

**The New York Times**

See usage restrictions below.

September 25, 2011

# Sentencing Shift Gives New Leverage to Prosecutors

By **RICHARD A. OPPEL Jr.**

GAINESVILLE, Fla. — After decades of new laws to toughen sentencing for criminals, prosecutors have gained greater leverage to extract guilty pleas from defendants and reduce the number of cases that go to trial, often by using the threat of more serious charges with mandatory sentences or other harsher penalties.

Some experts say the process has become coercive in many state and federal jurisdictions, forcing defendants to weigh their options based on the relative risks of facing a judge and jury rather than simple matters of guilt or innocence. In effect, prosecutors are giving defendants more reasons to avoid having their day in court.

“We now have an incredible concentration of power in the hands of prosecutors,” said Richard E. Myers II, a former assistant United States attorney who is now an associate professor of law at the University of North Carolina. He said that so much influence now resides with prosecutors that “in the wrong hands, the criminal justice system can be held hostage.”

One crucial, if unheralded, effect of this shift is now coming into sharper view, according to academics who study the issue. Growing prosecutorial power is a significant reason that the percentage of felony cases that go to trial has dropped sharply in many places.

Plea bargains have been common for more than a century, but lately they have begun to put the trial system out of business in some courtrooms. By one count, fewer than one in 40 felony cases now make it to trial, according to data from nine states that have published such records since the 1970s, when the ratio was about one in 12. The decline has been even steeper in federal district courts.

Cases like Florida v. Shane Guthrie help explain why. After Mr. Guthrie, 24, was arrested here last year, accused of beating his girlfriend and threatening her with a knife, the prosecutor offered him a deal for two years in prison plus probation.

Mr. Guthrie rejected that, and a later offer of five years, because he believed that he was not guilty, his lawyer said. But the prosecutor’s response was severe: he filed a more serious charge that would mean life imprisonment if Mr. Guthrie is convicted later this year.

Because of a state law that increased punishments for people who had recently been in prison, like Mr. Guthrie, the sentence would be mandatory. So what he could have resolved for a two-year term could keep him locked up for 50 years or more.

The decrease in trials has also been a consequence of underfinanced public defense lawyers who can try only a handful of their cases, as well as, prosecutors say, the rise of [drug courts](#) and other alternative resolutions.

The overloaded court system has also seen comparatively little expansion in many places, making a huge increase in plea bargains a cheap and easy way to handle a near-tripling in felony cases over the past generation.

But many researchers say the most important force in driving down the trial rate has been state and federal legislative overhauls that imposed mandatory sentences and other harsher and more certain penalties for many felonies, especially those involving guns, drugs, violent crimes and repeat offenders.

Stiffer punishments were also put in place for specific crimes, like peddling drugs near a school or wearing a mask in certain circumstances. And legislators added reams of new felony statutes, vastly expanding the range of actions considered illegal.

These tougher penalties, by many accounts, have contributed to the nation's steep drop in crime the past two decades. They have also swelled the prison population to levels that lawmakers in some states say they can no longer afford, and a few have rolled back some laws.

### **The 'Trial Penalty'**

In the courtroom and during plea negotiations, the impact of these stricter laws is exerted through what academics call the "trial penalty." The phrase refers to the fact that the sentences for people who go to trial have grown harsher relative to sentences for those who agree to a plea.

In some jurisdictions, this gap has widened so much it has become coercive and is used to punish defendants for exercising their right to trial, some legal experts say.

"Legislators want to make it easy for prosecutors to get the conviction without having to go to trial," said Rachel Barkow, a professor of law at New York University who studies how prosecutors use their power. "And prosecutors who are starved for resources want to use that leverage. And so now everyone acts with the assumption that the case should end with a plea."

"When you have that attitude," she said, "you penalize people who have the nerve to go to trial."

Prosecutors say they are giving defendants options and are merely charging them based on what is allowed under the law for those who turn down pleas.

While legal experts say the effect is clear in persuading more defendants to forgo trials, the trial penalty is hard to quantify without examining individual cases and negotiations between prosecutors and defense lawyers.

That is because threats of harsher charges against defendants who reject plea deals often are the most influential factor in the outcome of a case, but this interplay is never reflected in official data.

“How many times is a mandatory sentence used as a chip in order to coerce a plea? They don’t keep records,” said Senior Judge John L. Kane Jr. of United States District Court in Denver, who believes that prosecutors have grown more powerful than judges. But it is very common, he added. “That’s what the public doesn’t see, and where the statistics become meaningless.”

But one result is obvious, he said: “We hardly have trials anymore.”

In 1977, the year Judge Kane was appointed to the bench, the ratio of guilty pleas to criminal trial verdicts in federal district courts was a little more than four to one; by last year, it was almost 32 to one.

Here in Florida, which has greatly toughened sentencing since the 1990s, felony defendants who opt for trial now routinely face the prospect of higher charges that mean prison terms 2, 5, or even 20 times as long as if they had pleaded guilty. In many cases, the process is reversed, and stiffer charges are dismissed in return for a plea.

Before new sentencing laws, the gap was narrower, and trials less risky, veteran lawyers here say. The first thing [Denis deVlaming](#), a prominent Florida criminal defense lawyer, does with a new client is pull out a calculator to tally all the additional punishments the prosecutor can add to figure the likely sentence if the client is convicted at trial.

“They think I’m ready to charge them a fee, but I’m not,” he said. “I tell them in Florida, it’s justice by mathematics.”

No matter how strongly defendants believe they are innocent, he said, they could be taking dangerous risks by, for example, turning down a one-year plea bargain when the prosecutor threatens additional charges that carry a mandatory sentence 10 times as long.

## **A Power Shift**

The transfer of power to prosecutors from judges has been so profound that an important trial ritual has become in some measure a lie, Mr. deVlaming said — the instructions judges read stating that the jury determines guilt or innocence, and the judge a proper sentence. The latter part is no longer true when mandatory minimums and, in many cases, sentencing guidelines apply, but jurors often do not know that.

Legal scholars like Paul Cassell, a conservative former federal judge and prosecutor who is now a law professor at the University of Utah, describe the power shift as a zero-sum game.

“Judges have lost discretion, and that discretion has accumulated in the hands of prosecutors, who now have the ultimate ability to shape the outcome,” Mr. Cassell said. “With mandatory minimums and other sentencing enhancements out there, prosecutors can often dictate the sentence that will be imposed.”

Without question, plea bargains benefit many defendants who have committed crimes and receive lighter sentences than they might after trial. It also limits cases that require considerable time and expense in court.

But many defendants who opt for trial effectively face more prison time for rejecting a plea than for committing the alleged crime.

In Mr. Guthrie’s case, he was initially charged with aggravated battery on a pregnant woman and **false imprisonment**. But after he rejected the plea bargains, the prosecutor, more than a year later, filed the more serious charge of first-degree felony kidnapping, based on the girlfriend’s accusation that he pulled her by the arm inside her home and, once outside, grabbed her hair and pulled her on her feet the distance of several parking spaces.

Nobody is suggesting that Mr. Guthrie, previously incarcerated for 18 months on gun, assault and drug charges, is a sympathetic figure. According to a police report, he punched and kicked his girlfriend, left her with a bruised and bloody nose and a face that “appeared to be swollen,” and threatened to cut her stomach with a knife.

The assistant state attorney handling the case, Frank Slavichak, did not return calls. The chief investigator for the office, Spencer Mann, said Mr. Guthrie’s choices dictated the course of the case.

But his lawyer, **Craig DeThomasis**, hired after the plea rejections, said he was “plainly being punished for exercising his right to trial.” According to Mr. Guthrie’s mother, Claudia Guthrie, the prosecutor told her son at a hearing this spring that if he did not plead guilty and take a five-year sentence, higher charges would be filed that mean “you’re going to get life.” Mr. Mann did not dispute that some sort of warning of new charges was presented.

Mr. DeThomasis said that there was no evidence the girlfriend was pregnant, and that she started the altercation by hitting him in the forehead with a pipe, landing him in the jail infirmary for a week. He pointed out that she was arrested in 2009 for attacking Mr. Guthrie after telling the police he had struck her, leading police to say in a report that she had “changed her story several times and could not explain her actions.” He also said she had a history of involuntary hospitalizations, which she declined to address in a 110-page sworn deposition in February.

Mr. Mann declined to comment on the girlfriend’s background but said none of it affected the credibility of the case.

Judges in many cases can set aside verdicts that they believe are unsupported by the evidence, but they generally have no power in mandatory-minimum cases to reduce punishments below levels established through legislation.

While the Guthrie case may be a particularly stark example of how much power one prosecutor can have over a defendant's fate, many places have given district attorneys similar influence.

"There have been so many laws passed in the various states that just about always there is some enhancement available to the prosecutor that can be used as leverage in negotiations," said [Scott Burns](#), executive director of the National District Attorneys Association.

Mr. Burns, a former Utah prosecutor, did not dispute that sentencing-law changes had made trial riskier for defendants and helped drive down the percentage of cases taken to a verdict. He also acknowledged that the plea-bargain process "clearly is coercive" when defendants face harsher or more numerous charges for rejecting deals.

But he said plea bargains were also "extremely lenient in many instances because prosecutors are taking several criminal acts off the table." He emphasized that lawmakers time and again have given prosecutors more leverage and said it was "grossly unrealistic" to criticize district attorneys for enforcing laws that they are duty-bound to uphold — even those that are ill-advised.

"There are a lot of criminal laws that are passed that we all kind of roll our eyes at," he said. "Sometimes they are just repetitive; sometimes they are knee-jerk responses to some high-profile case, and therefore politically motivated."

Though national statistics are not readily available, the trend toward lower trial rates is evident in a number of places.

The [National Center for State Courts](#) in Williamsburg, Va., found that the percentage of felonies taken to trial in nine states with available data fell to 2.3 percent in 2009, from 8 percent in 1976.

The number of jury trials rose slightly, while nonjury trials, where a judge decides guilt or innocence, fell sharply — all while caseloads nearly tripled. The states account for more than a third of the American population, and most have mandatory minimums or sentencing guidelines or have passed toughened sentencing laws.

The Bureau of Justice Statistics, after studying partial data on state-court felony prosecutions nationwide, found that from 1986 to 2006 the ratio of pleas to trials nearly doubled.

The shift has been clearer in federal district courts. After tougher sentencing laws were enacted in the 1980s, the percentage of criminal cases taken to trial fell to less than 3 percent last year, from almost 15 percent, according to data from the State University at Albany's Sourcebook of Criminal Justice Statistics. The explosion of [immigration](#) prosecutions, where trials are rare, skews the numbers, but the trend is evident even when those cases are not included.

Nearly nine of every 10 cases ended in pleas last year, the federal data show, while one in 12 were dismissed (the percentage of dismissed cases was substantially higher a generation ago).

The number of acquittals dropped even further. Last year, there was only one acquittal for every 212 guilty pleas or trial convictions in federal district courts. Thirty years ago, the ratio was one for every 22.

### **More Plea Bargaining**

Experts like Ronald Wright, a former federal prosecutor and now a professor of law at Wake Forest University, say they fear that the steep decline in acquittals stems partly from more defendants, who might have winnable cases, deciding not to risk trials and reluctantly accepting plea bargains instead.

Some federal prosecutors worried that their power would be weakened by a 2005 Supreme Court ruling that made sentencing guidelines advisory only. But academics say the ruling had much less effect than what some predicted as many judges still largely follow the guidelines, and the ruling did not affect other laws that have given prosecutors more power.

While sentencing changes allowed legislators in this state to take credit for being tough on crime, they have also worked against their goal of trimming prison costs, leaving prosecutors caught in the middle.

“There is a big disconnect,” said [Bill Cervone](#), the state attorney in Gainesville and the chief prosecutor in six counties that make up [Florida’s Eighth Judicial Circuit](#). “There is subtle and not so subtle pressure” to reduce the numbers sent to prison.

Mr. Cervone, who was head of the Florida Prosecuting Attorneys Association, added, “Our position is, ‘Please don’t pass any new crime laws while you are also cutting our budgets.’” His budget has been cut 20 percent in four years.

The fiscal strains extend to judges, who face pressure to keep dockets moving. Some do not appreciate defendants who refuse pleas and then lose a time-consuming trial, he and other lawyers say.

“There are some judges who will punish you for going to trial,” Mr. Cervone said. “Legally, you cannot impose a longer sentence on someone because they exercised their right to trial,” he said, speaking of judges. “Factually, there are ways to do it.”

In some cases, he added, he wished judges had more discretion, instead of having to automatically impose an inflexible punishment.

So, too, do many judges faced with cases where legislatively mandated penalties do not square with their idea of justice.

Like the one in Polk County, Fla. that began when Orville Wollard said he fired his registered handgun into his living room wall to scare his daughter’s boyfriend out of the house after he repeatedly threatened his family.

In Mr. Wollard’s view, he was protecting his family and did not try to hurt the boyfriend, who was not hit, though the judge said the bullet missed him by inches. But after Mr. Wollard turned down a plea

offer of five years of felony probation, prosecutors won a conviction two years ago for aggravated assault with a firearm. Because the gun was fired, a mandatory-minimum law required a 20-year term.

At his sentencing, Mr. Wollard said he felt as if he were in “some banana republic” and described the boyfriend as a violent drug dealer. But prosecutors said the judge had “no discretion” because of the state law.

Reluctantly, the judge agreed. “If it weren’t for the mandatory minimum aspect of this, I would use my discretion and impose some separate sentence,” he told Mr. Wollard, adding that he was “duty bound” to impose 20 years.

This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers. Use the "Reprints" tool that appears next to any article. Visit [www.nytreprints.com](http://www.nytreprints.com) for samples and additional information.