



May 21, 2021

To the New York State Legislature:

I write on behalf of the National Association of Criminal Defense Lawyers (NACDL) to strongly urge the New York State Legislature to pass A5689/S1279, A5687/S1280, and A5688/S1281. These bills would have a substantive impact on fighting racial oppression in our criminal legal system by allowing appellate courts to review excessive sentences and suppression rulings while also streamlining the process for establishing indigence.

NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's many thousands of direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal legal system.

NACDL has long been concerned with reforming the “trial penalty,” a term referring to the substantial difference between the sentence offered in a plea deal prior to trial versus the sentence a defendant receives after trial. NACDL’s 2018 report, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*¹, found that only 3% of accused individuals’ cases make it to trial. In March 2021, NACDL released a second report, *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack*², finding that 96% of felony convictions and 99% of misdemeanor convictions in New York were the result of guilty pleas. A significant contributor to this is the fact that individuals choose to plead guilty, regardless of actual guilt or innocence, to avoid a potentially significantly greater sentence after trial – the “trial penalty.”

As the Honorable Jonathan Lippman states in the *New York State Trial Penalty* report, “the trial penalty has fundamentally transformed the criminal legal system into a plea system in which trials are nearly extinct...mandatory minimum sentences, sentencing enhancements, and charge selection provide the prosecutor with the leverage to extract guilty pleas under the threat of vastly increased punishment upon those who assert their rights.” Data analysis from New York City

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

² “The New York State Trial Penalty: The Constitutional Right to Trial Under Attack,” NACDL, March 2020, <https://www.nacdl.org/Document/NewYorkStateTrialPenaltyRighttoTrialUnderAttack>.



showed that in 66% of cases, individuals received a more severe sentence at trial than the one offered as part of their plea offer. This percentage rose when longer prison sentences were at stake and, for 89% of individuals who received a plea offer of over four years, going to trial resulted in a penalty.

These studies demonstrate how the trial penalty can manifest in a number of ways, and New York is no exception. In addition to the threat of harsh sentences, individuals charged with a crime in New York are often forced to waive various appellate rights. To mitigate the disastrous consequences associated with this practice, the report recommends prohibiting conditioning plea offers on waiving statutory or constitutional rights and guaranteeing access to appellate review for pretrial decisions and suppression motions, even after a guilty plea has been entered.

With this background, NACDL strongly supports A5687/S1280 and A5688/S1281, as the legislation would allow appellate courts to review excessive sentences and suppression rulings regardless of appeal waivers. We also support A5689/S1279 which works to streamline the assignment of appellate counsel by allowing poor person status to continue on appeal upon an attorney certification, thereby relieving indigent defendants of an onerous and unnecessary application process.

These proposals implement, rather than reverse, prior legislative policies. Current law broadly allows the appellate courts to both reduce sentences in the interests of justice and review suppression rulings that may involve police and official misconduct. The Legislature determined that these powers are so important that they may be exercised even when the defendant pleaded guilty, and even where the sentence is the result of a plea bargain.

However, prosecutors routinely thwart this legislative purpose by demanding that defendants waive their right to appeal in exchange for a plea deal. As a result, those who plead guilty are unable to access appellate review of their cases for suppression rulings and excessive sentences. By passing A5687/1280 and A5688/S1281, the Legislature can effectuate its intent and restore these rights.

The proposal in A5689/1279 is also not a significant departure from existing policies. This legislation simply streamlines the assignment of appellate counsel for indigent defendants by allowing an attorney to certify poor person status. This same method of verification is used in Family Court and civil cases. It is only in criminal cases where defendants do not receive the same benefit when applying for appellate counsel.

With Black and Latinx individuals most likely to receive harsh plea deals and excessive sentences, experience police and other official misconduct, and rely on public defenders, each of these reforms is critical to advancing the interests of racial justice. New York can make its criminal legal



system fairer by simply enabling access to appellate review and by allowing the Appellate Divisions to exercise their sentencing and suppression review power unfettered, as the Legislature originally intended.

Enabling appellate review is a key step in the right direction for New York, and NACDL strongly urges the New York State Legislature to pass this legislation to help create a fairer criminal legal system.

Sincerely,

Christopher W. Adams, President
National Association of Criminal Defense Lawyers