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Sentencing Statistics: White-Collar Lawyers Should Try More Cases

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Jury trials in America have undergone "virtual extinction" as stated by Judge Jed Rakoff. *See* Jed. S. Rakoff, "Why Innocent People Plead Guilty," The New York Review of Books, Nov. 20, 2014. This development is particularly alarming as the Trump administration disregards rights and liberties enshrined in the Constitution. Alexander Hamilton wrote that if the delegates to the Constitutional Convention agreed on nothing else, they agreed on the guarantee of a jury trial as a check on governmental power. The Federalist No. 83 (1788).

A primary reason for vanishing jury trials is the guideline sentencing regime imposed by Congress in the 1980's as well as mandatory sentencing laws primarily for drug offenses enacted in the same era. The purpose of this new sentencing regime was largely to cabin the sentencing discretion of federal judges, which resulted in fewer probationary sentences and longer terms of imprisonment.

Not surprisingly, the percentage of federal indictments going to trial began to decline from approximately 20% before the guidelines era to just six percent by 2000. *See* Jeffrey Q. Smith and Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 Judicature 26 (2017).

Even after the 2005 Supreme Court decision in *United States v. Booker*, 543 U.S. 220 (2005) making the sentencing guidelines discretionary rather than mandatory, the influence of the guidelines on sentencing has remained so significant that less than three percent of indicted cases went to trial last year. *See* U.S. Sentencing Commission, *2024 Sourcebook of Federal Sentencing Statistics* tbl. 11 (hereinafter "2024 Sourcebook").

As the guidelines came to dominate the sentencing landscape over the last four decades, the prevailing mindset of the criminal defense bar underwent a sea change. Defense lawyers began advising their clients to plead guilty for fear of a substantially greater sentence under the

guidelines—the so-called trial penalty—even in cases where the defense lawyer believed that there was a viable defense.

The focus of this article is on the spectrum of white collar cases in which the lawyer believes there is a credible chance of winning based not only on an assessment of weaknesses in the government's case but also of other factors such as loss of the opportunity to favorably litigate outcome-determinative evidentiary issues.

Too often in these situations defense lawyers recommend a guilty plea in the mistaken belief that conviction at trial will result in a significant trial penalty far greater than a plea bargain sentence. By reviewing empirical sentencing data we hope to dispel this widely held, but ultimately mistaken view.

As demonstrated by the relevant sentencing statistics discussed below, at least in the context of white collar offenses where the defendant has little to no criminal history, the degree of the trial penalty is vastly overstated and should therefore be of far lesser concern in the decision-making process regarding whether to go to trial or plead guilty.

Initially, it is important to address the perspective in which we write this article. First, whether as a policy matter the trial penalty is defensible is beyond the scope of this article. While the authors agree with many commentators that there should not be a trial penalty, that issue ultimately is beside the point we are making.

The fact of the matter is that there is a trial penalty—indeed, it is built into the Guidelines themselves in the guise of the two-to-three level downward adjustment for acceptance of responsibility. The purpose of this article is simply to report the sentencing statistics which show that the degree of the penalty is substantially and dramatically less than is anecdotally suspected.

Second, we recognize that advice on whether to go to trial is based on significant considerations other than potential prison time. For example, financial considerations such as the cost of trial may control the decision. With the proliferation of emails and digitalization the volume of discovery in a white-collar case frequently ranges from tens of thousands to millions of documents.

The client expense for trial preparation with this volume of documents is beyond the capacity of many white-collar defendants and this factor alone can drive the decision to seek a plea deal even where the case presents triable issues. Emotional considerations too such as the toll of protracted trial proceedings on the defendant as well as his family are also significant factors that may counsel in favor of pleading guilty over going to trial.

Common Misperceptions

Also, before discussing the relevant sentencing statistics we discuss several misperceptions by defense attorneys that impede a more positive view about going to trial.

A common and significant misperception is that if a plea offer is rejected, the government will increase the guideline offense level by adding new charges such as money laundering or charging additional facts increasing the gravity of the offense such as additional loss amount, number of victims or role in the offense. In that regard, the authors are unaware of any empirical study demonstrating such a practice by the Department of Justice.

Department of Justice policy is to charge all crimes that are provable in the indictment and charges cannot be held back as a weapon to pressure a plea by adding it to an indictment if the defendant does not accept a plea offer. Further, under guideline grouping provisions, additional charges would not substantially increase the total guideline offense level in any event.

Additionally, the sentencing laws require that the pre-sentencing report prepared by the Probation Office include dismissed charges and even uncharged crimes related to the offense of conviction to which the defendant pleaded guilty and include them in the guidelines calculation. Thus, as dismissed and uncharged conduct must be disclosed by the prosecutor to the Probation Office and even if these offenses are not added to the indictment they still will be used to calculate the Guidelines in any event.

Another misperception is that rejection of a plea offer will cause further investigation resulting in higher guidelines based on the prosecutor learning additional facts that support more severe offense characteristics such as greater loss amount, more victims or a role in the offense adjustment. This is contrary to reality and, once again, the authors are unaware of any empirical study evidencing such a practice by the Department of Justice.

By the time the prosecutor indicts, he already knows the essential amount of the loss. Continued investigation may produce more loss, but the dollar loss ranges are so large that additional proof of loss—if found—will most likely not change the guideline offense level.

Similarly, by the time of the indictment, the prosecutor knows the defendant's role in the offense and it is highly unlikely that further investigation will change this view. And adding a few more victims if they were not identified in the initial investigation is also unlikely to increase the offense level.

Statistical Analysis

We reviewed the publicly available sentencing datafiles published by the U.S. Sentencing Commission for fiscal year 2015 through and including fiscal year 2024, focusing exclusively on those individuals sentenced under USSG §2B1.1 (commonly referred to as the "fraud guideline") in

Criminal History Category I and who did not receive a downward departure pursuant to USSG §5K1.1 (providing for downward departures for those who provide substantial assistance to the government in the prosecution of others).

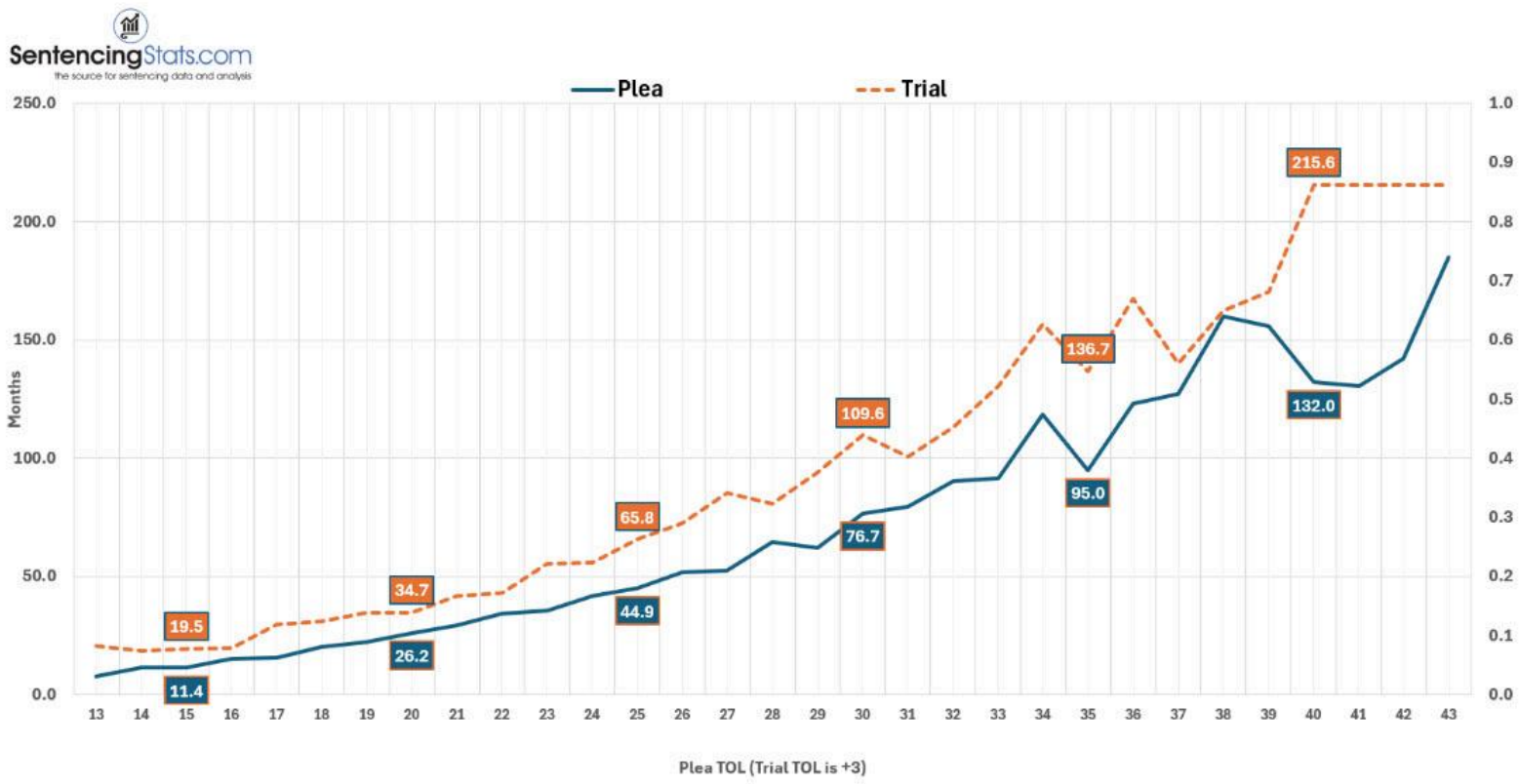
We included in our analysis those who were convicted of aggravated identify theft pursuant to 18 U.S.C. § 1028A, which carries a mandatory two-year consecutive sentence. Finally, our study encompasses all Total Offense Levels, i.e., the final offense level net of all upward and downward adjustments. In total, our study covers more than 32,000 sentencings.

Our analysis, based on these empirical data, demonstrates that in white-collar cases defendants with little or no criminal history who go to trial do not risk substantially more prison time than otherwise similarly situated defendants who plead guilty. We build into our analysis the guidelines provision of a two or three level reduction in the total offense level of the defendant who pleads guilty.

The graph below illustrates our major conclusion. We compare the average sentences by mode of conviction by Total Offense Level (TOL) beginning with a TOL of 13 through TOL 43, the maximum TOL under the Guidelines. The solid blue line indicates the average sentence for those that pleaded guilty by TOL who matched the selection criteria. The dotted orange line indicates the average sentence for those convicted at trial who were three offense levels higher.

So, for example, at offense level 15, the average sentence for those who pleaded guilty was 11.4 months. For the corresponding trial cohort at TOL 18, the average sentence was 19.9 months. At TOL 20, the average sentence for the plea cohort was 26.2 months and the average sentence for the trial cohort at TOL 23 was 34.6 months, and so forth.

Nationwide Comparison of Avg. Sentences by Mode of Conviction (FY 2015 -FY 2024)
Criteria: 2B1.1, CHC I, No 5K1.1 (Plea count= 30,401; Trial count= 1,923)



The table above summarizes the findings in the chart above reporting the difference between average sentences at the indicated offense levels. The difference in the average sentences we call the Actual Trial Penalty. The table below also compares the average loss amounts. Not surprisingly, the average loss amounts tend to be close in amount and within the same loss ranges to their respective cohorts pursuant to the loss table at USSG §2B1.1.

Although the average loss amount for the highest trial cohort here—Total Offense Level of 43—is over twice the average loss of the plea cohort (and thus in a higher loss range) this is attributable to the fact that one of the cases in that cohort had a loss of over $20 billion. Removing that single case reduces the average loss for the trial cohort to approximately $258 million.

Ultimately, we found that nearly 80 percent of the more than 32,000 cases we surveyed were at or below Total Offense Level 20/23, meaning that four out of every five white collar offenders received, on average, a trial penalty of no greater than 8.5 months if they opted for trial over pleading guilty notwithstanding loss amounts of up to $1 million. In sum, the bulk of white collar defendants face a trial penalty measured merely in months at most even when the loss amount is upwards of a million dollars.

OFFENSE LEVEL		CASE COUNT		AVERAGE LOSS AMOUNT		ACTUAL TRIAL PENALTY (DIFFERENCE IN AVERAGE SENTENCES)
Plea	Trial	Plea	Trial	Plea	Trial	
15	18	1255	56	$290,051	$247,122	8.2
20	23	1489	113	$1,051,391	$1,045,346	8.5
25	28	372	57	$4,278,467	$3,185,569	20.9
30	33	269	85	$13,753,936	$12,069,087	33.0
35	38	49	11	$47,914,700	$36,120,591	41.7
40	43	21	42	$319,171,540	$860,150,924	83.6

Conclusion

The trial penalty has long been significantly overstated by the defense bar. This misconception has impeded clarity in defendant decision making on whether to go to trial in white collar cases. For the vast majority of white collar defendants, belief that going to trial in such cases will result in a sentence years longer than the defendant would receive by pleading guilty is refuted by these sentencing statistics.

Indeed, for most, the trial penalty is measured in months, and not years—and even when the measure is in years, it is but a few. Only in the most extreme high-dollar loss cases does there appear to be a notable trial penalty.

In sum, our empirical finding that the trial penalty is substantially overstated in the vast majority of white collar cases is a significant finding that hopefully may persuade more defendants to exercise their Constitutional right to go to trial rather than to plead guilty based on a misconception of the true dimensions of the trial penalty.

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