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'Coercive' Prosecution Drives Trial Penalty, Defense Attys Say

By **Marco Poggio**

Law360 (March 30, 2021, 2:21 PM EDT) -- Almost a decade ago, U.S. Supreme Court Justice Anthony M. Kennedy wrote in an opinion in the case Missouri v. Frye that "criminal justice today is, for the most part, a system of pleas, not a system of trials."

That statement rings true, even more so today. Jury trials in the United States are disappearing, and attorneys and legal scholars have been **trying to understand why**. In the criminal justice system, mandatory minimum sentences and sentencing guidelines have been identified as reasons. But pressure for guilty pleas is by and large the reason fewer and fewer defendants get their day before a jury, attorneys say.

The New York State Association of Criminal Defense Lawyers, a group with more than 1,000 members, said in a report released Friday that "coercive" prosecution tactics resulting in criminal defendants pleading guilty are largely responsible for killing jury trials, which hurts the constitutional rights of defendants.

The report, "The New York State Trial Penalty: The Constitutional Right to Trial Under Attack," surveyed data from more than 40 counties across the state to understand the extent of prosecutorial and judicial practices that combined lead to what is known as the trial penalty: when a defendant is sentenced to a longer prison term because they decided to go trial instead of taking a plea offer.

"In virtually every jurisdiction people plead guilty to avoid significantly greater punishment, having nothing to do with their guilt or innocence. If they contest the charge against them, litigate the legality of evidence that will be offered, or insist upon a trial, they will receive a much harsher sentence," the report says. "This trial penalty has fundamentally transformed the criminal legal system into a plea system in which trials are nearly extinct."

Susan J. Walsh of Vladeck Raskin & Clark PC, chair of NYSACDL's trial penalty project, said prosecutorial discretion, mandatory minimums and limitation of judicial discretion have been driving the stark decline in jury trials in the last three decades. Friday's report says the number of criminal trials in the state has dropped 61% since 1990.

"Unfortunately, the trial penalty is pervasive, alive and well in New York state," she said.

Defendants who reject plea offers and go to trial are bound by mandatory minimum sentences, which are significantly higher than those proposed during negotiations with prosecutors ahead of trial. Walsh called the difference "exponential" between the sentence included in a plea offer and the one received by a defendant upon conviction.

But if mandatory minimums tie the hands of judges once there is a conviction, prosecutors have discretion: They leverage shorter sentences in exchange for defendants pleading guilty, and they wield the mandatory minimums as a weapon to discourage defendants to seek trial, she said.

"The threat of the trial penalty is what drives plea rates so high," Walsh said. "The prisons are packed with people who direct victims of the trial penalty, but the prisons have even more people who are incarcerated as a result of the threat of the trial penalty."

The report presents several cases in point. In 2016, despite apparent deficiencies in its case, the district attorney's office in Staten Island charged Victor Gutierrez with attempted murder and other lesser charges in the stabbing of several of his girlfriend's relatives. The charges carried a minimum sentence of 25 years.

Prosecutors offered Gutierrez a 12-year sentence if he took a plea. Gutierrez refused the offer, and at trial, a jury acquitted him of attempted murder, finding him guilty only of assault and weapons possession.

But even after the murder acquittal, prosecutors asked for a sentence of 32 years, nearly three times longer than the last plea they offered. The judge ultimately sentenced Gutierrez to 34 years in prison.

In a different case, an Ontario County woman was charged with a felony and a misdemeanor after getting into a car crash that hurt another motorist. She was offered 60 days in prison and five years of probation. The woman refused to plead guilty. A grand jury later indicted her of a more serious felony.

In a trial where she faced a possible sentence ranging from 2½ to seven years, she was acquitted of the felony charge and convicted only of the misdemeanor. In the end, she was sentenced to the same time in prison she would have served if she had pled guilty to her first felony charge.

"This is not an uncommon phenomenon," Walsh said. "That is something we have to take a very hard look at."

George Mims, a man who was tried for two armed robberies, had been offered 15 years in prison by prosecutors. A judge offered him a 10-year sentence minutes before the jury returned the verdict. Mims, who continues to affirm his innocence, refused the offer. He was ultimately sentenced to 40 years.

Walsh said the trial penalty goes beyond hurting a defendant's right to have a trial, which is enshrined in the Sixth Amendment.

Public hearings and records provide a window into possible police misconduct. The disappearance of trials has jeopardized that oversight. Mass incarceration is also fueled by the trial penalty, or the threat of it, she said.

"The most consequential act of civic participation in a participatory democracy, second only to voting, is jury practice, jury trial," she said. "Jury trials by the public are designed to oversee law enforcement, and prosecutions and government conduct."

Some of the concerns surrounding the trial penalty have been mitigated by the recently passed bail and discovery laws, which require state prosecutors to turn over to a defendant all evidence they might have before they are able to offer a plea deal.

Before those changes kicked in, defendants faced a choice between risking long sentences or accepting plea bargains without knowing how strong the evidence prosecutors had against them was.

The changes took effect in January 2020. An almost complete halt on trials caused by the coronavirus pandemic has made it difficult to gauge their impact on the trial penalty.

In compiling its report, NYSACDL reached out to all prosecutors' offices in the state for input, but only one responded: the Washington County District Attorney's Office, which has jurisdiction over a mostly rural area with a population of 60,000.

A spokesman for Manhattan's district attorney, Cyrus R. Vance Jr., declined to comment to Law360 Pulse, and so did his Brooklyn counterpart, the office of District Attorney Eric Gonzalez.

Prosecutorial offices in the Bronx, Queens and Staten Island did not respond to requests for comment on the report.

Vance has said he will not seek reelection when his term ends this year.

Tali Farhadian Weinstein, a former federal prosecutor and one of eight candidates in the all-Democrat field competing for Vance's seat, called the trial penalty "a serious problem" and said that prosecutors overcharging defendants have been the most important factor driving it.

Farhadian Weinstein, who more recently served as the general counsel for Gonzalez, for whom she drafted new parole policies, told Law360 that reducing the trial penalty requires implementing a "policy of truth" among prosecutors at the charging stage.

"You charge from the beginning what you think are actually the fair charges that you would want to carry through the entire life of the case," she said. "Truthful charging, rather than strategic charging."

The high-volume caseloads cause all parties in the justice system — prosecutors, judges, attorneys — to contribute to the trial penalty. But prosecutors hold the most power because they design the charges, Farhadian Weinstein said.

Policy Recommendations

In its first recommendation in the report, NYSACDL said mandatory minimum sentencing statutes should be repealed, or at least reviewed.

Tess Cohen, a criminal defense attorney at ZMO Law PLLC and former prosecutor who chairs the New York City Bar Association's criminal justice operations committee, said banishing the minimums is the most urgent point of reform. Without fixing that, any other advance would be difficult, she said.

"Mandatory minimums remain the primary driver of pretrial penalties and the reason people don't exercise their right to trial," Cohen said, adding that prosecutors can offer shorter sentences only up until a verdict, not after.

Prosecutors can, however, coerce defendants during litigation. For instance, they can offer defendants shorter sentences on the condition that they not make motions to suppress certain evidence, Cohen said.

The volume of caseloads handled by prosecutors and limited resources have contributed to steady growth in the trial penalty.

"The system at this point cannot handle any significant percentage of defendants taking their cases to trial," Cohen said.

Addressing the lack of resources is no easy task.

Prosecutors could decide to divert people arrested for lower offenses, such as drug possession or small thefts, to alternatives programs, saving resources to be used combatting more serious crimes, Cohen said.

NYSACDL recommends the repeal of New York Penal Law 220.10(5), which prevents prosecutors from offering pleas on lesser charge, in certain circumstances. The statute makes it more difficult for prosecutors to be lenient.

Other recommendations — there are 15 in total — address prosecutorial discretion and propose giving judges the power to review sentences after a number of years served, to ensure they are still "proportionate."

Cohen said the current justice system makes it impossible to implement some of the report's recommendations.

In one recommendation, the report advises that "it should be unethical for a prosecutor to seek a higher sentence compared to the pretrial offer based on the defendant litigating his or her statutory or constitutional rights, including the right to trial."

Cohen said prosecutors who offer shorter sentences do so with the balance between workloads and budgets in mind, and not necessarily because they believe those sentences are deserved.

"Unless there's really a change in the structural resources, I don't see how [such] policy recommendation can really be fairly required of prosecutors," and the minimum mandatory sentencing presents the first obvious hurdle, she said.

Robert J. Masters, a former Queens prosecutor and now chair of the New York State Bar Association's criminal justice section, defended both mandatory minimums and prosecutorial discretion, saying they ensure the justice system continues to work.

Mandatory minimums were created to avoid situations in which two defendants tried in different courtrooms, charged with the same crimes and with similar evidence, could receive dramatically different sentences.

"That's a form of injustice that the system cannot tolerate either," Masters said. "There has to be a consistency in what the level of punishment can be."

Masters, who during his decades-long career has instructed many assistant district attorneys, defended the role of prosecutors and their discretion in charging defendants, saying he's rarely seen coercion used.

"It's never been something I have seen, as a strategy, been done routinely," Masters said.

"Charging somebody with a felony that's going to require a piece of their life being taken from them is as serious as a heart attack," he said. "If we are going to do that, it has to be based on something that we are confident really happened and that we can prove."

Masters said it's normal to see defendants getting more severe sentences at trial because trial proceedings allow judges more intimacy with cases — the extent of crimes and the hurt they have caused on victims — and these factors ultimately weigh heavily on sentencing determinations.

"I don't know that that's inequitable," he said.

He conceded that the trial penalty might be used across the state.

"What is inequitable is the possibility that people who are not guilty of the charge, because they worry about the most extreme level of sentencing, they plead guilty to something they're not," he said. "As a prosecutor, I was concerned about that."

In 1970 in North Carolina v. Alford, the U.S. Supreme Court held that it was constitutional for judges to accept guilty pleas from defendants who want to plead guilty while still professing their innocence.

But "In my time in the district attorney's office, I put out an edict that we would never take such a plea," Masters said.

Masters said he doubts NYSACDL's recommendation will lead to changes in the law. However, they might result in policy changes at prosecutorial offices and in the judiciary.

Trial Penalty Studies

The study of the trial penalty began at the federal level, with NYSACDL's parent organization, the National Association of Criminal Defense Lawyers, looking at data published by the U.S. Sentencing Commission showing that the average post-trial sentence was more than triple the average sentence of defendants who pled guilty.

In a 2018 report titled "The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It," NACDL highlighted a considerable hurdle in assessing the use of trial penalty: the lack of data. Plea negotiations are off the record, and since most cases end up with pleas, there is little insight.

"Nevertheless, a combination of anecdotal evidence and an analysis of prosecutorial practices, sentencing laws, and judicial decisions strongly suggests that coercion plays a major role in the ever-increasing percentage of defendants who forego their right to a trial," that report concluded.

Scholars estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent and bowing to pressure.

Walsh said the next step is investigating how the phenomenon plays out in other states.

"The goal is to investigate throughout the state systems," Walsh said, adding that New York is the first state to be scrutinized.

About 94% of criminal justice practitioners who were surveyed across the state said the trial penalty was being used in their respective counties. Walsh said court statistics support that assessment.

"People are just not going to trial," she said.

--Editing by Brian Baresch and Kelly Duncan.

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