a slim majority said those factors did not impact whether a penalty occurred.

Defense counsel broadly believed that the trial penalty had caused marked negative effects on their individual clients and on the criminal legal system in California. Those negative impacts included a confluence of factors creating a coercive environment that pressures their clients to forego constitutional rights to seek pretrial release, challenge evidence against them, exercise their right to trial, and/or appeal errors that occurred in their cases. The overwhelming majority of defense counsel survey and interview respondents stated that the trial penalty resulted in substantial increased penalties for the small portion of their clients who risked going to trial and who were convicted.

The Task Force received a much more limited response to its survey of prosecutors. Only 25 prosecutors from eight California counties responded to the survey. The small sample of prosecutors who responded to the survey nearly unanimously stated that their offices did not have any

> Defendant and his girlfriend, both adults and frequent drug users, traveled around together in a shared vehicle that they both used to pick each other up from different locations. There was a history of domestic violence, and the girlfriend eventually alleged that the defendant was forcing her to stay in the vehicle against her will. The Santa Barbara County prosecutor charged the defendant with kidnapping, but the defendant maintained that he was innocent and that the girlfriend had always been free to leave.
>
> The prosecutor made an initial pre-trial offer, and then, just before jury selection, the prosecutor reduced the offer to 7 years. The defendant remained steadfast in his innocence and went to trial.
>
> After being found guilty of all charges except one, the defendant was sentenced to 29 years, more than 4 times the sentence the prosecutor had offered just before trial.

formal plea offer policies regarding conditions on plea offers or that required changes to sentencing positions for defendants who reject plea offers. However, most responding prosecutors reported that subsequent plea offers made after initial plea offers are rejected are less favorable and they acknowledged requiring waiver of a range of rights as a condition of defendants accepting plea offers. About 40% of prosecutors agreed that a trial penalty existed in their counties in misdemeanor and felony cases. But in contrast to defense counsel, prosecutors generally attributed the trial penalty to mandatory sentencing requirements, discounted plea offers after constitutional or factual infirmities in their cases arose, or sentencing practices of judges. The overwhelming majority of prosecutors responded that their practice was to argue for the same sentence after trial as was offered in the last plea offer to defendants.

Despite the impressions of prosecutors as expressed in their responses to the Task Force's survey, the data obtained from multiple sources by the Task Force and analyzed starkly confirmed the existence of the trial penalty in rural, urban, and suburban areas of California. The first tranche of data the Task Force obtained came from a subset of California Superior Courts and District Attorneys' Offices, constituting hundreds of thousands of cases over about a ten-year period from 2013 to 2023. The courts or prosecutors in seven counties maintained data in a way that allowed the comparison of the actual sentences for defendants who pled guilty versus those who went to trial. Regardless of the severity of the charges—misdemeanor or felony; property, non-violent, or violent crime—a statistically significant trial penalty appeared in the data for the tens of thousands of defendants whose records were analyzed. The vast majority of those defendants chose to plead guilty and they received measurably shorter sentences in aggregate than their counterparts charged under the same California penal code who elected to go to trial. The trial penalty also existed in the much smaller set of defendants from two counties where an analysis could be conducted between the defendants facing life sentences due to the nature of their crimes.

The second tranche of data that the Task Force obtained came from the San Francisco Office of the Public Defender. In 2015, the SF OPD recorded the plea offers and sentences in misdemeanor and felony cases that went to trial that year. That data reflected significantly longer sentences for the defendants convicted after trial compared to the pretrial offers in both misdemeanor and felony cases.

The trial penalty that has been captured in this report has had profound impacts on the criminal justice system in California over the past 45 years. During that period, the criminal legal system in California has been transformed from one in which the possibility that a defendant would get their day in court at a trial to test the evidence against them was real. Today, that possibility has all but vanished. Community members—whose voices in their role as jurors either affirmed or rejected the arrest and prosecution decisions of police and prosecutors—have nearly been silenced. The Task Force believes that the reforms proposed below can begin to shift the tide in ways that will simultaneously strengthen and make more accountable California's criminal justice system.

PRINCIPLES AND FINDINGS

1. The "trial penalty"—when defendants face drastically harsher sentences for exercising their constitutional right to trial—undermines the very foundation of justice by having all but extinguished the right to trial as guaranteed by the Sixth Amendment to the U.S. Constitution.

2. This report, along with NACDL's groundbreaking reports analyzing the trial penalty in federal courts and in the New York State and Connecticut state courts, exposes the undeniable existence of a systemic injustice that coerces guilty pleas, deepens racial and economic disparities, and erodes public confidence in the criminal legal system. Therefore, addressing the trial penalty is essential to restoring fairness, transparency, and integrity to American justice.

3. This report establishes—through its surveys, anecdotes, and statistical analysis of a wealth of data—that the trial penalty is a pervasive and intimidating reality in California. Defendants face demonstrably longer, sometimes exponentially longer, sentences if they choose to exercise their constitutional right to challenge the accusations against them by going to trial. That risk has led to an overuse of and imbalance of power in the plea bargaining system, a marked drop in the number of jury trials, and a concentration of power in prosecutors. The consequences for the criminal justice system are significant, because the trial penalty prevents accountability by police and prosecutors through robust pretrial and trial challenges of the evidence in the cases brought by the police and pursued by prosecutors, resulting in over-policing and prosecution of cases that might never stand up to scrutiny without the trial penalty. Thousands of cases of wrongful convictions of the innocent across the country, including as many as a quarter of cases where innocent defendants have pled guilty to crimes they did not commit because of the threat of more severe penalties if they went to trial, is another pernicious consequence of the trial penalty. While we do not seek to eliminate plea bargaining, we do seek to eliminate its increasingly coercive nature.

4. The trial penalty promotes increased police and prosecutorial misconduct by shielding it from public view and judicial scrutiny.

5. The trial penalty punishes persons for exercising their constitutional rights, effectively nullifying the right to the American justice system's bedrock safeguards: the presumption of innocence, and the right to be convicted only by sufficient, lawfully obtained evidence meeting the legal standard of proof beyond a reasonable doubt.

6. The elimination of criminal trials erodes the oversight function of the jury, thereby muting the voice of lay people in the criminal legal system.

7. The elimination of criminal trials undermines public faith in the legitimacy and fairness of the criminal legal system.

POLICY RECOMMENDATIONS

RESTORE RESPECT FOR THE RIGHT TO TRIAL

1. Don't Allow Sentencing to Be Based on the Decision to Exercise the Right to Trial

Judges and prosecutors should be directed to respect the constitutional right to trial and, therefore, not consider the exercise of this right in recommending or imposing a criminal justice sentence except within specific, limited, and clearly articulated sentencing guidelines. Specifically, we recommend the following measures:

- Enact legislation prohibiting prosecutors from seeking, and judges from imposing, harsher sentences based on an individual's decision to exercise his or her right to trial or any other constitutional right.
- Amend the Code of Judicial Ethics to prohibit imposition of a greater sentence in retaliation based on an individual's decision to exercise his or her right to trial or any other constitutional right.
- Amend the Rules of Professional Conduct, Rule 3.8, to prohibit prosecutors from seeking a greater sentence or punishment based on an individual's decision to exercise his or her right to trial or any other constitutional right.
- Establish a rule that requires prosecutors to state, on the record, the bases for differences in sentencing recommendations made for individuals convicted pursuant to a guilty plea and those convicted in the same case pursuant to a jury verdict.

RESTORE RESPECT FOR THE PRESUMPTION OF INNOCENCE

2. Prohibit the Use, and Impact, of Pretrial Detention, or Conditions of Release, on an Individual's Right to Trial

Judges must consider the effect of pretrial detention, or conditions of release, on an individual's ability to exercise his or her right to trial. Pretrial restrictions on liberty may not be imposed if they are intended to undermine an individual's right to trial or if they have the effect of undermining the right to trial. This both ensures the right to trial and complies with the California Supreme Court's holdings in *Humphrey* and *Kowalczyk* that attainable bail is constitutionally required.[76]

RESTORE JUDICIAL INDEPENDENCE AND JUDICIAL DISCRETION TO FIT THE PUNISHMENT TO THE CRIME

3. Eliminate or Reform Mandatory Sentencing Schemes

Repeal mandatory minimum sentencing and sentencing enhancements that eliminate judicial discretion, including firearm, gang, and repeat-offender provisions, and ensure meaningful sentencing discretion statewide. Specific reforms should include:

- **Watson Murder Reform**: Establish a triad sentencing scheme (e.g., 10–20–life) for implied malice DUI murders to restore proportionality and judicial discretion.[77]
- **Repeal or Reform "Three Strikes" Sentencing or Limit its Scope**: The Three Strikes Law should be repealed in order to allow judges to impose punishment based on all relevant criteria. At a minimum, legislation should remove juvenile adjudications for offenses committed before age 18 and implied intent crimes, such as *Estes* robberies,[78] should not count as serious or violent felonies.
- **Eliminate Mandatory Probation Bars**: Repeal provisions, including *Penal Code* § 1203.066, that categorically bar probation. Restore judicial authority to impose alternatives to incarceration where appropriate.
- **Allow Judges to Consider and Remove Collateral Consequences**: Authorize judicial discretion to waive sex offender registration and other severe collateral penalties where appropriate.

4. Protect Judicial Independence and Require Proportionate Sentencing Directives

Judicial performance evaluations and assignments in criminal cases should not be based on "efficiency" in resolving cases. Specifically, evaluations and assignments in criminal cases should not be conditioned on "efficiency" metrics (including trial rates, evidentiary rulings, or speed of disposition).

5. Eliminate Barriers to Post-Conviction Innocence Claims for Individuals Who Pled Guilty as a Result of Coercive Plea Bargaining

6. Authorize Judicial "Second Looks" and Expand the Availability of Clemency and Compassionate Release

Authorize courts to review and modify lengthy post-trial sentences after substantial service of the sentence to ensure continuing proportionality and fairness. The ability to initiate second looks at sentencing should be broadened beyond the current scope of Cal. Penal Code § 1172.1, which allows only for DOC- or DA-recommended reviews, to expressly authorize defendants to seek sentence reductions after meeting established eligibility criteria. Eligibility for early release should be broadened to include rehabilitation, advanced age, serious illness, and extraordinary circumstances. Eligibility for sentencing second looks under Cal. Penal Code § 1170.91, currently available only to military veterans, should be expanded. Individuals who pled guilty should be permitted to seek clemency on grounds of actual innocence, and a rebuttable presumption in favor of release should be established when specified criteria are satisfied.

RESTORE EFFECTIVE ASSISTANCE OF COUNSEL BEFORE PLEA BARGAINING

7. Guarantee Informed and Voluntary Pleas by Ensuring Effective Assistance of Counsel Before Plea Bargaining

No plea should be accepted unless the defendant has received discovery sufficient to make a knowing and voluntary decision, and legislation should prohibit prosecutors from conditioning plea offers on the waiver of constitutional or statutory rights, including the right to seek pretrial release, obtain discovery or *Brady* disclosures, investigate, or litigate pretrial motions. Prosecutors and courts may not set arbitrary and coercive plea deadlines that effectively undermine the right to effective assistance before entering a plea.

Specifically, we recommend amending the Penal Code to add a discovery provision requiring the prosecuting agency, in any misdemeanor or felony case, to provide full discovery after the defendant's first appearance, whether in person or through counsel. The prosecution must disclose all information and reports then in the possession of the prosecution team concerning the defendant or the charges within 72 hours of the first court appearance, excluding Sundays and holidays. After the initial disclosure, the prosecution must provide any new or additional reports or information concerning the defendant or the charges within 72 hours of receipt by the prosecuting agency or its investigating agencies. Disclosures must be made to defense counsel, or directly to the defendant if the court has granted pro per status.

RESTORE TRANSPARENCY AND ACCOUNTABILITY

8. Require Courts to Impose the Least Restrictive Appropriate Disposition

Amend Rule 4.410 to require courts to impose the least restrictive sentence in light of all relevant facts and in light of statutory sentencing objectives and to explain, on the record, the bases for concluding that there is "no less restrictive means" to accomplish these objectives.

9. Require Transparency in Charging, Plea Bargaining, and Sentencing

Prosecutors should document and justify charging decisions, plea offers, and sentencing recommendations. Courts, prosecutors, and defense agencies should be required to collect and publish standardized data on plea offers and trial outcomes — including the lowest plea offer extended, the sentence imposed after trial, and relevant case characteristics — to enable independent statewide evaluation of the trial penalty and sentencing disparities.

10. Establish a Criminal Justice Data and Accountability Dashboard

We recommend establishing an automated statewide criminal justice data dashboard collecting and publishing data from arrest through release. This infrastructure should provide the evidentiary foundation for ongoing reform by enabling independent evaluation of the trial penalty, sentencing disparities among co-defendants, racial and demographic disparities, disparities between guilty plea and trial convictions, and outcomes at every stage of the criminal process.

ENDNOTES

1. In 1980, California residents experienced 886.9 violent crimes per 100,000 residents. In 2006, the California violent crime rate was 535.6 per 100,000 residents and in 2024 it was 490.8 per 100,000 residents. This reflects a decrease in the violent crime rate in that 44-year period of 44.7%. Property crime rates show an even more dramatic fall: in 1980 there were 6,880.6 property crimes per 100,000 residents, which then fell to 3,189.3 per 100,000 by 2006 and 1,969.6 in 2024. The property crime decrease over four and a half decades was over 71%. *See* https://www.cjcj.org/reports-publications/blog/new-fbi-data-californias-crime-rate-is-at-record-lows-yet-crime-wave-lies-persist ("2024 FBI CJCJ Report").

2. Despite the steady decline in crime rates, California's prison population soared between 1980 and 2006, before dropping over the next 17 years. In 2006, the number of prison inmates in California had risen to 172,528, a more than seven-fold increase even while the violent crime rate had dropped by 40% and the property crime rate by 54% over that 26-year period. By 2023, California's prison population was still 94,188, nearly four times higher than in 1980. *Id.*

3. Racial bias in sentencing in California has been well documented. *See, e.g.* UC Law Journal, Dec. 2023, *Proving Actionable Racial Disparity Under the California Racial Justice Act*, Colleen V. Chien, W. David Ball, and William A. Sundstrom. This report, however, did not specifically analyze the relationship between the trial penalty in California, structural racism, and implicit bias. This relationship should be studied further using quantitative data because subjective surveys incorporate the biases of the respondents to the surveys. For this reason, as suggested in our recommendations, data should be collected to understand this relationship.

4. Crime-rate and incarceration-rate data were calculated by calendar year (*see* "2024 FBI CJCJ Report"), while the trial-rate data in the following chart are stated by fiscal year, reflecting the precise conventions of the underlying sources.

5. "State court caseload statistics: Annual Report 1980" at 195. National Center for State Courts, available at https://bjs.ojp.gov/content/pub/pdf/sccs80.pdf ("1980 State Courts Report"). The data presented in this section involves dispositions in 1979/1980 on cases filed as felonies, whether or not they resulted in guilty findings (via guilty pleas or trials) on felonies or misdemeanors or resulted in some other disposition other than guilty findings.

6. "*Court Statistics* Report, *Statewide Caseload Trends 1988-89 through 1997-98 and Caseload Data for Individual Courts 1996-97 and 1997-98*," Judicial Council of California, Administrative Office of the Court, available at https://courts.ca.gov/sites/default/files/courts/default/2024-12/1999csr.pdf ("1999 Annual Report").

7. "*2025 Court Statistics Report, Statewide Caseload Trends 2014-15 Through 2023-24*," Judicial Council of California, available at https://courts.ca.gov/system/files/file/2025-court-statistics-report.pdf ("2025 Court Statistics Report"). The data available for the 1997/1998 year is slightly different than the available data from 1979/1980 and 2023/2024. The available data for 1997/1998 reflects the total number of defendants convicted of felony crimes via guilty pleas or after trials, as well as the number of dispositions (acquittals or dismissals) of felony charges. Unlike the data from 1979/1980 and 2023/2024, the 1997/1998 data does not reflect the outcomes of all cases originally filed as felonies. *See*, Tables 13 through 18. *Compare* 1980 State Courts Report at 195 and 2025 Court Statistics Report: Statewide Caseload Trends, 2014-15 Through 2023-24 at Table 8a.

8. The significant increase in Other Dispositions in the 2023/2024 data, compared to the 1979/1980 and 1997/1998 data, may be explained by the establishment and growth in California of specialty courts such as drug courts and mental health courts.

9. Some use the equivalent term "trial tax."

10. The following detailed reports have concluded that the trial penalty is a real phenomena and analyze its myriad harmful on the federal criminal legal system: Human Rights Watch, *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty* (2013) (hereinafter "HRW Report"); 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* (2018); Norman L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, Vol. 31 Federal Sentencing Reporter Issue 4-5 (Apr./June 2019). Comparable data for state court criminal cases generally is scarce, save for a 2021 comprehensive New York trial penalty report, a 2023 American Bar Association report, and the recently issued March 26, 2026 Connecticut trial penalty report. Nat'l Ass'n of Crim. Def. Laws., *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack* (2021); Am. Bar Ass'n, Crim. Just. Section, *2023 Plea Bargain Task Force Report* (2023) (hereinafter "2023 Plea Bargain Task Force Report"); *The Trial Penalty in Connecticut: Are People Being Punished for Exercising Their Constitutional Rights?* (2026) (hereinafter "The Connecticut Report").

11. *See* 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.* at 14 (2018).

12. *See* 2023 Plea Bargain Task Force Report, *supra* note 10, at 6.

13. HRW Report, *supra* note 10, at 2.

14. *Id.*; *see also id.* at 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.").

15. *Id.* 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.").

16. *Id.* 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.").

17. *Id.* at 100 (citation omitted).

18. *Id.* at 2.

19. *See, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 394 (1987).

20. NACDL, Conn. Office of Chief Public Defender & Conn. Criminal Defense Lawyers Ass'n, "The Trial Penalty in Connecticut: Are People Being Punished for Exercising Their Constitutional Rights?" (March 2026), https://www.nacdl.org/Document/TrialPenaltyConnecticutPunishedforExercisingRights.

21. *See* Andreea Matei et al., *An Exploration of Prosecutorial Discretion in Plea Bargaining in Philadelphia*, at 14, Urban Institute (Nov. 29, 2022), https://www.urban.org/research/publication/exploration-prosecutorial-discretion-plea-bargaining-philadelphia.

22. *See id.* at 18.

23. *See, e.g.*, Stacey J. Bosick, *Racial Disparities in Prosecutorial Outcomes: An analysis of felony cases accepted for prosecution by the Denver District Attorney's Office in the City and County of Denver* (Report No. 19-04A), University of Denver, Colorado Evaluation and Action Lab (Mar. 2021), file:///H:/temp/convert/Racial-Disparities-in-Prosecutorial-Outcomes.pdf; Phila. Dist. Att'y's Off., *Racial Injustice Report: Disparities in Philadelphia's Criminal Courts from 2015-2022* (June 2023), https://phillyda.org/wp-content/uploads/2023/06/RACIAL-INJUSTICE-REPORT-2023.pdf.

24. Equal Just. Initiative, *Research Finds Evidence of Racial Bias in Plea Deals* (Oct. 26, 2017), https://eji.org/news/research-finds-racial-disparities-in-plea-deals/.

25. *See* 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.").

26. *Id.* at 1213-14.

27. *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.").

28. *See also* Ram Subramanian et al., *In the Shadows: A Review of the Research on Plea Bargaining*, at 44, Vera Inst. of Just. (Sept. 2020), https://vera-institute.files.svdcdn.com/production/downloads/publications/in-the-shadows-plea-bargaining.pdf ("[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.").

29. *See* End the Trial Penalty, *Sixth Amendment Right to Trial on the Verge of Extinction* (last visited Sept. 9, 2026), https://www.endthetrialpenalty.org/.

30. *United States v. Walker*, 423 F. Supp. 3d 281, 298 (S.D. W. Va. 2017).

31. *New York v. Thomas*, 34 N.Y.3d 545, 587 (2019) (Wilson, J., dissenting in part, concurring in part).

32. Comm. on Revision of the Penal Code, *Annual Report and Recommendations* 53 (2023) https://www.capolicylab.org/topics/criminal-justice/research-partner-california-committee-on-revision-of-the-penal-code/ (herein "2023 Annual Report").

33. *Id.*

34. *Id.*

35. *Id.* at 55 (quoting Professor Carissa Byrne Hessick, Testimony at the Committee on Revision of the Penal Code (Oct. 2, 2023) (Part 2 of 4, 0:07:15-0:07:27)).

36. *Id.* at 55 (citing Professor Amy Lerman, Testimony at the Committee on Revision of the Penal Code (Oct. 2, 2023) (Part 2 of 4, 0:13:32-0:14:20)).

37. *See id.* at 55-56.

38. The Judicial Council established rules of court for sentencing with a non-exclusive list of aggravating and mitigating circumstances, and standards for when they outweighed use of the middle term.

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

40. 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.

41. Consistent with general county population levels, fewer responses were received from the state's predominantly rural counties.

42. The survey employed a pathing logic such that responses to certain questions dictated whether a respondent would be directed to subsequent explanatory questions. As an example, in instances where defense counsel responded affirmatively regarding the existence of a specific issue, they might then be directed to a subsequent question asking them to identify specific features or conditions of the issue. Respondents who did not identify the issue would be directed to the next sequence of questions.

43. Missing responses refers to instances where a respondent either left a specific question blank or instances where pathing logic, as described in note 42, directed a respondent past a certain question.

44. *See id.*

45. "Strikes for probation" generally refers to the practice of offering probation in exchange for a strike as part of a plea. If a defendant is subsequently convicted of a separate felony, the strike can result in a significant sentencing enhancement under California's Three Strikes Law.

46. *See In re Kowalczyk*, 19 Cal.5th 593 (2026); *In re Humphrey*, 11 Cal.5th 135 (2021).

47. Under California Penal Code § 1538.5, a defendant may move for the return of property or to suppress evidence obtained as a result of an unreasonable search or seizure.

48. "TRC" is an abbreviation for a trial readiness conference, which occurs on the eve of trial.

49. In contrast to the defense counsel survey, which the Task Force sent to defense bar association and defense membership organizations (in addition to the leaders of California public defender and institutional defender organizations and offices), the Task Force did not have access to membership lists for prosecutor membership organizations. Instead, the Task Force relied on the 58 California District Attorneys to share the prosecutor's survey with their colleagues and encourage them to respond.

50. *People v. Watson*, 637 P.2d 279 (Cal. 1981).

51. California Penal Code § 1538.5 allows criminal defendants to request the suppression or exclusion of evidence in motions filed and, if not withdrawn, litigated before trial.

52. By comparison, nearly 30% of respondents to the defense counsel survey indicated that prosecutors coerce defendants into accepting a guilty pleas in felony cases by threatening increased sentencing in future offers. *See* page 21 above.

53. Only nine of the 25 respondents provided responses here.

54. Only nine of the 25 respondents provided responses here.

55. California Penal Code § 1385 is a provision that authorizes California judges to dismiss a criminal action in the "furtherance of justice." The authority can be on the court's own motion or at the application of a prosecutor, pursuant to a number of specific factors, including mitigating factors such as the age, mental health history, non-violent nature of a felony, the inoperability of a weapon, or the significant potential sentence (over 20 years), as well as a factor that can be invoked if application of an enhancement provision would result in a discriminatory racial impact.

56. Examples of the records requests sent to district attorneys and the courts can be found in Appendix 3.

57. A "nolo contendere" plea, also referred to as a "no-contest" plea, involves a defendant who accepts a plea offer and allows the entry of a finding of guilt without admitting guilt to the charges.

58. Many, but not all, of the usable datasets the Task Force received distinguished between cases in which defendants entered guilty pleas and those in which defendants entered nolo contendere pleas. However, because both guilty plea cases and nolo contendere plea cases result in the entry of guilty verdicts against defendants without holding trials, in the analysis below, guilty pleas and nolo contendere pleas are collectively referred to as "guilty pleas."

59. The Task Force received data for Siskiyou County from both the Superior Court and the District Attorney. The datasets from those two sources were not identical but duplicate data was removed before the analysis was conducted.

60. Penal code formatting may vary slightly between counties, even when referring to the same offense. For example, a DUI charge may appear as "23152(a) VC" in Ventura County's data and as "VC23152(A)" in Siskiyou County's data. These formatting differences result in technically different entries and were not normalized across counties. However, because this analysis was conducted within each county's dataset, these variations do not affect the interpretation of the results.

61. There were only five felony penal codes with an average sentence ratio of 1, meaning the defendants convicted pursuant to those penal codes on average received neither a trial penalty nor a trial benefit. The total number of guilty plea cases for those five penal codes was 458 and the total number of trials was ten, so this group represented a small fraction of the felony penal codes containing both plea dispositions and trial dispositions.

Similarly, just under one-seventh of the felony cases analyzed produced an average sentence ratio of less than 1, representing a trial benefit. Those cases represented 45 distinct penal codes with a total of 2,080 plea cases and 146 trials.

62. There were only four misdemeanor penal codes with an average sentence ratio of 1, reflecting neither a trial penalty nor a trial benefit. Those penal codes involved just 175 plea cases and merely 7 trials.

There were 45 penal codes that produced an average sentence ratio of less than 1, indicating the defendants sentenced pursuant to those penal codes received a trial benefit. There were just 2,645 plea cases and 107 trial cases among those 45 penal codes, or just over five percent of the misdemeanor cases analyzed for a trial penalty or trial benefit.

63. Although California has a death penalty statute permitting the imposition of a capital sentence under special circumstances, California has not executed a defendant who was sentenced to death since January 2006. In 2019, California Governor Gavin Newsom signed an executive order announcing a moratorium on executions which remains in effect as of the publication of this report. Hayley Bedard, *Twenty Years Since Last Execution: California Remains Under Execution Moratorium as Advocates Push for Mass Clemency Grant*, Death Penalty Information Center (2026), https://deathpenaltyinfo.org/twenty-years-since-last-execution-california-remains-under-execution-moratorium-as-advocates-push-for-mass-clemency-grant.

64. The other Penal Code section in Siskiyou County that is associated with life sentences is § 269(a) which involves aggravated sexual assault of a child.

65. The SF OPD data included 65 cases, one of which involved a trial to determine whether or not the client was competent to stand trial. Because there was no plea offer in that case nor a trial with a traditional guilty/not guilty verdict and subsequent sentencing, it has been excluded from this trial penalty analysis.

66. In four of the 11 cases that resulted in a not guilty verdict, the jury hung on one or more counts. None of the defendants in those four cases were found guilty of any offenses.

67. In two of the 31 cases that ended with a mixed verdict, the juries could not reach a unanimous verdict on the felony counts but did find the defendants guilty on misdemeanor counts. In another mixed verdict case, the jury hung on all of the felony charges, but after the court declared a mistrial, the defendant accepted the prosecutor's offer to plead guilty to a misdemeanor.

68. This analysis uses the same definition for a trial penalty as described above for the SF OPD felony trial penalty cases.

69. These cases involved charges under California Vehicle Code § 23152.

70. "SWAP" is a term for an out-of-custody community service program run by local detention centers. Defendants sentenced to SWAP must report to the county jail daily and then are assigned volunteer work to perform.

71. Cal. Penal Code § 487(c).

72. *Id.* § 243.3.

73. *Id.* § 21810.

74. *Id.* § 25850(a).

75. *Id.* § 243.4(e)(1).

76. *See* n.46, *supra*.

77. A "*Watson* Murder" refers to a crime involving a death that occurs during a drinking and driving incident and, as a result, can be charged as a second degree homicide. The "triad" is a colloquial term referring to three distinct terms of incarceration, lower, mid, and upper, under California's determinate sentencing scheme. Pursuant to a 2024 California Supreme Court case, California courts cannot go above the midterm of the triad unless facts supporting the enhancement are proven to the jury or admitted by the defendant.

78. *People v. Estes*, 147 Cal. App. 3d 23 (1983) (holding that use of force or threat of force while fleeing a shoplifting elevates the shoplifting to the more serious crime of robbery).

APPENDIX 1:

Defense Counsel Survey



NACDL CACJ Trial Penalty Survey

INTRODUCTION

The "trial penalty" refers to the substantial difference between the sentence offered in a pre-trial plea bargain versus the sentence an accused receives after trial. Many believe this penalty is so severe and pervasive that it has virtually eliminated the constitutional right to a trial by effectively coercing guilty pleas. The trial penalty has not only eliminated trials, it has also undermined other rights established in the Constitution that are essential to the adversarial process by requiring waivers of the rights guaranteed by the Fourth, Fifth and Sixth Amendments, including the right to seek pre-trial release, the right to discovery, the right to receive exculpatory material, the right to conduct a meaningful investigation, the right to challenge unlawful searches and seizures, the right to develop mitigation, and the right to appeal. Without these, police and prosecutorial misconduct go unchecked and innocent people get convicted in increasing numbers.

For these reasons CACJ and NACDL have assembled a task force to assess the impact of the trial penalty in California and to identify causes and potential remedies. Our investigation builds on reports issued by the National Association of Criminal Defense Lawyers (NACDL) and NYSACDL which studied the trial penalty on the federal level and in the state of New York. Our focus, however, is purely on the extent and impact of the trial penalty in California. Our objective is to issue a comprehensive report, along with recommendations to provide the basis for a broad reform movement.

To compile the necessary data, we need your help! Your responses to the following survey will form the basis for our findings and recommendations.

The survey is exclusively targeted to California state prosecutions (not federal). It consists of a total of 20 questions with sub-parts and is divided into two parts. Part I asks where you practice, the extent to which accused persons in your jurisdictions face a trial penalty, the various stages in the process at which the trial penalty comes into play, and whether systemic racism or discrimination or implicit bias play a part.[1] Part II asks you to identify a specific case or cases in which you believe the trial penalty was evident and to contribute a particularly illustrative example of resulting injustice.

NOTE: In this questionnaire the term "trial penalty" is referring both to cases which went to trial and resulted in a sentence much more severe than the pre-trial offers, and cases where a plea was entered to avoid the potential for a much longer sentence if there was a conviction at trial.

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[1] "Systemic racism or discrimination" as used here refers to racial, ethnic, gender, sexual orientation, religious, etc. characteristics of the accused that affect outcomes of cases, whether intentionally or unconsciously applied.

NACDL CACJ Trial Penalty Survey

*** I practice exclusively:**

- ○ Trial level
- ○ Both trial and appellate level
- ○ Appellate level

NACDL CACJ Trial Penalty Survey

PART I

*** 1. In what county in California 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.

2. Do you believe the trial penalty is a factor in this county?

- ○ Yes
- ○ No

NACDL CACJ Trial Penalty Survey

FELONY CASES

3a. How frequently do prosecutors apply coercion to induce your client to accept a plea offer in your county? Examples of coercion might include, but is not limited to: threatening additional charges or threatening to withdraw a plea offer if the defense seeks pre-trial release or discovery or if the defense files motions including motions to suppress.

Rarely ○ Sometimes ○ Frequently ○

3b. How frequently do judges apply coercion to induce your client to accept a plea offer in your county? Examples of coercion might include, but is not limited to: threatening a higher or maximum sentence if the defendant does not accept the plea offer.

Rarely ○ Sometimes ○ Frequently ○

*** 4a. At what stage of the proceedings do you most often resolve your cases by a guilty or no contest plea? (Check up to 3)**

- ☐ At arraignment on the complaint
- ☐ After arraignment but before preliminary hearing
- ☐ After preliminary hearing, but prior to trial assignment or readiness conference
- ☐ Prior to receiving complete discovery
- ☐ Prior to adjudication of motion to suppress evidence
- ☐ Prior to adjudication of PC 995 motion to dismiss
- ☐ Upon denial of motion for release from custody
- ☐ Other (please describe)

NACDL CACJ Trial Penalty Survey

FELONY CASES

*** 4b. Are prosecution offers conditioned on the defense foregoing discovery, refraining from bringing motions, or waiving appellate rights? (In other words, do clients have to give up litigation in order to take advantage of a favorable plea offer?)**

- ○ Yes
- ○ No

*** 4c. Which of the following are fairly common conditions on pleas in your county? (Check all that apply)**

- ☐ Plea must be entered at first appearance after arraignment and bail setting
- ☐ Plea must be entered before litigating some defense motion - Sec. 1538.5, Pitchess, Discovery or enforcement of subpoenas *duces tecum*, etc.
- ☐ Plea must be entered before preliminary examination
- ☐ Plea requires foregoing a non-criminal disposition (i.e. diversion or similar)
- ☐ Plea must include admission of strikes or other sentence enhancements
- ☐ Plea must include waiver of appeal of denial of 1538.5 or other constitutional issues
- ☐ Plea must include waiver of appeal generally
- ☐ Plea must include admission to elements necessary for a future prosecution (i.e., "*Watson* waivers") requested or demanded by the prosecution
- ☐ Plea must include admission to elements necessary for a future prosecution (i.e., "*Watson* waivers") requested or demanded by the judge or court

4d. Do prosecutors often use direct or implied threats to encourage acceptance of offers? (For example "If you don't take this before prelim it is off the table", or "If you don't take this, I'll add charges")

- ○ Yes
- ○ No

4e. Do judges or bench officers often use direct or implied threats to encourage acceptance of offers? (For example "If you don't take this I'll give your client the maximum")

- ○ Yes
- ○ No

NACDL CACJ Trial Penalty Survey

FELONY CASES

4f. What forms does this coercion take in your jurisdiction?

- ☐ Adding charges and/or enhancements
- ☐ Charging additional persons, such as a family member
- ☐ Exploding offer (i.e. a motion with an arbitrary or short time limit for acceptance, e.g. "For today only")
- ☐ Increased sentence in future offers
- ☐ Other (please explain)

4g. Do you perceive a disparity in the application of coercion with respect to plea offers based race, gender, ethnicity, or other unconstitutional classification?

- ○ Yes
- ○ No

*** 4h. Do judges often support the application of coercion based on race, gender, ethnicity, or other constitutional classification?**

- ○ Yes
- ○ No

*** 4i. You indicated that judges encourage or support unfair conditions on pleas. Please describe your observations in 150 words or less:**

NACDL CACJ Trial Penalty Survey

MISDEMEANOR CASES

In this questionnaire the term "trial penalty" is referring both to cases which went to trial and resulted in a sentence much more severe than the pre-trial offers, and cases where a plea was entered to avoid the potential for a much longer sentence if there was a conviction at trial.

*** 5a. At what stage of the proceedings do you most often resolve your cases by a guilty or no contest plea? (Check up to 2)**

☐ At arraignment / bail setting

☐ At pre-trial conference before motions

☐ At or immediately after hearing on defense motions

☐ After motions and before TRC

☐ At the TRC

☐ N/A – I don't handle misdemeanor cases

*** 5b. Are the plea offers often conditioned on waiving rights (beyond the right to trial), such as foregoing discovery, refraining from bringing motions, or waiving appellate rights?**

○ Yes

○ No

*** 5c. Which of the following are fairly common conditions on pleas in your county? (Check all that apply)**

☐ Plea must be entered at arraignment / bail setting

☐ Plea must be entered at first appearance after arraignment and bail setting

☐ Plea must be entered before litigating some defense motion - Sec. 1538.5, Pitchess, Discovery or enforcement of subpoenas *duces tecum*, etc.

☐ Plea requires foregoing a non-criminal disposition (i.e. diversion or similar)

☐ Plea must include waiver of appeal of denial of 1538.5 or other constitutional issues

☐ Plea must include waiver of appeal generally

5d. Do prosecutors often use direct or implied threats to encourage acceptance of offers?

○ Yes

○ No

NACDL CACJ Trial Penalty Survey

MISDEMEANOR CASES

5e. What forms does this coercion take in your jurisdiction?

- ☐ Adding felony charges
- ☐ Adding charges and/or enhancements
- ☐ Charging additional persons, such as a family member
- ☐ Exploding offer (e.g. "For today only")
- ☐ Increased sentence in future offers
- ☐ Other (please explain)

5f. Do you perceive a disparity in the application of coercion with respect to plea offers based race, gender, ethnicity, or other unconstitutional classification?

- ○ Yes
- ○ No

*** 5g. Do judges often support the application of coercion based on race, gender, ethnicity, or other constitutional classification?**

- ○ Yes
- ○ No

*** 5h. You indicated that judges encourage or support unfair conditions on pleas. Please describe your observations in 150 words or less:**

NACDL CACJ Trial Penalty Survey

PART I

6. If the trial penalty is a factor in your county, is the trial penalty uniform throughout the county, or does it vary significantly by courthouse, courtroom, or prosecutor? (Check all that apply)

- ☐ Uniform across our courts and prosecutors
- ☐ Varies by assigned deputy D.A. (Or City Attorney)
- ☐ Varies by supervising prosecutor
- ☐ Varies by judge presiding
- ☐ Varies from courthouse to courthouse

*** 7a. If the trial penalty is a factor in your county, does it vary by type of case?**

- ○ Yes
- ○ No

7b. In which case types do you see the trial penalty most often? (Choose up to 2)

- ☐ Homicide cases
- ☐ Sex cases
- ☐ Gang cases
- ☐ Felony cases with available enhancements (strike priors etc.)
- ☐ Assault cases
- ☐ Other (please describe)

NACDL CACJ Trial Penalty Survey

PART I

7c. Which of following individual characteristics of the accused (e.g. race, ethnicity, gender) affect the frequency or severity of the trial penalty? (Check all that apply)

- ☐ Race of the defendant
- ☐ Ethnicity of the defendant (e.g., Hispanic v. non-Hispanic)
- ☐ Immigration status of the defendant
- ☐ Age of the defendant
- ☐ Sexual orientation of the defendant
- ☐ Sex or gender of the defendant
- ☐ Custody status of the defendant
- ☐ Economic status of the defendant
- ☐ Other factors OR please elaborate on your selections above

- ☐ None – individual characteristics of the defendant do not affect the frequency or severity of the trial penalty

NACDL CACJ Trial Penalty Survey

PART I

8. In what ways does the trial penalty manifest itself in your county? (Check all that apply)

- ☐ One time only offers at first appearance
- ☐ Exploding plea offers that expire immediately or on short notice
- ☐ Policy or practice of opposing an accused's release on bail even when a non-custodial plea offer is made
- ☐ Dramatically reduced plea offers (as opposed to dismissal) after revelation of a constitutional defect or other core problem with the prosecution
- ☐ Adding new charges if offer not accepted
- ☐ Increasing severity of charges
- ☐ Waiver of the right to counsel
- ☐ Waiver of time to conduct a meaningful investigation
- ☐ Waiver of discovery
- ☐ Waiver of pretrial suppression motions
- ☐ Waiver of access to experts to develop mitigation
- ☐ Waiver of appeal
- ☐ Waiver of prospective claims of ineffective assistance
- ☐ Waiver of Public Records Act requests (PRAs)
- ☐ Significantly increased penalty if convicted after trial
- ☐ Local or common perceptions about how the trial penalty could be used against the accused
- ☐ Other (please describe)

NACDL CACJ Trial Penalty Survey

PART I

9a. Do you believe that any of the following are a factor in the trial penalty as it occurs in your jurisdiction? (Check all that apply)

- ☐ Mandatory minimum sentences
- ☐ Statutory Limitation of plea bargaining
- ☐ State Rules of Court
- ☐ Local Rules of Court
- ☐ Policies and practices of the prosecutors
- ☐ Policies and practices of the Judge such as the court actively engaging or not engaging in the bargaining process
- ☐ Judicial manipulation of pre-trial release
- ☐ Policies and practices of the Court (i.e. like plea forms that make you give up your right to appeal)
- ☐ Policies and practices of defense attorneys
- ☐ Excessive caseloads
- ☐ Financial considerations of the client, i.e. the client cannot afford the cost of litigation so they choose to plead guilty or no contest instead
- ☐ Other (please specify)

9b. Please elaborate on how the factors you selected above affect the trial penalty in your jurisdiction (up to 200 words)

*** 10a. Do your judges ever use existing tools (imposing concurrent sentences, dismissal under Penal Code §1385, etc.) after trial so that post-trial sentences are equal to or less than the pre-trial offer?**

- ○ Yes
- ○ No

NACDL CACJ Trial Penalty Survey

PART I

*** 10b. You indicated that judges use existing tools after trial to result in post-trial sentences that are equal to or less than the pre-trial offer. How often does this happen in your county?**

Rarely | Occasionally | Frequently

10c. Please explain (up to 200 words)

*** 11a. Have you ever had the prosecuting attorney argue for the same sentence post trial as their pre-trial offer?**

- ○ Yes
- ○ No

*** 11b. You indicated that you have seen a prosecutor ask for the same post-trial sentence as a pretrial plea offer. About how many times has this happened?**

- ○ Less than 5
- ○ 6 to 10
- ○ More than 10

11c. Please explain (up to 200 words)

*** 12a. Do you or the agency by which you are employed (e.g., a public defender office or an assigned counsel plan) maintain records of plea offers in cases, particularly cases that go to trial?**

- ○ Yes
- ○ No

NACDL CACJ Trial Penalty Survey

PART I

*** 12b. What is the name of the agency/firm where you are employed?**

13a. Are you willing to participate in an interview by one of the researchers collecting information for this project?

- ○ Yes
- ○ No

13b. Please provide your name and contact information.

Name

Email Address

Phone Number

NACDL CACJ Trial Penalty Survey

PART II

Please identify one or more cases which you believe provide an example of the trial penalty at work, and what you believe to have been a substantial injustice arising from it. For example, it could be a case in which a client who was less culpable than one or more co-defendants, who went to trial and received a significantly greater sentence than the more culpable defendants. Or it could be a case in which the client turned down a plea offer with a minimal or modest sentence and then received a significantly greater sentence after trial. Conversely, it could a be case in which a client entered a guilty or no contest plea before full discovery was given to the attorney and/or investigation was completed or waived a particularly strong motion to suppress. Or it could be a case in which you believe a client who may have been innocent or less culpable nevertheless opted to plead guilty or no contest to increased charges rather than risk increased charges or penalties going forward.

Please provide up to three examples that you believe illustrate the injustice caused by the trial penalty with your answers to the following questions.

NACDL CACJ Trial Penalty Survey

PART II

14. What is the name of the accused?

(If you do not feel comfortable giving names use a 'person 1' designation in the space below.)

*** 15a. In what county did the case occur?**

15b. If there are multiple courthouses in that county, at which one was this case held?

16. What was the principal or top charge in this case?

17. What agency prosecuted the case?

18. Who was the sentencing judge?

19a. What was/were the plea offer(s) made in this case?

19b. At what stage of the case were these offer(s) made by the District Attorney?

NACDL CACJ Trial Penalty Survey

PART II

19c. Did the trial judge give an indicated sentence in order to settle the trial?

- ○ Yes
- ○ No

19d. What did the District Attorney argue for at sentencing after trial?

20. What was the result of the case?

21. What was the sentence given to the client?

22. Please describe how the trial penalty came into play and contributed to an unjust outcome (Comment up to 200 words):

*** 23. Do you have another example to share?**

- ○ Yes
- ○ No

NACDL CACJ Trial Penalty Survey

PART II

24. What is the name of the accused?

(If you do not feel comfortable giving names use a 'person 2' designation in the space below.)

*** 25a. In what county did the case occur?**

25b. If there are multiple courthouses in that county, at which one was this case held?

26. What was the principal or top charge in this case?

27. What agency prosecuted the case?

28. Who was the sentencing judge?

29a. What was/were the plea offer(s) made in this case?

29b. At what stage of the case were these offer(s) made by the District Attorney?

NACDL CACJ Trial Penalty Survey

PART II

29c. Did the trial judge give an indicated sentence in order to settle the trial?

- ○ Yes
- ○ No

29d. What did the District Attorney argue for at sentencing after trial?

30. What was the result of the case?

31. What was the sentence given to the client?

32. Please describe how the trial penalty came into play and contributed to an unjust outcome (Comment up to 200 words):

*** 33. Do you have another example to share?**

- ○ Yes
- ○ No

NACDL CACJ Trial Penalty Survey

PART II

34. What is the name of the accused?

(If you do not feel comfortable giving names use a 'person 3' designation in the space below.)

*** 35a. In what county did the case occur?**

35b. If there are multiple courthouses in that county, at which one was this case held?

36. What was the principal or top charge in this case?

37. What agency prosecuted the case?

38. Who was the sentencing judge?

39a. What was/were the plea offer(s) made in this case?

39b. At what stage of the case were these offer(s) made by the District Attorney?

NACDL CACJ Trial Penalty Survey

PART II

39c. Did the trial judge give an indicated sentence in order to settle the trial?

- ○ Yes
- ○ No

39d. What did the District Attorney argue for at sentencing after trial?

40. What was the result of the case?

41. What was the sentence given to the client?

42. Please describe how the trial penalty came into play and contributed to an unjust outcome (Comment up to 200 words):

NACDL CACJ Trial Penalty Survey

HOW YOUR INFORMATION WILL BE USED

We appreciate the information you have provided regarding your experience in the criminal justice system. While we cannot guarantee the Task Force will use any particular story, we will contact you to ensure that the information used in our 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.

Thank you for participating in a process that we hope will assist in addressing the problem of the trial penalty and the erosion of the Sixth Amendment right to trial.

APPENDIX 2:

Prosecutor Survey



California Trial Penalty Survey for Prosecutors

INTRODUCTION

Organizations nationally have studied and are studying the existence, and consequences, of the "trial penalty" in criminal prosecutions in federal courts and in specific state courts. The California Attorneys for Criminal Justice (CACJ) and the National Association of Criminal Defense Lawyers (NACDL) have assembled a task force to assess whether there is a "trial penalty" in criminal prosecutions in state courts in California. NACDL, in fact, has been working with prosecutors and former prosecutors in numerous jurisdictions and with national prosecutor organizations to understand the issue in numerous jurisdictions, to identify factors that contribute to any trial penalty identified, and to propose potential joint remedies to alleviate the trial penalty.

The phrase "trial penalty" refers to the substantial difference between the sentence offered in a pre-trial plea bargain versus the sentence an accused receives after trial. Many believe the trial penalty has led to a marked reduction in the exercise of the constitutional right to a trial by simultaneously incentivizing the acceptance of guilty pleas and raising the risks of going to trial. And many are concerned that the trial penalty can lead to unfair sentences, including disparities between defendants charged with similar or the same offenses and even circumstances in which more culpable defendants who plead guilty receive significantly shorter sentences than less culpable defendants who exercise their right to trial. The goal of the California Trial Penalty Project is to issue a comprehensive report analyzing the existence and impact of the trial penalty in California, including recommendations that provide the basis for reducing the negative consequences of the trial penalty.

To compile the objective data, we hope to receive input from all parties within the criminal justice system in California, including and especially prosecutors. One source of data is surveys of defense counsel and prosecutors, exclusively targeted on California state prosecutions (not federal).

The following survey consists of 16 questions, some with sub-parts, and is divided into two sections. Part I asks where you practice and asks a series of questions designed to identify whether and how the trial penalty occurs in your county. Part II asks you to identify up to three specific cases in which you believe the trial penalty was evident and asks you for additional information about those cases. Parts I and II are independent, meaning that you can complete Part I but not Part II if you prefer. Part I takes less than five (5) minutes to complete.

California Trial Penalty Survey for Prosecutors

PART I

In this questionnaire, the phrase "trial penalty" refers to the substantial difference between the sentence offered in a pre-trial plea bargain versus the sentence an accused receives after trial.

*** 1. In what county in California 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.

California Trial Penalty Survey for Prosecutors

FELONY CASES

*** 2a. At what stage of the proceedings do you most often resolve your cases by a guilty or no contest plea, when cases do not proceed to trial? (Check up to 3)**

☐ Before entry of not guilty plea at arraignment;

☐ After denial of release from custody;

☐ Post plea on the complaint but prior to the preliminary hearing;

☐ Before providing full discovery;

☐ At or immediately after the preliminary hearing;

☐ At the arraignment on the Information;

☐ Prior to dispositive motions (e.g. 995, 1538.5);

☐ At or immediately after defense motions but before Trial Readiness Conference (TRC);

☐ At TRC;

☐ Immediately before or during trial.

☐ Other (please describe)

*** 2b. Does your office have a general policy (including one in which exceptions can be made on a case-by-case basis) that conditions plea offers in felony cases on not filing motions or agreeing to enter a plea before discovery? (In other words, do defendants have to give up litigation in order to take advantage of a favorable plea offer?)**

○ Yes

○ No

*** 2c. You indicated that your office does not have a general policy like the one described in (b) above; how often do you condition plea offers in felony cases on waiving rights or foregoing discovery or defense motions?**

Rarely or Never	Sometimes	Frequently
○	○	○

California Trial Penalty Survey for Prosecutors

FELONY CASES

*** 2d. Which of the following are fairly common conditions on pleas in your county? (Check all that apply)**

- ☐ Plea must be entered at first appearance after arraignment and bail setting
- ☐ Plea must be entered before litigating some defense motion – Sec. 1538.5, Pitchess, Discovery or enforcement of subpoenas *duces tecum*, etc.
- ☐ Plea must be entered before preliminary examination
- ☐ Plea requires foregoing a non-criminal disposition (i.e. diversion or similar)
- ☐ Plea must include admission of strikes or other sentence enhancements
- ☐ Plea must include waiver of appeal of denial of 1538.5 or other constitutional issues
- ☐ Plea must include waiver of appeal generally
- ☐ Plea must include admission to elements necessary for a future prosecution (i.e., "*Watson* waivers")

*** 2e. Does your office have a general policy (including one in which exceptions can be made on a case-by-case basis) that if defendants reject an initial plea offer, they are told that any future plea offers that are made will be less favorable to them?**

- ○ Yes
- ○ No

*** 2f. You indicated that your office does not have a general policy like the one described in (b) above; how often do you inform defendants (or their attorneys) that if they reject an initial plea offer, any future plea offers that are made will be less favorable?**

Rarely or Never	Sometimes	Frequently
○	○	○

California Trial Penalty Survey for Prosecutors

FELONY CASES

2g. Which of the following actions have you taken after a defendant has rejected an initial plea offer?

☐ Adding charges and/or enhancements

☐ Charging additional persons, such as a family member

☐ Expiring plea offer *e.g.* "For today only"

☐ Increased sentence in future offers

☐ Other (please explain)

2h. Do judges often encourage or support such conditions on pleas?

○ Yes

○ No

California Trial Penalty Survey for Prosecutors

MISDEMEANOR CASES

In this questionnaire, the phrase "trial penalty" refers to the substantial difference between the sentence offered in a pre-trial plea bargain versus the sentence an accused receives after trial.

*** 3a. At what stage of the proceedings do you most often resolve your cases by a guilty or no contest plea, when cases do not proceed to trial? (Check up to 2)**

- ☐ At arraignment / bail setting
- ☐ At pre-trial conference before motions
- ☐ At or immediately after hearing on defense motions
- ☐ After motions and before TRC
- ☐ At the TRC

*** 3b. Does your office have a general policy (including one in which exceptions can be made on a case-by-case basis) that conditions plea offers in misdemeanor cases on *not* filing motions or agreeing to enter a plea before discovery? (In other words, do defendants have to give up litigation in order to take advantage of a favorable plea offer?)**

- ○ Yes
- ○ No

*** 3c. You indicated that your office does not have a general policy like the one described in (b) above; how often do you condition plea offers in misdemeanor cases on waiving rights or foregoing discovery or defense motions?**

Rarely or Never	Sometimes	Frequently
○	○	○

California Trial Penalty Survey for Prosecutors

MISDEMEANOR CASES

*** 3d. Which of the following are fairly common conditions on pleas in your county? (Check all that apply)**

- ☐ Plea must be entered at arraignment / bail setting
- ☐ Plea must be entered at first appearance after arraignment and bail setting
- ☐ Plea must be entered before litigating some defense motion - Sec. 1538.5, Pitchess, Discovery or enforcement of subpoenas *duces tecum*, etc.
- ☐ Plea requires foregoing a non-criminal disposition (i.e. diversion or similar)
- ☐ Plea must include waiver of appeal of denial of 1538.5 or other constitutional issues
- ☐ Plea must include waiver of appeal generally

*** 3e. Does your office have a general policy (including one in which exceptions can be made on a case-by-case basis) that if defendants reject initial plea offers in misdemeanor cases, they are told that any future plea offers that are made will be less favorable to them?**

- ○ Yes
- ○ No

3f. You indicated that your office does not have a general policy like the one described in (b) above; how often do you inform defendants (or their attorneys) in misdemeanor cases that if they reject initial plea offers, any future plea offers that are made will be less favorable?

Rarely or Never	Sometimes	Frequently
○	○	○

California Trial Penalty Survey for Prosecutors

MISDEMEANOR CASES

3g. Which of the following actions have you taken after a defendant has rejected an initial plea offer?

- ☐ Adding felony charges
- ☐ Adding charges and/or enhancements
- ☐ Charging additional persons, such as a family member
- ☐ Expiring offer *e.g.* "For today only"
- ☐ Increased sentence in future offers
- ☐ Other (please explain)

*** 3h. Do judges often encourage or support such conditions on pleas?**

- ○ Yes
- ○ No

*** 3i. You indicated that judges encourage or support unfair conditions on pleas. Please describe your observations in 150 words or less:**

California Trial Penalty Survey for Prosecutors

FELONY AND MISDEMEANOR CASES

4. If the trial penalty is a factor in your county, is the trial penalty uniform throughout the county, or does it vary significantly by courthouse and courtroom? (Choose 1)

☐ Uniform across our courts

☐ Varies by judge presiding

☐ Varies from courthouse to courthouse

*** 5a. If the trial penalty is a factor in your county, does it vary by type of case?**

○ Yes

○ No

*** 5b. In which case types do you see the trial penalty most often? (Choose up to 2)**

☐ Homicide cases

☐ Sex cases

☐ Gang cases

☐ Felony cases with available enhancements (strike priors etc.)

☐ Assault cases

☐ Other (please describe)

California Trial Penalty Survey for Prosecutors

FELONY AND MISDEMEANOR CASES

6. If you have observed a trial penalty in your county, in what ways does the trial penalty manifest itself? (Check all that apply)

- ☐ One time only offers at first appearance
- ☐ Plea offers that expire immediately or on short notice
- ☐ Policy or practice of opposing an accused's release on bail even when a non-custodial plea offer is made
- ☐ Dramatically reduced plea offers (as opposed to dismissal) after revelation of a constitutional defect or other core problem with the prosecution
- ☐ Adding new charges if offer not accepted
- ☐ Increasing severity of charges
- ☐ Increased sentence in offer
- ☐ Waiver of the right to counsel
- ☐ Waiver of time to conduct a meaningful investigation
- ☐ Waiver of discovery
- ☐ Waiver of pretrial suppression motions
- ☐ Waiver of access to experts to develop mitigation
- ☐ Waiver of appeal
- ☐ Waiver of prospective claims of ineffective assistance
- ☐ Waiver of Public Records Act requests (PRAs)
- ☐ Significantly increased penalty if convicted after trial
- ☐ Local or common perceptions about how the trial penalty could be used against the accused
- ☐ Other (please describe)

California Trial Penalty Survey for Prosecutors

FELONY AND MISDEMEANOR CASES

7. Do you believe that any of the following are a factor in the trial penalty as it occurs in your jurisdiction? (Check all that apply)

- ☐ Mandatory minimum sentences
- ☐ Statutory Limitation of plea bargaining
- ☐ State Rules of Court
- ☐ Local Rules of Court
- ☐ Policies and practices of the prosecutors
- ☐ Policies and practices of the Judge such as the court actively engaging or not engaging in the bargaining process
- ☐ Pre-trial release status
- ☐ Policies and practices of your office
- ☐ Policies and practices of the Court (i.e. like plea forms that make you require defendants to waiver their rights to appeal)
- ☐ Policies and practices of defense attorneys
- ☐ Excessive caseloads
- ☐ Other (please specify)

7b. Please elaborate on how the factors you selected above affect the trial penalty in your jurisdiction (up to 200 words)

*** 8a. Do judges ever impose concurrent sentences, dismiss charges under Penal Code §1385 or take other actions after trial so that post-trial sentences are equal to or less than the pre-trial offer?**

- ○ Yes
- ○ No

California Trial Penalty Survey for Prosecutors

FELONY AND MISDEMEANOR CASES

*** 8b. You indicated that judges use existing tools after trial to result in post-trial sentences that are equal to or less than the pre-trial offer. How often does this happen in your county?**

Rarely | Occasionally | Frequently

8c. Please explain (up to 200 words)

*** 9a. Have you ever argued at sentencing for the same sentence post trial as your last pre-trial offer?**

- ○ Yes
- ○ No

*** 9b. You indicated that you have asked for the same post-trial sentence as a pretrial plea offer. About how many times has this happened?**

- ○ Less than 5
- ○ 6 to 10
- ○ More than 10

9c. Please explain (up to 200 words)

*** 10a. Do you or the agency for which you are employed track the number of cases filed, and the number or percentage of cases disposed of by a guilty / no contest plea?**

- ○ Yes
- ○ No

California Trial Penalty Survey for Prosecutors

PART I

*** 10b. Does your office keep data showing the last plea offer in each case and the sentence imposed in cases that proceed to trial?**

- ○ Yes
- ○ No

*** 10c. Is your office willing to provide such data to the Trial Penalty Project?**

- ○ Yes
- ○ No

11a. Are you willing to participate in an interview by one of the researchers collecting information for this project?

- ○ Yes
- ○ No

11b. Please provide your name and contact information.

Name

Email Address

Phone Number

California Trial Penalty Survey for Prosecutors

PART II

If you prosecuted one or more cases in which you believe the trial penalty may have had an impact, this section requests that you provide information of examples of the trial penalty. Examples could include a case in which a defendant, who you considered to be less culpable than one or more of the other defendants, went to trial and received a significantly greater sentence than defendants who pled guilty and who you believe were more culpable. Or a case in which the defendant turned down a plea offer with a minimal or modest sentence and then received a significantly greater sentence after trial. You can describe the cases without case numbers or names if you prefer. If so, please write "NW" for "name withheld." If you do not recall the length of a sentence or plea offer with precision, please write "approximate."

Please provide up to three examples of the trial penalty in cases you have prosecuted.

California Trial Penalty Survey for Prosecutors

PART II

12. What is the name of the defendant?

*** 13a. In what county did the case occur?**

13b. If there are multiple courthouses in that county, at which one was this case held?

14. What was the principal or top charge in this case?

15. Who was the sentencing judge?

16a. What plea offer(s) did you make in the case?

16b. At what stage of the case did you make these offer(s)?

16c. Did the trial judge give an indicated sentence in order to settle the trial?

- ○ Yes
- ○ No

California Trial Penalty Survey for Prosecutors

PART II

16d. What sentence did you argue for at sentencing after trial?

17. What was the result of the case?

18. What was the sentence given to the defendant by the judge?

*** 19. Do you have another example to share?**

- ○ Yes
- ○ No

20. What is the name of the defendant?

*** 21a. In what county did the case occur?**

21b. If there are multiple courthouses in that county, at which one was this case held?

22. What was the principal or top charge in this case?

California Trial Penalty Survey for Prosecutors

PART II

23. Who was the sentencing judge?

24a. What plea offer(s) did you make in the case?

24b. At what stage of the case did you make these offer(s)?

24c. Did the trial judge give an indicated sentence in order to settle the trial?

- ○ Yes
- ○ No

24d. What sentence did you argue for at sentencing after trial?

25. What was the result of the case?

26. What was the sentence given to the defendant by the judge?

*** 27. Do you have another example to share?**

- ○ Yes
- ○ No

California Trial Penalty Survey for Prosecutors

PART II

28. What is the name of the defendant?

*** 29a. In what county did the case occur?**

29b. If there are multiple courthouses in that county, at which one was this case held?

30. What was the principal or top charge in this case?

31. Who was the sentencing judge?

32a. What plea offer(s) did you make in the case?

32b. At what stage of the case did you make these offer(s)?

32c. Did the trial judge give an indicated sentence in order to settle the trial?

- ○ Yes
- ○ No

California Trial Penalty Survey for Prosecutors

PART II

32d. What sentence did you argue for at sentencing after trial?

33. What was the result of the case?

34. What was the sentence given to the defendant by the judge?

California Trial Penalty Survey for Prosecutors

HOW YOUR INFORMATION WILL BE USED

We appreciate the information you have provided regarding your experience in the criminal justice system. While we cannot guarantee the Task Force will use any particular story, we will contact you to ensure that the information used in our 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.

Thank you for participating in a process that we hope will assist in addressing the problem of the trial penalty and the erosion of the Sixth Amendment right to trial.

APPENDIX 3:

Examples of Outreach Letters



April 4, 2022

The Office of the District Attorney of San Diego County

RE: PUBLIC RECORDS ACT REQUEST

Dear Sir or Madam:

Please accept and process this request for records from 2012 to present, containing the following information under the California Public Records Act:

1. All current policies related to plea offers and sentencing
2. The total number of felony cases filed each year
3. The total number of misdemeanor cases filed each year
4. The total number of cases resolved by guilty or no-contest plea
5. The total number of trials held
6. The total number of bench trials compared to jury trials
7. The name and/or case number of every case tried which resulted in a guilty verdict
8. For every case tried which resulted in a guilty verdict, the terms of the last plea bargain offered the defendant prior to verdict, including, if available, the offered counts and sentences
9. For every case tried which resulted in a guilty verdict, the post-trial sentence imposed by the court.
10. The number of cases filed by year, and the particular types of dispositions by number, including, for example, dismissal, acquittal after jury trial, conviction after jury trial, acquittal after court trial, conviction after court trial, negotiated guilty or no-contest plea (plea bargain), diversion, still pending, etc.
11. Demographic data corresponding to each case disposition.

Kindly provide the requested documents within 15 days of receipt of this request. Thank you in advance.

Sincerely,

Toni Rodriguez

Communications Specialist

The Law Office of Jacqueline Goodman

Member
STATE BAR OF CALIFORNIA

Member
MASSACHUSETTS BAR

JACQUELINE GOODMAN
ATTORNEY AT LAW

April 28, 2022

Glenn County Superior Court
526 Sycamore Street B
Willows, CA 95988

RE: PUBLIC RECORDS ACT REQUEST

Dear Sir or Madam:
Please accept and process this request for records from 2012 to present, containing the following information under the California Public Records Act:

1. All current policies related to plea offers and sentencing
2. The total number of felony cases filed each year
3. The total number of misdemeanor cases filed each year
4. The total number of cases resolved by guilty or no-contest plea
5. The total number of trials held
6. The total number of bench trials compared to jury trials
7. The name and/or case number of every case tried which resulted in a guilty verdict
8. For every case tried which resulted in a guilty verdict, the terms of the last plea bargain offered the defendant prior to verdict, including, if available, the offered counts and sentences
9. For every case tried which resulted in a guilty verdict, the post-trial sentence imposed by the court.
10. The number of cases filed by year, and the particular types of dispositions by number, including, for example, dismissal, acquittal after jury trial, conviction after jury trial, acquittal after court trial, conviction after court trial, negotiated guilty or no-contest plea (plea bargain), diversion, still pending, etc.
11. Demographic data corresponding to each case disposition.

Kindly provide the requested documents within 15 days of receipt of this request. Please send the documents via email to jacquie@jglawgroup.com or via U.S. Postal Service delivered to 712 N. Harbor Bl. Fullerton, CA 92832. Thank you in advance.

Kindest regards,

JACQUELINE GOODMAN
Attorney at Law

Member of the Bar
UNITED STATES SUPREME COURT
✧
THE GOODMAN LAW BUILDING
712 N. HARBOR BOULEVARD • FULLERTON, CA 92832 • 714.879.5770 • TELECOPIER: 714.879-5771
www.californiadefenselawyer.net



California Attorneys for Criminal Justice Foundation

Foundation Board

2022 Chair
Allison Zuvela, *Sacramento*

Fighting for Justice Through Education

July 20, 2022

Superior Court of Butte County
One Court Street
Oroville, CA 95965

Attn: Court Administration – Jarrod Orr

Re: REQUEST UNDER CALIFORNIA COURT RULE 10.500

Dear Sir or Madam:

On behalf of the California Attorneys for Criminal Justice ("CACJ") Foundation, please accept and process this request for records from 2012 to present, containing the following information:

1. All current and prior policies related to plea offers and sentencing
2. The total number of felony cases filed each year
3. The total number of misdemeanor cases filed each year
4. The total number of cases (divided by felony or misdemeanor filings, if known) resolved by guilty or no-contest plea
5. The total number of trials held (divided by felony or misdemeanor filings, if known)
6. The total number of bench trials compared to jury trials
7. The name and/or case number of every case tried which resulted in a guilty verdict
8. For every case tried which resulted in a guilty verdict, the terms of the last plea bargain offered the defendant prior to verdict, including, if available, the offered counts and sentences
9. For every case tried which resulted in a guilty verdict, the charges convicted as compared to those charged, if known, and the post-trial sentence imposed by the court.
10. The number of cases filed by year, and the particular types of dispositions, including, for example, dismissal, acquittal after jury trial, conviction after jury trial, acquittal after court trial, conviction after court trial, negotiated guilty or no-contest plea (plea bargain), diversion, still pending, etc.
11. Demographic data corresponding to each case disposition.

Please note that the CACJ Foundation submits this request as a non-profit organization without "commercial, trade, or profit interests" pursuant to California Court Rule 10.500(e)(4)(D)(i), and as such, seeks to waive all fees and charges associated with this request.



California Attorneys for Criminal Justice Foundation

Foundation Board

2022 Chair
Allison Zuvela, *Sacramento*

Fighting for Justice Through Education

Kindly provide the requested documents within 15 days of receipt of this request. Please send the documents via email to me at zuvelalaw@gmail.com or via U.S. Postal Service delivered to 1610 Arden Way, Suite 140, Sacramento, CA 95815. Thank you in advance.

Kindest regards,

Allison Zuvela
Chair, California Attorneys for
Criminal Justice Foundation



California Attorneys for Criminal Justice Foundation

Fighting for Justice Through Education

June 15, 2023

Office of the Public Defender, County of Tuolumne
c/o Scott Gross
99 N. Washington Street
Sonora, CA 95370

Re: Request Pursuant to California Public Records Act

To whom it may concern:

On behalf of the California Attorneys for Criminal Justice Foundation ("CACJ Foundation"), please accept and process this request for **records from 2013 to present**, containing the following information:

For each crime for which data is available, any data, including aggregated data, showing the sentences for convictions upon guilty or "no contest" pleas, as compared to, or in addition to, data showing sentences upon conviction after trial for that same crime.

Kindly provide the requested documents—or send any questions or concerns—within 15 days of receipt of this request, via email to CACJ Foundation's pro bono counsel, Donald P. Salzman, by email at donald.salzman@probonolaw.com or via U.S. Postal Service delivered to:

Donald P. Salzman
1440 New York Avenue, N.W.
Washington, D.C. 20005

Thank you in advance for your prompt attention to this request.

Kindest regards,

/s/ Graham Donath

Graham Donath, Chair
CACJ Foundation



California Attorneys for Criminal Justice Foundation

Fighting for Justice Through Education

June 20, 2023

Office of the District Attorney, County of Alameda
c/o Pamela Price
1225 Fallon Street, Suite 900
Oakland, CA 94612

Re: Request Pursuant to California Public Records Act

To whom it may concern:

On behalf of the California Attorneys for Criminal Justice Foundation ("CACJ Foundation") please accept and process this request for **records from 2013 to present**, containing the following information:

For each crime for which data is available, any data, including aggregated data, showing the sentences for convictions upon guilty or "no contest" pleas, as compared to, or in addition to, data showing sentences upon conviction after trial for that same crime.

Kindly provide the requested documents—or send any questions or concerns—within 15 days of receipt of this request, via email to CACJ Foundation's pro bono counsel, Donald P. Salzman, by email at donald.salzman@probonolaw.com or via U.S. Postal Service delivered to:

Donald P. Salzman
1440 New York Avenue, N.W.
Washington, D.C. 20005

Thank you in advance for your prompt attention to this request.

Kindest regards,

/s/ Graham Donath

Graham Donath, Chair
CACJ Foundation



FOR MORE INFORMATION CONTACT:

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS | NACDL FOUNDATION FOR CRIMINAL JUSTICE

National Association of Criminal Defense Lawyers®
1660 L Street NW, 12th Floor, Washington, DC 20036
Phone: 202-872-8600

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