New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 260—NO. 71
THURSDAY, OCTOBER 11, 2018

WHITE-COLLAR CRIME

Expert Analysis

The Vanishing Federal Criminal Trial

By **Robert J. Anello**

And **Richard F. Albert**

Scenes of jurors filing into the jury box, handing the verdict to the court, and its reading—the suspenseful moments of television crime dramas—in reality are a rarity these days. Contrary to Hollywood's fictionalized vision of our criminal justice system, a recent report from the National Association for Criminal Defense Lawyers confirms what many have recognized: trials are an endangered species. In most cases, resolution via a guilty plea is a foregone conclusion: fewer than three percent of federal criminal cases are resolved by a trial. This phenomenon is often described by jurists and practitioners as "the vanishing trial."

The NACDL Report, titled "The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It," is a thorough and thoughtful examination of the disappearing federal criminal trial and its primary cause, the "trial penalty"—the substantial difference between the sentence a defendant will receive when pleading guilty prior to trial versus the sentence that defendant will receive after trial. The Report concludes: "There is ample evidence that federal criminal defendants are being *coerced* to plead guilty because the penalty for exercising their constitutional [trial] rights is simply too high to risk."

ROBERT J. ANELLO *and* RICHARD F. ALBERT *are partners at Morvillo Abramowitz Grand Iason & Anello P.C.*

In the foreword to the Report, former U.S. District Judge for the Eastern District of New York John Gleeson opines: "Once the centerpiece of our criminal justice ecosystem, the trial is now spotted so infrequently that if we don't do something to bring it back, we will need to rethink many other features of our system that contribute to fair and just results only when trials occur in meaningful numbers." The Report offers detailed insight into the sources of the trial penalty and makes a number of astute recommendations. White-collar practitioners in particular should take interest in the Report's discussion of the role of the trial penalty in corporate and business prosecutions.

White-collar practitioners in particular should take interest in the Report's discussion of the role of the trial penalty in corporate and business prosecutions.

Statistical Data and Why the Trial Penalty Is a Grave Problem. The vanishing trial is not a new trend but has occurred over a number of decades. In 2004, Patricia Lee Refo, the chair of the Litigation Section of the American Bar Association, reviewed data from 1962, when 5,097 federal criminal trials took place, to 2002, when the figure had declined to 3,574. This decline occurred even though the number of criminal cases filed doubled during the same time period. The trend has continued steadily downward since. In 2017, the number of federal criminal trials fell to around 1,800, including both jury and bench trials.

One obvious explanation may be that defendants are unwilling to risk a guilty verdict. The vast majority of defendants who choose to go to trial are found guilty. In 2017, more than 85 percent of the defendants tried in the United States district courts were found guilty. This number was even higher in fraud cases, where 88.5 percent of the 349 defendants who opted for trial were found guilty. Obviously, the risk of conviction itself gives many defendants and defense attorneys pause before deciding to go to trial.

As set forth in the Report, which focuses on United States Sentencing Commission data from 2015, defendants also are less likely to go to trial because of the likelihood that a post-trial sentence will be significantly more severe than a pretrial sentence. A comparison of sentences imposed after trial as a result of a guilty verdict to sentences imposed in cases where a defendant pleads guilty

demonstrate that in every category of crime, defendants who go to trial are penalized via a higher sentence. This is especially evident in white-collar cases. In fraud cases, for example, defendants who go to trial receive on average sentences that are more than three times higher than the sentences received by defendants who plead guilty. Specifically, sentences imposed after trial averaged six years in length and sentences imposed after a plea averaged 1.9 years in length in fraud cases. In food and drug offense cases, the average sentence for defendants who plead is 0.4 years as compared to four years for those who take their chances at trial. The numbers from 2015 reflect a consistent pattern: Individuals who choose to exercise their right to a trial and lose face exponentially higher sentences.

The vanishing trial is a pernicious threat to the foundation of the criminal justice system. The Constitution intended a criminal trial to be a check on the imperfect grand jury system by putting the government to its proof. Trials also are a bulwark against improper police action such as improper arrests and searches and coerced confessions. The decrease in criminal trials and its attendant rigors means that prosecutorial power and potential abuses are left without this critical check. As a result, the risk is high that innocent individuals and those against whom insufficient admissible evidence exists are pleading guilty.

Harsh Sentencing Guidelines: The Trial Penalty in White-Collar Cases. In the 2002 ABA article, Ms. Refo wrote that the federal sentencing guidelines, which became applicable to crimes committed after its 1987 enactment, were a major factor responsible for the decline in criminal trials. "They impose a substantial penalty on a defendant who chooses to exercise his right to a trial—and since they appear to have been designed to encourage or coerce, depending upon your view, defendants to enter into plea agreements, they appear to be working." Sixteen years later, the NACDL Report confirms these sentiments.

The harshness of the guidelines and its provisions that incentivize defendants to plead contribute to this pressure. Defendants recognize that a prosecutor's threat of exponentially higher sentences to defendants considering trial have merit, especially in the white-collar context, because the formulaic calculations set forth in the guidelines can result in sentences that are out of proportion to the defendant's culpability.

The NACDL Report includes a specific discussion of the excessive sentences resulting from the application of §2B1.1, the guideline provision that applies to economic crimes. Sentences are calculated based on the amount of loss that actually results or was intended to result from the offense. The loss table breaks various loss amounts into categories ranging from "$6,500 or less" to "more than $550,000,000" and provides a corresponding increase to the base offense level of the crime for each loss amount range. The impact on a sentence logarithmically increases to as high as an additional 30 levels as one moves higher in the loss amount categories. These amounts have been ratcheted upwards over the years, as high-profile scandals exerted pressure on Congress to more aggressively penalize white-collar wrongdoing. The bottom line, as widely recognized among judges, practitioners, and scholars of federal sentencing, is that the guidelines are "fundamentally broken" in high-loss cases and that overemphasis on the amount of loss often leads to sentences that are disproportionate to the seriousness of the offense.

Examples of excessive sentences are well known. One example, referenced in the Report, is the Second Circuit case *United v. Corsey*, 723 F.3d 366 (2d Cir. 2013). The defendants in *Corsey* were sentenced to the statutory maximum of 20 years' imprisonment after being found guilty of engaging in a scheme variously described by the court as "absurd," "ridiculous," and "clumsy, almost comical" to procure funding for an imaginary oil pipeline they proposed to build across the Russian tundra in Siberia. The scheme did not come to fruition because the defendants attempted to sell their deal to an FBI informant. Nevertheless, the sentences imposed by the district court were driven upward because their "intended loss" was equal to the $3 billion of funding they sought. On review, the Second Circuit vacated the sentences and remanded to the trial court for resentencing.

As stated in the Report: "Because the [g]uidelines are untethered from determinations of actual culpability, prosecutors have the power to threaten sentences for economic offenders that generally are reserved for the most heinous of violent criminals." Prosecutors induce defendants to avoid these harsh sentences by offering plea deals that guarantee significantly gentler terms and sensible white-collar defendants often pursue a plea deal with the government rather than risk trial. The outsized impact of §2B1.1 gives prosecutors undue leverage to force plea agreements in white-collar cases.

As a result, prosecutors are able to rely on untested theories of liability. The Foreign Corrupt Practices Act is a perfect example of a frequently relied upon statute (the Justice Department and SEC collected just shy of $6 billion in fines and penalties over the past five years) that is never tested at trial because corporations are loath to take the risk. For instance, the government takes the position that the loss attributable to a defendant's conduct in an FCPA case should include all profits made from a particular market if the initial entry into the market was the result of a bribe, even if much of that profit is unrelated to the initial crime. This dubious theory, often used by prosecutors to "encourage" settlements, has not been

subjected to the rigors of a trial and contested sentencing.

Unbridled Prosecutorial Discretion. The trial penalty also has had an impact on the quality of prosecutorial decision making. Prosecutors who do not expect to defend their discretionary calls—either the reasonableness of a charging decision or the evidence upon which it is based—at trial or before a judge in a fully contested proceeding are bound to exercise less self-discipline. The Report examines both how the system favors prosecutors and how prosecutors use this advantage.

First and foremost, the plea-bargaining process does not happen on even ground. A prosecutor enters the arena knowing what evidence he or she has and the likelihood they will be able to prove their case beyond a reasonable doubt, but in many instances, a defendant has no access to this information and no real opportunity to evaluate the merits of the prosecution's case. As a result, defendants start out at a negotiating disadvantage.

Prosecutors also are able to exert pressure on defendants to plead through what the NACDL refers to as "charge bargaining" and "facts bargaining." Prosecutors generally have sole discretion on how to charge misconduct and the substantive crimes charged greatly influence the sentence ultimately imposed. According to the Report, in order to pressure plea bargains, prosecutors regularly threaten to bring charges under statutes that carry a higher penalty. Prosecutors further influence sentencing by bargaining with defendants about the facts that will be set forth in an indictment or information. These facts typically are lifted by the probation department for inclusion in a pre-sentence report, which is then relied on by the sentencing court.

Finally, the Report refers to "rights bargaining" by prosecutors, which it defines as the use of prosecutorial discretion to dictate the terms and timing of a plea agreement, including the practice of requiring defendants to waive certain rights, such as the right to appeal their sentence or certain legal rulings. All of these prosecutorial decisions are made without judicial scrutiny.

The Report offers a particularly telling example in the corporate context of how prosecutors use the system to frame their position differently in a plea/settlement negotiation as compared to trial. In 2013, FedEx and UPS were accused of conspiring to distribute controlled substances by delivering packages containing pharmaceuticals purchased from Internet pharmacies. Even though the government's theory was untested and no evidence existed that either company had knowledge of what was in the packages, UPS entered into a non-prosecution agreement requiring corporate governance reforms and paid a fine of approximately $40 million. Fed Ex took its case to trial. At trial, the government sought fines of $1.6 billion—40 times the amount accepted from UPS. Ultimately, FedEx prevailed when the government dropped the charges after the trial judge found the company to be factually innocent of the charges.

The NACDL's report and suggestions to "restore the balance essential to a fair and just criminal justice system" is to be commended.

Every reason exists to believe that UPS was equally innocent, but the company gave up its right to trial in exchange for leniency which, in this case, resulted in a $40 million fine.

Recommendations From the Report. The Report concludes with ten recommendations to begin to level the playing field between the government and the defendants. The NACDL proposes limited judicial oversight of the plea-bargaining process and the provision of full discovery to defendants prior to the entry of a guilty plea. The NACDL also recommends eliminating the government's ability to require defendants to waive rights in order to enter a plea. Other suggestions focus on changes to the sentencing guidelines, such as prohibiting an increase to a sentence for obstruction of justice if a defendant chooses to testify in his or her defense, amending provisions that allow acquitted conduct to be considered relevant conduct by the sentencing court, and authorizing courts to reward defendants who plead for accepting responsibility without a motion from the government or if the acceptance occurs post-trial. Finally, the Report recommends that procedures be adopted to better evaluate and ensure that pretrial and post-trial sentencings are not so disparate.

Conclusion

The NACDL's report and suggestions to "restore the balance essential to a fair and just criminal justice system" is to be commended. The Report says it well: "The virtual elimination of the option of taking a case to trial has so thoroughly tipped the scales of justice against the accused that the danger of government overreach is ever-present. And on a human level, for the defense attorney there is no more heart wrenching task that explaining to client who very likely may be innocent that they must seriously consider pleading guilty or risk the utter devastation of the remainder of their life with incalculable impacts on family."