

No. 25-11097

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IN THE  
**United States Court of Appeals for the Fifth Circuit**

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

DERRICK LEE,

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Northern District of Texas  
No. 4:24-cr-00178-P-2, Hon. Mark Pittman

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**AMICUS CURIAE BRIEF ON BEHALF OF  
THE NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS  
IN SUPPORT OF APPELLANT AND REVERSAL**

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## SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rules 28.2.1 and 29.2, the number and style of the case are as follows: *United States v. Derrick Lee*, 5th Cir. No. 25-11097. In accordance with Federal Rule of Appellate Procedure 26.1, and in addition to the persons and entities listed in Appellant's and Appellee's Certificates of Interested Persons, the undersigned counsel certifies that amicus curiae, the National Association of Criminal Defense Lawyers—a nonprofit entity with no parent corporation and no publicly held corporation owning any of its stocks—has a non-financial interest in the outcome of this case. The names of amicus counsel are listed below. These representations are made for the judges of this Court to evaluate possible recusal or disqualification.

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## INTEREST OF AMICUS CURIAE<sup>1</sup>

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has thousands of members nationwide, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defense and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL dedicates itself to advancing the proper, efficient, and just administration of criminal justice. Each year, NACDL files amicus briefs in this Court and others in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. The question addressed in this amicus brief, involving the importance of the trial right and ensuring that defendants are not punished for exercising it, is such an

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the submission of this amicus brief.

issue. NACDL has conducted research and authored reports related to this topic. *See, e.g.,* 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* (July 2018) (“NACDL Report”), available at <https://bit.ly/4rcjuAW>.

## INTRODUCTION

The jury-trial right has been foundational to the American legal system since before the creation of the Republic. John Adams called this right “‘the heart and lungs’ of liberty.” *Erlinger v. United States*, 602 U.S. 821, 829 (2024). Its importance is twofold. First, it is an essential individual freedom, providing a check on the government’s power to punish indiscriminately or based on inadequate evidence. Second, it guarantees citizen participation in our justice system, improving transparency and providing invaluable civic education. Our Constitution enshrines the criminal jury-trial right not once but twice: in the Sixth Amendment’s guarantee that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury,” U.S. Const. amend. VI, as well as in Article III’s command that the “Trial of all Crimes ... shall be by Jury,” U.S. Const. art. III, § 2.

Yet that fundamental right has rapidly eroded due to the increasing use of trial penalties. Today, “individuals who choose to exercise their Sixth Amendment right to trial face exponentially higher sentences if they invoke the right to trial and lose.” NACDL Report at 5. As a result, federal criminal jury

trials have all but vanished in the face of plea bargaining, with jury trials now deciding just a fraction of federal criminal cases.<sup>2</sup>

Courts must zealously guard against practices that penalize defendants for exercising their jury-trial rights. That is precisely what this Court confronts here. Sentencing is meant to be a holistic, individualized process that imposes the least severe sentence necessary to achieve Congress’s aims. Defendant-Appellant Derrick Lee was denied that process when the district court announced its policy of denying downward variances from Guidelines sentences whenever a defendant exercises the jury-trial right that the Constitution guarantees.

*“I have never granted a downward variance on an individual that’s decided to go to trial, especially in a case like this where it’s overwhelming evidence.”* ROA.664–65 (emphasis added).<sup>3</sup> With that pronouncement at sentencing, the district judge made express that there was a penalty associated with Mr. Lee’s choice to exercise his constitutional rights. That penalty is unconstitutional.

Mr. Lee’s appellate brief has ably explained why the district court’s policy, also expressed in the sentencing court’s other comments, chills the exercise of

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<sup>2</sup> More than 97 percent of federal criminal convictions in 2024 stemmed from guilty pleas, with less than 3 percent the result of trials. U.S. Sent’g Comm’n, 2024 Sourcebook of Federal Sentencing Statistics at 30, Table 11 (“Sent’g Comm’n Sourcebook”), available at <https://bit.ly/4r6HJ3v>.

<sup>3</sup> This brief uses the following abbreviations: “OB” (Mr. Lee’s opening brief); “ROA” (Record on Appeal).

defendants' Sixth Amendment rights and thus merits resentencing. *See* OB 19–27. NACDL joins those arguments here to emphasize both the deep historical tradition confirming the jury-trial right's sacred role under the Constitution and to highlight the severity of trial penalties: effectively choking off jury trials as a realistic avenue for criminal defendants.

This Court should, at a minimum, vacate the sentence below and remand.

## **ARGUMENT**

### **I. The jury-trial right is a bedrock feature of our constitutional republic.**

The Sixth Amendment's promise of a jury trial both reflects and reinforces the most important values in our constitutional tradition. First, it protects individuals by providing a check against prosecutorial power. Second, it encourages public participation in the justice system that is essential to cultivating civic republicanism. Both functions animate the jury trial's role in our constitutional order. And both have been repeatedly re-affirmed by courts.

#### **A. The jury-trial right has been central to safeguarding individual liberty since before the Founding.**

The jury-trial right has been part of the lifeblood of the American legal tradition since long before the Founding. In the colonial era, “juries existed first and foremost to protect the people against the abuse of power by an arbitrary Crown.” Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 294 (1997). And threats to this right were at the center of the

American colonists' grievances against the British. The Declaration of Independence, for instance, charged the Crown with "depriving us in many cases, of the benefits of Trial by Jury." The Declaration of Independence para. 20 (U.S. 1776).

In the constitution-making processes that unfolded in the United States following independence, Americans gave "two rights preeminent importance. If the rights to representation and to trial by jury were left to operate in full force, they would shelter nearly all the other rights and liberties of the people." Rakove, *supra*, at 293. The state constitutions adopted in that period drive home this point. "Every state that penned a constitution between 1775 and 1789 featured at least one express affirmation of jury trial, typically celebrating the jury with one or more of the following words: 'ancient,' 'sacred,' 'inviolable,' 'great,' and 'inestimable.'" Akhil Reed Amar, *America's Constitution* 330 (2006).

The Sixth Amendment gives force to these ideas—shielding all people against tyranny by guaranteeing a jury trial as a constitutional right. In doing so, it closely tracks the views of the Framers. Alexander Hamilton, for example, called the jury trial a valuable "defense against the oppressions of an hereditary monarch." The Federalist No. 83 (Alexander Hamilton), *available at* <https://bit.ly/3OOMX6J>. In a similar vein, Thomas Jefferson described the jury system as "the only anchor, ever yet imagined by man, by which a

government can be held to the principles of its [sic] constitution.” Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 *The Papers of Thomas Jefferson*, at 267 (Julian P. Boyd ed., 1958), available at <https://bit.ly/3OSS71x>.

Thus, “the right to trial by jury was probably the most valued of all civil rights” at the Founding. Vikrant P. Reddy & R. Jordan Richardson, *Why the Founders Cherished the Jury*, 31 *Fed. Sent’g Rep.* 316, 316 (2019).

**B. The jury-trial right has also been key to preserving the Nation’s democratic character.**

Nor is the jury-trial right crucial only to the liberty of the individual. This right also empowers the people collectively to participate in the legal system.

At the Founding, “[t]rials were not just about the rights of the defendant but also about the rights of the community. The people themselves had a right to serve on the jury—to govern through the jury.” Amar, *supra*, at 237. No wonder, then, that the Constitution enshrined the practice of trial by jury even before the Bill of Rights was adopted: Article III provides that the “Trial of all Crimes ... shall be by Jury.” U.S. Const. art. III, § 2.<sup>4</sup>

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<sup>4</sup> In fact, one scholar writing about this provision has argued that “[f]ederal bench trials premised upon defendant’s jury waiver cannot be justified by constitutional text, common law history, or Founding-era practices.” Stephen A. Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 *Santa Clara L. Rev.* 373, 376 (2012).

This view of the jury right as important to inculcating democratic values persisted after the Founding and throughout the Early Republic period. Alexis de Tocqueville—whose landmark nineteenth-century discussion of American political life began as an investigation of American prisons—emphasized this republican character of juries. A jury, he wrote, “should be regarded as a free school which is always open and in which each juror learns his rights.” Alexis de Tocqueville, *Democracy in America* 275 (J.P. Mayer ed., G. Lawrence trans., Harper Perennial Modern Classics ed. 2006) (1835).

**C. Courts have consistently recognized the jury-trial right’s critical roles in our democracy.**

The U.S. Supreme Court has repeatedly recognized these twin functions of the jury-trial right: protecting liberty and fostering civic engagement.

The Court has explained, for instance, that the jury-trial right exists to “guard against the exercise of arbitrary power” by introducing “the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor.” *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); accord *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (calling the jury-trial right an “inestimable safeguard against the corrupt or overzealous prosecutor”); *Alleyne v. United States*, 570 U.S. 99, 114 (2013) (describing the jury’s historical role “as an intermediary between the State and criminal defendants”).

The Supreme Court has similarly extolled the jury trial’s importance to encouraging democratic participation. “Community participation in the administration of the criminal law ... is ... critical to public confidence in the fairness of the criminal justice system.” *Taylor*, 419 U.S. at 530. “The jury is a tangible implementation of the principle that the law comes from the people.” *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 210 (2017).

\* \* \*

It is no exaggeration to say that the Sixth Amendment “place[s] the jury at the heart of our criminal justice system” and democracy. *Erlinger*, 602 U.S. at 831. And if the jury-trial right is arguably the beating heart of both liberty and democracy under the Constitution, then penalties merely for exercising that right are anathema to our constitutional tradition.

**II. Federal criminal defendants now overwhelmingly forgo their right to trial due to the trial penalty, undermining the jury-trial right’s functions.**

Despite their lofty place in our constitutional history, federal jury trials in criminal cases have all but disappeared. That decline stems from the trial penalty—harsher sentences for defendants who exercise their inviolable right to a jury trial than for those who waive that right. In considering this appeal, the Court should look askance at any practice that threatens to further undermine the jury-trial right.

In 2024, just 2.8 percent of convictions in federal criminal cases were the result of guilty verdicts at trial; the rest were all guilty pleas. *See* Sent’g Comm’n Sourcebook at 30, Table 11; *see also* NACDL Report at 14 (reporting similar figure for 2016).

There is little mystery about why. Scholars tie this alarming reduction to the dramatically higher sentences that federal defendants now face after trial. Repeated studies confirm the existence of a trial penalty in the federal system and its contribution to the jury trial’s disappearance, making it “among the most robust findings in the empirical sentencing literature.” Brian D. Johnson, *Plea–Trial Differences in Federal Punishment: Research and Policy Implications*, 31 Fed. Sent’g Rep. 256, 256 (2019); *accord* NACDL Report at 17; Andrew Chongseh Kim, *Understanding the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 Miss. L.J. 1195, 1199 (2015) (referring to a 2015 study concluding that “the average federal trial penalty is actually around sixty-four percent”). One scholar and practitioner has described “threatening massively disproportionate sentences to defendants who refuse to plead guilty” as one of the principal levers prosecutors use to pressure defendants to forgo their jury-trial right. Clark Neily, *A Distant Mirror: American-Style Plea Bargaining Through the Eyes of a Foreign Tribunal*, 27 Geo. Mason L. Rev. 719, 730 (2020). Indeed, “very few federal defendants rationally can choose to exercise

their constitutional right to trial” and most defendants who go to trial “do so against their own best interests.” Kim, *supra*, at 1249.

This trend flouts defendants’ fundamental rights. The Supreme Court has instructed that pressuring a defendant to trade away rights through the threat of punishment for exercising those rights is unconstitutional. The Court has banned “penalt[ies] imposed by courts for exercising a constitutional privilege”—those that “cut[] down on the privilege by making its assertion costly.” *Griffin v. California*, 380 U.S. 609, 614 (1965); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (“[T]he unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”).

This Court has been even more specific, ruling that a sentence that a district court explicitly because the defendant went to trial “clearly amount[s] to a constitutional violation.” *United States v. Gozes-Wagner*, 977 F.3d 323, 337 (5th Cir. 2020); *see also Thomas v. United States*, 368 F.2d 941, 942–43 (5th Cir. 1966) (ruling that imposing a harsher sentence based in part on the defendant’s unwillingness to waive his Fifth Amendment right was unconstitutional). Despite these rulings, trial penalties continue to whittle away at the jury-trial right.

Trial penalties make defendants choose between exercising their jury-trial right and avoiding additional punishment. This dynamic undermines the jury’s historical role as a check on prosecutorial power—completely at odds with the constitutional design. And it even encourages innocent defendants to plead guilty to avoid harsher sentences. *See* NACDL Report at 6, 9–10 (summarizing data regarding guilty pleas by innocent defendants). This Court should therefore prohibit blanket policies that reinforce this alarming erosion of the jury-trial right and the values it is meant to enhance.

**III. The district court’s refusal to consider a variance because of Mr. Lee’s decision to go to trial is an unconstitutional trial penalty.**

Mr. Lee incurred an unconstitutional trial penalty here. The district court’s statement that it “never” grants a downward sentencing variance when a defendant goes to trial is a brazen example of conditioning a right on a defendant’s forgoing another right guaranteed by the Constitution. Little could be further from the Founders’ design.

Under 18 U.S.C. § 3553(a), courts must consider several enumerated factors—of which the Sentencing Guidelines range is only one—to fashion a sentence that is “sufficient, but not greater than necessary” to promote the statutory aims. In crafting a sentence, courts must “consider every convicted person as an individual and every case as a unique study in human failings that

sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Gall v. United States*, 552 U.S. 38, 52 (2007) (citation omitted).

Rather than engage in this “unique study,” *id.*, the district court declared outright that it had “never granted a downward variance on an individual that’s decided to go to trial,” ROA.664. This was not an isolated remark: The district court’s other comments at sentencing cement that Mr. Lee faced punishment not based on a faithful application of § 3553(a)’s individualized assessment but on the district court’s open hostility toward those who exercise their right to go to trial. *See, e.g.*, ROA.619–20 (“[I]t is my policy if you go to trial in a case that I do take you in today.”); ROA.671 (“You don’t go to trial over here and get to walk out.”). The trial court’s blanket policy of denying any downward variance from the Guidelines range is thus a paradigmatic instance of a trial penalty.

It does not save the district court’s sentencing decision that the court found “overwhelming evidence” of guilt.<sup>5</sup> ROA.665. A defendant’s Sixth Amendment rights do not hinge on the volume of evidence involved. This Court granted relief in the face of identical language in *Thomas*, 368 F.2d at 943 (“You have been proven guilty beyond a reasonable doubt by overwhelming evidence—by the

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<sup>5</sup> Even on this score, there is room for doubt: Mr. Lee maintains that the district court violated his Confrontation Clause right, and that the improperly admitted evidence was fundamental to the government’s case. *See* OB 13–19.

testimony of five eye-witnesses, plus the testimony of one of the persons who participated in the robbery.”). There, the Court reasoned, “Thomas suffered the consequences for choosing [not to confess under the Fifth Amendment] in the form of a longer prison term. ... [H]e paid a judicially imposed penalty for exercising his constitutionally guaranteed rights.” *Id.* at 946. So too here. Mr. Lee paid a penalty in the form of a harsher sentence because he chose to exercise his rights under the Constitution. That is unacceptable.

With criminal jury trials now virtually a thing of the past, it is vital for this Court to protect what remains of the Founders’ vision of a robust jury-trial right. Both to shield individual liberty and to foster the democratic values that our constitutional tradition demands, the Court should not brook naked statements that a defendant will be punished more severely for going to trial.

## CONCLUSION

For these reasons, NACDL urges the Court to, at a minimum, vacate the sentence below and remand.

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### **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing amicus curiae brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on March 6, 2026. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John B. Williams III  
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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,918 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Calisto MT, in a 14-point font size.

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