

RACIAL DISPARITIES IN CRIMINAL COURT PROCESSING IN THE UNITED STATES

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EXECUTIVE SUMMARY

1. Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination (“Convention”) requires the state party “to pursue by all appropriate means and without delay a policy of eliminating racial discrimination.” The Convention, in Article 2(c), also calls upon the government to “take effective measures to review governmental, national, and local policies” that have a racially discriminatory effect. More specifically, Article 5(a) of the Convention requires the state party “to prohibit and to eliminate racial discrimination in all its forms” and to ensure “[t]he right to equal treatment before the tribunals and all other organs administering justice.”
2. In practice, the United States government frequently falls short of its obligations under Article 2 and Article 5 in the areas of criminal court case processing. Every year, more than 1 million Americans are sentenced in United States criminal courts, many without the benefit of adequate counsel. These individuals face a system that privileges the prosecutor and is structurally oriented to reward efficiency through plea bargains, rather than reinforcing institutional safeguards intended to achieve fairness in outcomes.
3. Because African Americans are disproportionately represented at all stages of the criminal justice system, any showing of procedural or substantive unfairness in policing, courts, or corrections can be presumed *a priori* to disproportionately impact communities of color. We urge the Committee to consider three areas of concern in American criminal court processing.
 4. First, the centralization of authority and discretion within the office of the prosecutor has tipped the balance of power dangerously in favor of the state in criminal proceedings. Prosecutors wield considerable discretion with respect to whether to bring charges at all, and if so, which charges to bring. As is the case at any point in the criminal justice system where individual actors exercise broad discretion, there is substantial room for the operation of both conscious and unconscious racial discrimination in decision making. The prosecutor’s ability to control sentencing and plea bargain outcomes through charging practices threatens the viability of the American adversarial court system. The United States lacks viable oversight mechanisms to hold prosecutors accountable when they engage in racially discriminatory conduct that jeopardizes the fairness of the criminal court process.
 5. The equal treatment before the courts required by Article 5 is jeopardized as a result of the disproportionate authority and discretion that has been centralized in the office of the prosecutor over the last 30 years. In an adversarial system that determines guilt or

innocence based on the interplay of two equally situated parties, tipping of the balance in the favor of one of these parties threatens to subvert the fairness of the outcome. The scope of the impact of prosecutorial decision-making in shaping the racially disparate patterns witnessed in the United States criminal court system cannot be overstated.

6. Secondly, General Recommendation XXXI, ¶ 30 equates the “guarantees of a fair trial and equality before the law” with the establishment of a “system under which counsel . . . will be assigned free of charge.” Notwithstanding the well-established constitutional protections ensuring the right to counsel for criminal defendants at trial and the public provision of counsel for indigent defendants facing potential incarceration cited by the United States in its Periodic Report at ¶ 152, the practical application of these protections across the country routinely fails to meet even the most rudimentary requirements of a fair trial.

7. More than three-quarters of criminal cases in the United States require the public provision of counsel. Criminal defendants of color are more likely to utilize publicly funded defense services than white defendants in light of racial disparities in income, wealth, and access to opportunity discussed elsewhere in this report. As a result, the crisis in America’s public defense system has a disproportionate impact on communities of color. The dramatic under-funding and lack of national standards governing America’s indigent defense services has made people of color second class citizens in the American criminal justice system, and constitutes a violation of the U.S. Government's obligation under Article 2 and Article 5 of the Convention to guarantee “equal treatment” before the courts.

8. Lastly, mandatory minimum sentencing practices, the result of 30 years of legislative policies that have usurped judicial discretion, have further enhanced the role of the prosecutor, greatly increased the length of imprisonment in many cases, and have had a profound impact on African American and Latino/a communities. General Recommendation XXXI calls on governments to pay “special attention . . . to the system of minimum punishments and obligatory detention applicable to certain offenses” that have a disproportionate impact on racial and ethnic minorities. Since 1980, the United States prison population has more than tripled, due in large part to the imposition of longer sentences pursuant to mandatory minimums. Much of this growth has been fueled by law enforcement and prosecutorial practices in the “war on drugs” which disproportionately target communities of color. African Americans currently comprise 40% of the prison population, despite the fact that they represent only 12% of the total United States population. These disparities exist among women as well. In 2005, black women were more than three times as likely as white women to be incarcerated in prison or jail, and Hispanic women 69% more likely.¹ These trends can be directly traced to the evolution of punitive sentencing laws, most notably mandatory minimum sentences for drug offenses.

¹ Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics, November 2006, at 4.

PROSECUTORIAL DECISION-MAKING

9. The impact of prosecutorial decision-making in shaping the racially disparate outcomes in the United States criminal justice system about which the Committee expressed considerable concern in ¶ 395 of its 2001 Concluding Observations cannot be overstated. Questions of prosecutorial decision-making are more important than ever because the courts are “producing more, rather than less, racially disparate outcomes.”² Nearly one-third of black males between the ages of 20 and 29 are “under some form of criminal justice supervision on any given day – either in prison or jail or on probation or parole.”³ As of 2004, the imprisonment rates for black and Hispanic males were seven and three times the rate for white males, respectively.⁴ The figures are similar for women of color. African-American women comprise only 13 percent of the U.S. female population but make up 48 percent of the state female prison population.⁵ Moreover, a recent study demonstrates that even though “women of all races use drugs at approximately the same rate,” women of color are imprisoned “at much higher rates.”⁶

10. Prosecutors play a critical role in generating these racially disproportionate outcomes, given their wide-ranging and “essentially unchecked discretion.”⁷ Thus, in the event that a prosecutor holds any racially discriminatory tendencies – either consciously or unconsciously – those tendencies will invariably affect the criminal justice system in some way.⁸ After all, in the U.S., prosecutors have “sole [charging] discretion” – “from the decision whether to prosecute at all to the selection of the nature and the number of charges to bring before the grand jury.”⁹ Because mandatory sentencing laws and sentencing guidelines “virtually eliminate judicial discretion,” the prosecutor’s charging decision “often effectively determines the defendant’s sentence.”¹⁰ Roughly 95 percent of defendants plead guilty without ever going to trial;¹¹ as a result, the charging decision -

² “Note: Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion,” 119 Harv. L. Rev. 2121, 2123 (2006).

³ Marc Mauer, *The Crisis of the Young African American Male and the Criminal Justice System* (April 1999), available at www.sentencingproject.org/pdfs/5022.pdf.

⁴ See *Judging the Prosecution*, *supra* note 2, at 2121.

⁵ Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 Santa Clara L. Rev. 285, 298 (2007).

⁶ American Civil Liberties Union, *Caught in the Net: The Impact of Drug Policies on Women and Families*, March 15, 2005, available at http://www.aclu.org/images/asset_upload_file393_23513.pdf (last visited Nov. 16, 2007).

⁷ See *Judging the Prosecution*, *supra* note 2, at 2123.

⁸ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 25 (1998) (stating that prosecutors’ “decisions potentially have the greatest discriminatory impact”).

⁹ Douglas B. Bloom, *United States v. Booker and United States v. Fanfan: The Tireless March of Apprendi and the Intracourt Battle to Save Sentencing Reform*, 40 Harv. C.R.-C.L. L. Rev. 539, 553 (2005) (“For any given criminal underlying conduct, prosecutors have a wide menu of applicable charges from which to choose.”); Suzanne Roe Neely, *Note: Preserving Justice and Preventing Prejudice: Requiring Disclosure of Substantial Exculpatory Evidence to the Grand Jury*, 39 Am. Crim. L. Rev. 171, 190 (2002).

¹⁰ See Davis, *supra* note 8, at 23.

¹¹ See *Judging the Prosecution*, *supra* note 2, at 2125.

- “[i]n conjunction with the plea bargaining process” -- “almost predetermines the outcome of a criminal case.”¹²

SIDEBAR: In December 2006, six black teenagers (now known as the “Jena Six”) were arrested for allegedly beating Justin Barker, a white classmate at Jena High School in Jena, Louisiana.¹³ Prior to the attack on Barker, the town had been the site of months of racial unrest in reaction to three white students who hung nooses – a “symbol of lynching of African-Americans in segregationist times”¹⁴ – from a tree at the high school as a way of warning black students against sitting beneath the tree.¹⁵ A number of racial fights ensued. But while white students who attacked black students were charged with misdemeanors (if at all),¹⁶ five of the six black teenagers involved in the attack on Barker were charged with attempted second-degree murder and conspiracy to commit murder, carrying prison sentences of up to 80 years.¹⁷ These charges sparked a massive civil rights demonstration.¹⁸ Critics accused the prosecutor of “treating blacks more harshly than whites.”¹⁹ The Jena Six case reveals that even now the race of the alleged perpetrators and the alleged victim plays an important, if not paramount, role in prosecutors’ charging decisions.

11. “Like the charging decision, the plea bargaining process is controlled entirely by the prosecutor.”²⁰ The prosecutor alone decides whether or not to offer the defendant a plea.²¹ In a typical plea bargain, a defendant pleads to a lesser offense and forgoes his or her right to trial in exchange for the prosecutor’s decision to drop the more serious charges. The problem is that prosecutors have the “power to extract extraordinary penalties from defendants who choose to go to trial and lose” as a result of mandatory minimum sentences.²² Prosecutors may leverage repeat-felony-offender rules and mandatory minimum sentencing to elongate the sentence a defendant will face.²³ Furthermore, the so-called limited sphere of federal criminal law now includes hundreds of crimes,²⁴ the number of state crimes has multiplied, and the ranks of prosecutors have

¹² See Davis, *supra* note 8, at 23.

¹³ Howard Witt, Jena 6 defendant out of jail, Chicago Tribune (Sept. 28, 2007).

¹⁴ Robert Raffaele, U.S. House of Representatives Committee Probes Case With Racial Overtones, VOA News (Oct. 17, 2007).

¹⁵ See *id.*

¹⁶ See Witt, *supra* note 13.

¹⁷ Sharpton calls for investigation of prosecutor in racially charged school fight case, International Herald Tribune (Sept. 9, 2007).

¹⁸ Howard Witt, Jena 6 teen’s return to jail draws queries, Chicago Tribune (Oct. 13, 2007).

¹⁹ Michael Kunzelman, Judge steps out of Jena Six news case; another judge will decide whether to open proceedings, The Associated Press (Oct. 30, 2007).

²⁰ See Davis, *supra* note 8, at 25.

²¹ See *id.*

²² Craig Horowitz, The Defense Rests - Permanently, New York, Mar. 4, 2002, available at <http://www.newyorkmetro.com/nymetro/news/crimelaw/features/5730/index.html> (last visited Sept. 20, 2007).

²³ See *id.*

²⁴ Although historical state governments (rather than the federal government) historically regulated criminal conduct, more recent legislative changes have “forever altered the landscape of criminal law,” with the federal government “encroach[ing] upon what had been a bastion of state sovereignty.” See

expanded.²⁵ As a result, today's defense lawyers are "not so much negotiating as pleading" at the bargaining table.²⁶ There is an increasing basis for concern that plea bargains lead to both the conviction of innocent defendants and the imposition of excessive sentences.²⁷

12. Against this backdrop, meaningful accountability measures are imperative to ensure the proper exercise of this expansive prosecutorial authority. As one scholar has pointed out, "[o]ne would expect that the more power an administrative agent has to affect people's lives..., the more this power will be confined by clear guidelines and checked by judicial review."²⁸ In reality, in the U.S. there are "few, if any, consequences for prosecutorial misconduct."²⁹ Prosecutors' decisions are "seldom subject to review in higher courts."³⁰ This violates Article 2's requirement that states take effective measures to review governmental, national and local policies... which have the effect of creating or perpetuating racial discrimination, as well as the obligation under Article 5 to eliminate racial discrimination in all its forms and to guarantee equality before the law, including the right to equal treatment before the courts and the obligation under Article 6 to obtain effective protection and remedies.

13. In addition to racially discriminatory or disparate exercises of prosecutorial discretion, prosecutorial misconduct also contributes to racial disparities in incarceration rates. The consequences of such misconduct are minimal for the prosecutors involved, yet severe for affected criminal defendants. One study revealed that state and local prosecutors have "bent or broke[n] the rules to help put 32 innocent people in prison, some under death sentence, since 1970."³¹ Likewise, as of April 2006, we know that another 175 wrongfully convicted individuals who were eventually exonerated as a result of the post-conviction DNA work by The Innocence Project in New York.³² In almost two-thirds of these wrongful convictions, police or prosecutorial misconduct "played an important role;"³³ and more specifically, the misconduct took the form of "suppression

Robert Heller, "Comment: Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion," 145 U. Pa. L. Rev. 1309, 1310 (1997).

²⁵ *See id.*

²⁶ *See id.*

²⁷ Joseph A. Colquitt, Ad Hoc Plea Bargaining, 75 Tul. L. Rev. 695, 706 (2001).

²⁸ Yoav Sapir, "Criminal Law: Pursuing New Visions of Justice: Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal," 19 Harv. BlackLetter J. 127, 139 (2003).

²⁹ Ellen Yaroshesky, "Zealous Advocacy in a Time of Uncertainty: Understanding Lawyers' Ethics: Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously," 8 D.C. L. Rev. 275, 276-77 (2004).

³⁰ Ellen S. Podgor, "Symposium: The Ethics and Professionalism of Prosecutors in Discretionary Decisions," 68 Fordham L. Rev. 1511, 1516 (2000). *See, e.g.,* United States v. Tucker, 78 F.3d 1313, 1317 (8th Cir. 1996) (discussing the "unreviewability" of prosecutorial discretion).

³¹ Michael J. Sniffen, "Dozens falsely imprisoned amid thousands of cases of misconduct by local prosecutors," Washington Dateline (June 26, 2003).

³² Barry C. Scheck, "Article: Barry Scheck Lectures on Wrongful Convictions," 54 Drake L. Rev. 597, 600 n.4 (2006).

³³ James S. Liebman, "Article: The Overproduction of Death," 100 Colum. L. Rev. 2030 (2000) (citing Barry Scheck et al., Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted (2000), at 107-25, 172-82).

of evidence of innocence, knowing use of false testimony, witness coercion and other evidence fabrication, and false statements to the jury.”³⁴ For the 175 exonerated individuals, the circumstances were fortunate in that there was DNA. On the other hand, there are “thousands” of wrongfully convicted people who remain in prison.³⁵

14. Unfortunately, not many strides have been made to ensure that the prosecutorial arm of our system operates in compliance with the US government's obligations under Article 2 so that all public authorities and public institutions, national and local, act in conformity with their obligations to eliminate racial discrimination.³⁶ Out of 381 homicide convictions reversed due to prosecutorial misconduct – and specifically for presenting false evidence or for failing to disclose exculpatory evidence – “not one prosecutor faced trial for the misconduct.”³⁷ Similarly, among 1,464 lawyer discipline cases between 2001 and 2005, only one disciplinary action was against a prosecutor.³⁸ In fact, according to one commentator, a lawyer who steals his clients’ money faces more stringent consequences than the lawyer “who, intentionally or through gross negligence, steal[s] years of a person’s life.”³⁹ Common sense suggests that the exact opposite should be true.

RECOMMENDATIONS:

- Prosecutors’ offices should systematically collect data on their charging decisions. This should include documenting: the racial and ethnic backgrounds of those defendants whom prosecutors decided to prosecute, the racial and ethnic backgrounds of those whom prosecutors decided *not* to prosecute, and the proportion of arrested racial and ethnic minorities charged with a crime, in comparison to whites.
- Prosecutors’ offices should make a systematic effort to investigate instances of alleged prosecutorial misconduct. One scholar has suggested borrowing methods from the airline industry.⁴⁰ In that industry, upon the discovery that a person has engaged in “serious... misconduct... that threatens life, health, or public welfare,” the person is “audit[ed]... to determine whether [he] engaged in similar misconduct in other cases.”⁴¹ Among other things, his supervisors and trainers are examined in order to determine the “weaknesses in the system and to take remedial action.”⁴²

³⁴ See Liebman, *supra* note 33, at 107-25, 172-82.

³⁵ See Yaroshefsky, *supra* note 29, at 285.

³⁶ See Sapir, *supra* note 28, at 137.

³⁷ Catherine Ferguson-Gilbert, “Comment, It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?,” 38 Cal. W. L. Rev. 283, 303 (2001)

³⁸ Mike Zapler, “State Bar Ignores Errant Lawyers,” San Jose Mercury News (Feb. 12, 2006).

³⁹ See Yaroshefsky, *supra* note 29, at 283-83. See Bennett L. Gershman, The New Prosecutors, 53 U. Pitt. L. Rev. 393, 445 (1992) (explaining that the lack of consequences of prosecutorial misconduct “contrasts sharply with the fairly common use of disciplinary sanctions against private attorneys in civil and criminal matters”).

⁴⁰ See Yaroshefsky, *supra* note 29, at 285-86.

⁴¹ *Id.*

⁴² *Id.* at 286.

- The United States should call for an independent, standardized oversight committee based in each state charged with monitoring the activities of local prosecutors, investigating complaints, and issuing recommendations to improve transparency and accountability.

INDIGENT DEFENSE

15. As reported by the U.S. Government in its Periodic Report at ¶ 152, every person accused of a crime that carries a potential sentence of incarceration in the United States of America is entitled to a lawyer. If the accused cannot afford to hire a lawyer, the government must provide her with one. The system for providing counsel to a defendant who cannot afford to hire an attorney is called the public defense system. Public defenders are the only lawyers poor people, who are disproportionately people of color charged with crimes, are able to access.

16. Although, the government states in ¶ 152 of the Period Report that counsel for indigent defendants is provided without discrimination based on race, profound failures in the fragmented, patchwork public defense system in the U.S. have a disproportionate effect on people of color in the US, thereby violating Articles 2 and 5 of the Convention.

17. Members of minority races utilize indigent defense services more than any other racial group because they are more likely to live in poverty as a result of multiple factors articulated in other sections of this report, most notably the section on structural racism. In 2002, the percentage of non-Hispanic whites living in poverty was 8%, while the percentage of non-Hispanic blacks living in poverty was 23.3% and the percentage of Hispanics living in poverty was 21.8%.⁴³ With respect to the utilization of indigent defense services, these disparities only increase. For example, in Alabama in 2001, just under 60% of defendants using the indigent defense system were black, despite the fact that African-Americans only make up 26% of the state's population.⁴⁴ Overall, 77% of black inmates in state prisons reported having had lawyers appointed for them by the court, whereas only 69% of white inmates report having utilized public defense services.⁴⁵ In the federal system, the disparity is worse; 65% of black inmates report using public defense services compared with only 57% of white inmates.⁴⁶

18. Contrary to the Committee's interpretation of Article 5's requirement that signatory states guarantee equal rights before the courts contained in General Comment XXXI, which states that "[e]ffectively guaranteeing these rights implies that States parties must set up a system under which counsel and interpreters will be assigned free of charge," public defense services in the United States are not governed by any national,

⁴³ Mark Levitan, *Poverty in 2002: One-Fifth of the City Lives below the Federal Poverty Line*, September 30, 2003, available at www.cssny.org/pubs/special/2003_09poverty.pdf.

⁴⁴ David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Toward Change*, 52 Ala. L. Rev 975, 994 (2001).

⁴⁵ Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics Special Report (Nov 2000), at 3.

⁴⁶ *Id.*

governmental standards. As discussed in the Periodic Report at ¶ 152, the federal government has sporadically studied the services provided in states and localities and helped to develop nonbinding "best practices,"⁴⁷ without allocating any resources to support their implementation. It has failed to impose any national standards for guaranteeing the right to effective counsel without discrimination based on race. Moreover, even these minimal efforts have been significantly curtailed in the past five years.

19. State governments are not required by law to provide any oversight for indigent defense services. As a result, most of the systems are in disarray. Many, including those in Pennsylvania, Michigan, California, Arizona and New York, simply delegate responsibilities for providing indigent defense services, particularly trial level services, to the multitude of counties within the state, with no guidance or standards to govern the nature or provision of services.⁴⁸

20. Public defense services in most parts of the United States are also dramatically under-funded. The federal government provides minimal to no financial support for indigent defense in state courts. A recent ABA study concluded that funding for public defense services is "shamefully inadequate."⁴⁹ In the study report, one witness illuminated the problem on a national scale by comparing the United States to England. The witness stated, "The expenditures per capita are \$34 per person in England and Wales. In the United States, the comparable figure is about \$10 per person, and in 29 states the expenditures are less than \$10 per capita. England is outspending the United States by more than three to one."⁵⁰

21. As a result of chronic under-funding, states and municipalities are compromising the quality of their public defense programs to reduce costs – using fewer lawyers to handle more cases, using less-experienced lawyers to handle more complicated cases, and cutting back on training, access to experts and other services necessary for adequate preparation of a criminal defense. The consequences of this neglect include:

- In Cook County, Illinois [Chicago], the felony public defenders handle approximately 250 cases a year, over 150% of the maximum case limit

⁴⁷ In the past, the Department of Justice held symposia, published studies and manuals, and collected and analyzed data on state public defense systems. For example, in 2000, the Department held a National Symposium on Indigent Defense and published a report on the findings, as well as a number of manuals. See, e.g., *Keeping Public Defender Workloads Manageable*, DOJ Bureau of Justice Assistance (2001), available at <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>; *Contracting for Indigent Defense Services: A Special Report*, DOJ Bureau of Justice Assistance (2000), available at www.ncjrs.org/pdffiles1/bja/181160.pdf. Although some data continues to be collected from states, all symposia and publication of most of the studies and manuals has ceased.

⁴⁸ The Spangenberg Group, *State Indigent Defense Commissions* (Dec 2006), at 3, available at http://www.abanet.org/legalservices/sclaid/defender/downloads/state_indigentdefense_feb07.pdf.

⁴⁹ *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, American Bar Association Standing Committee on Legal Aid and Indigent Defense (Dec 2004), at V, available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/>.

⁵⁰ *Id.* at 8.

proscribed by national experts. Misdemeanor public defenders handle more than ten times the maximum recommended number of cases.⁵¹

- In Clark County, Nevada [Las Vegas], a defendant charged with murder was appointed an attorney who was just out of law school and who had never handled a murder case before. The defendant was found guilty and sentenced to death. Fourteen years later, the defendant was exonerated and released from prison.⁵²
- A number of states, including Nevada, New York, and Pennsylvania have no state-wide training program for public defense lawyers.⁵³

22. There has also been a dramatic increase in the use of contract public defenders across the country. These attorneys are not employees of any government agency, but rather are lawyers in private practice who are paid a fixed-price annually to take a percentage of the public defense cases that arise in their locality. This structure does not impose any standards in the provision of criminal defense, does not limit the number of cases the contract defender can take, does not prohibit contractors from taking on additional, paying clients, and does not provide them with any overhead. Fixed-price contracts encourage attorneys to process cases quickly, with as little effort as possible.

23. In 1997, a rural county in California agreed to pay a low-bid contract defender slightly more than \$400,000 a year to represent one half of the county's indigent defendants. The defender employed no paralegals or investigators. Together with two associates, the defender handled over 5,000 cases per year (or over 6 cases per attorney per week day).⁵⁴ In the past few years, more counties in California have turned to low-bid contract defender systems as a means of cost-savings.

24. The lack of oversight, standards and funding for public defense services harm public defense clients, who are disproportionately people of color, for the following reasons:

- Public defense lawyers have less contact with their clients. Of inmates who received publicly funded counsel, only 37% of state inmates and 54% of federal inmates spoke with their attorneys within the first week. In contrast, 60% of state inmates and 75% of federal inmates who hired private counsel had contact with their lawyers within a week of arrest.

⁵¹ Testimony of John Wesley Hall, Jr. of the National Association of Criminal Defense Lawyers before the Cook County Commissioners (January 30, 2007), available at [http://www.nacdl.org/public.nsf/newsreleases/2007mn005/\\$FILE/Hall_Testimony.pdf](http://www.nacdl.org/public.nsf/newsreleases/2007mn005/$FILE/Hall_Testimony.pdf); Abdon M. Pallasch, *Calls to Limit Cases Amuse Public Defenders*, Chicago Sun Times (July 24, 2006), available at http://findarticles.com/p/articles/mi_qn4155/is_20060724/ai_n16642443.

⁵² *Miranda v. Clark County*, 279 F.3d 1102, 1112 (9th Cir. 2002).

⁵³ *Gideon's Broken Promise*, *supra* note 49, at 11.

⁵⁴ U.S. Department of Justice, Bureau of Justice Assistance, *Contracting for Indigent Defense Services: A Special Report* (April 2000), available at www.ncjrs.org/pdffiles1/bja/181160.pdf

Inmates represented by public defenders were also more likely to report not having spoken to their lawyer at all before resolving their case.⁵⁵

- Clients of public defenders are also less likely to go to trial and more likely to be convicted when they proceed to trial.⁵⁶

25. Janet Reno, former United States Attorney General, once said “a good lawyer is a best defense against a wrongful conviction.”⁵⁷ Providing competent defense services for poor people of color is essential to ensuring equal access to the courts as required by the Convention. Because the people who use public defense services are disproportionately people of color, they make up a disproportionate number of the wrongfully convicted. For example, 64% of the people who have been wrongfully convicted of rape (and then exonerated through DNA) are black, even though African-Americans make up only 12% of the United States population.⁵⁸ Without a functional public defense system, it cannot be said that a state is in compliance with Article 5 of the CERD as interpreted by General Comment XXXI.

RECOMMENDATIONS:

- The United States should require all indigent defense systems, state and federal, to maintain accurate data on the race of the defendants utilizing indigent defense services, as well as the caseloads of each defender annually, the salary of the public defenders and/or payment structure for court appointed counsel, the number of open cases carried over annually by defender, the percentage of cases plea bargained and the percentage of cases tried in each case category, the average time from arraignment to sentencing or acquittal for each case category, and the amounts spent on investigative and expert services. These statistics would facilitate proper evaluation of the indigent defense system and its particular impact of the system on communities of color.
- The United States should research and produce publications on best practices in the provision of indigent defense services, including caseload management and limitations, contracting for public defense services and oversight methodologies. These standards should be used to establish national, enforceable guidelines governing the provision of public counsel.
- The United States should establish a fund to assist poorer state jurisdictions in providing quality indigent defense services.

⁵⁵ Harlow, *supra* note 45, at 8.

⁵⁶ *Id.*

⁵⁷ Janet Reno, Remarks at the 2000 Indigent Defense Summit, *available at* http://www.sado.org/publicdefense/reno_competent.pdf; *see also* Janet Reno, *Legal Services for the Poor Need Vigilance*, USA Today (Mar 18, 1998), *available at* <http://www.criminaljustice.org/INDIGENT/ind00011.htm>.

⁵⁸ 200 Exonerated, Too Many Wrongfully Convicted, Innocence Project, *available at* <http://www.innocenceproject.org/Content/530.php>.

SIDEBAR: James Thomas, an black day laborer in Baton Rouge, Louisiana, was charged with murder in 1996. With no money to hire a lawyer, he was forced to rely on the government to provide him with one. Due to inattentiveness, high turn-over, overwhelming caseloads and other problems in the public defender's office, he waited more than ten years before going to trial. He spent more than eight of those years in prison.⁵⁹ Eventually, his case was taken over by a private lawyer, and in 2007, his case was finally tried. It took the jury less than two hours of deliberation before acquitting him.⁶⁰

RACE AND SENTENCING

26. In ¶¶ 309-318 of the Initial, Second, and Third Periodic Reports of the United States of America submitted to the Committee on the Elimination of Racial Discrimination in September of 2000, the United States directly addressed racial disparity in sentencing as it pertains to its state obligation under Article 5 of the Convention. The United States conceded in its discussion of Article 5 in ¶ 298, that “[i]n many of the areas covered by this article . . . serious problems exist.” Regarding disparities in sentencing, in ¶ 309 the United States correctly identified the “war on drugs,” and particularly mandatory minimum sentencing and disparities in the treatment of crack and powder cocaine for the purposes of sentencing, as an area that has drawn substantial concern over the preceding 15 years.

27. In ¶ 395 of its Concluding Observations for the Initial, Second, and Third Periodic Reports of the United States, the Committee expressed concern regarding racially disparate rates of incarceration, particularly among African Americans and Latinos, and called upon the United States to take deliberate action in order to ensure “equal treatment before the courts and all other organs administering justice.”

28. Since then, the United States has failed to adequately address the identified problems inherent in mandatory minimum sentencing or the crack and powder cocaine disparity, both of which continue to have racially disparate impacts on people of color. General Recommendation XXXI, ¶ 4(b) notes that “potential indirect discriminatory effects of certain domestic legislation” can be regarded as a cause of racial discrimination.

29. Mandatory minimum sentences are statutorily prescribed terms of imprisonment that automatically attach upon conviction of certain criminal conduct, usually pertaining to drug or firearm offenses. Absent very narrow criteria for relief (such as certain categories of first-time offenders or persons who have provided assistance to the prosecution in an ongoing investigation), a sentencing judge is powerless to mandate a term of imprisonment below the mandatory minimum. In the realm of drug offenses, by relying exclusively upon quantity as the indicator of a defendant’s involvement in a drug enterprise, Congress had sought to establish generalized equivalencies in punishment

⁵⁹ Laura Parker, *8 Years in a Louisiana Jail, but He Never Went to Trial*, USA Today (Aug 29, 2005), at A1.

⁶⁰ Laura Parker, *Acquitted Man: That’s ten years they can never replace*, USA Today (Feb 14, 2007), at A4.

across drug types by controlling for the risk of the drug by adjusting the quantity threshold. Sentences are disproportionately severe relative to the conduct for which a person has been convicted because mandatory minimum sentences for drug offenses rely solely upon the weight of the substance as a proxy for the degree of involvement of a defendant's role. This is tantamount to a "one size fits all" sentencing scheme.

30. Linking quantity with severity has had a particularly profound impact on women, who are statistically more likely to play peripheral roles in a drug enterprise than men. However, because prosecutors can attach drug quantities to an individual regardless of the level of sophistication of a defendant's participation in the charged offense, women have been exposed to increasingly punitive sentences to incarceration. From 1986 to 1996, despite the fact that the rate at which women used drugs actually declined substantially, the number of women incarcerated in state facilities for drug offenses increased by 888%, compared to a rise of 129% for non-drug offenses.⁶¹ Moreover, American drug enforcement relies on arresting individuals and offering a reduced sentence in exchange for information on other persons engaged in criminal activity. However, because women tend to play lesser roles in drug distribution networks, they often do not have information of value to the prosecution. Thus, they are less likely to benefit from a substantial assistance sentence amendment.

31. Since its inception more than a quarter-century ago, no single policy has so impacted the racial dynamics of law enforcement, sentencing, and corrections in the United States as the "war on drugs." Between 1980 and 2005, the racially disparate law enforcement practices in the "war on drugs" were the most important factors contributing to the rapidly widening ratio of African American and white incarceration rates. Michael Tonry, in his landmark book on American sentencing, *Malign Neglect*, concluded, "[u]rban black Americans have borne the brunt of the War on Drugs. They have been arrested, prosecuted, convicted, and imprisoned at increasing rates since the early 1980s, and grossly out of proportion to their numbers in the general population or among drug users. By every standard, the war has been harder on blacks than on whites; that this was predictable makes it no less regrettable."⁶²

32. African Americans comprise 13 percent of the United States population and 14 percent of monthly drug users, but represent 37 percent of those persons arrested for a drug offense and 56 percent of persons in state prison for a drug conviction.⁶³ This is contrary to the U.S. government's suggestion in ¶ 327, made in response to the Committee's expressed concern regarding racial disparities in incarceration rates, that such disparities result from differential rates of involvement in crime. Because African Americans use controlled substances at the same rate as their representation of the

⁶¹ Marc Mauer, Cathy Potler, and Richard Wolf, *Gender and Justice: Women, Drugs, and Sentencing Policy*, The Sentencing Project, November 1999, at 7.

⁶² Tonry, M. (1996). *Malign Neglect: Race, Crime, and Punishment in America*. Oxford University Press, USA, at 105.

⁶³ Drug use data from Substance Abuse and Mental Health Services Administration, *Results from the 2006 National Survey on Drug Use and Health: National Findings*, 2007, at Table 1.19A; arrest data from Federal Bureau of Investigation, File UCR91300, March 2002; Ryan S. King and Marc Mauer, *Distorted Priorities: Drug Offenders in State Prison*, The Sentencing Project, September 2002.

general population, there is nothing in the patterns of drug use to suggest the disproportionalities witnessed in arrest and sentences to incarceration.

33. Mandatory minimum sentences have consistently been shown to have a disproportionately severe impact on African Americans. A study by the United States Sentencing Commission (“Commission”), an independent governmental agency charged with overseeing the federal sentencing system, found that African Americans were 21 percent more likely to receive a mandatory minimum sentence than white defendants facing an eligible charge.⁶⁴ A separate study by the Federal Judicial Center also concluded that African Americans face an elevated likelihood of receiving a mandatory minimum sentence relative to whites.⁶⁵ More recently, the Commission, in a 15-year overview of the federal sentencing system since the full implementation of the Sentencing Reform Act of 1984, concluded that “mandatory penalty statutes are used inconsistently” and disproportionately affect African American defendants.⁶⁶ As a result, African American drug defendants are 20 percent more likely to be sentenced to prison than white drug defendants.⁶⁷ Higher arrest rates of African Americans generally reflect a law enforcement emphasis on inner city areas, where drug sales are more likely to take place in open-air drug markets and fewer treatment resources are available.⁶⁸ However, research suggests that visible manifestations of drug selling activity are not accurate indicators of drug use and dependency in neighborhoods and fuel widely held misperceptions about patterns of drug abuse in American society.⁶⁹ Despite average rates of drug use among the general population, African Americans who use drugs are more likely to be arrested than other groups. And this disparity extends throughout the criminal justice system. In fact, simply relying upon visible drug sales as a means of measuring the level of drug distribution in a neighborhood greatly overestimates the degree to which African Americans are involved in the drug trade and discounts the active drug selling economy in majority white communities that tends to take place behind closed doors and out of public view.

34. The Commission observed that the efforts to reform the federal sentencing system, notably in the guise of mandatory minimum sentencing and sentencing guidelines, have had “a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation” and that there is some question as to “whether these new policies are necessary to achieve any legitimate purpose of sentencing.”⁷⁰

⁶⁴ United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, 1991.

⁶⁵ Barbara S. Meierhoefer, *General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentencing Imposed*, Federal Justice Center, 1992.

⁶⁶ United States Sentencing Commission, *Fifteen Years of Guideline Sentencing*, 2003, at 89.

⁶⁷ *Id.* at 122.

⁶⁸ Leonard Saxe, Charles Kadushin, Andrew Beveridge, David Livert, Elizabeth Tighe, David Rindskopf, Julie Ford, and Archie Brodsky, “The Visibility of Illicit Drugs: Implications for Community-Based Drug Control Strategies,” *American Journal of Public Health*, Vol. 91, (12), pp. 1987-1994, 2001.

⁶⁹ *Id.* at 1990.

⁷⁰ United States Sentencing Commission, *supra* note 66, at 135.

35. The broad range of mandatory minimum sentences for drug offenses ushered in by the Anti-Drug Abuse Act of 1986 included substantially different penalty structures for crack and powder cocaine. The voiced rationale at that time was that the smokeable form of cocaine was far more addictive, presented more dangerous long-term consequences of use, and its distribution markets had a greater association with violence.⁷¹ The sub-text was that crack cocaine was perceived as a drug of the Black inner-city urban poor, while powder cocaine, with its higher costs, was a drug of wealthy whites. Crack and powder cocaine share the same pharmacological roots, but crack cocaine is cooked with water and baking soda to create a hard, rock-like substance that can be smoked. Crack cocaine is sold in small quantities and is a cheaper alternative to powder cocaine, thereby making it affordable to people who had not traditionally used cocaine. Its advent in the 1980s in a number of major urban areas in the United States was accompanied by massive media attention of the drug's meteoric rise and its associated dangers. A core component of the media coverage was the thinly-veiled (and unfounded) link between the drug's use and low-income, communities of color. In a matter of weeks, crack cocaine was widely held by the American public to be a drug that was sold and used by poor African Americans. This framing of the drug in class and race-based terms provides important context when evaluating the legislative response.

36. The resulting legislation punished crack cocaine with historically punitive sanctions. Crack cocaine is the only drug in which simple possession can result in a five-year mandatory sentence. A defendant convicted with five grams of crack cocaine – between 10 and 50 doses – will receive a five-year mandatory sentence. To receive the same sentence for a powder cocaine violation, a defendant would have to have been involved in an offense involving 500 grams – between 2,500 and 5,000 doses. This is commonly referred to as the “100-to-1 sentencing disparity.” In order to trigger a ten-year mandatory sentence, a defendant would need to be charged with 50 grams of crack cocaine – between 100 and 500 doses – or 5,000 grams of powder cocaine – up to 50,000 doses.

37. The impact of this policy in the African American community has been nothing less than devastating. While two-thirds of regular crack cocaine users in the United States are either white or Latino, 82 percent of those persons sentenced in federal court for a crack cocaine offense are African American.⁷² Thus, African Americans disproportionately face the most severe drug penalties in the federal system. The average sentence for less than 25 grams of crack cocaine is 65 months, compared to 14 months for the same quantity range of powder cocaine.⁷³

⁷¹ As has been documented repeatedly, history has proven all of these concerns unfounded. See The Sentencing Project, *Federal Crack Cocaine Sentencing*, 2007.

⁷² Substance Abuse and Mental Health Services Administration, *Results from the 2005 National Survey on Drug Use and Health: Detailed Table J*, 2006, at Table 1.43a; and, United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2007, at 15.

⁷³ United States Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, March 2002.

38. On average, crack cocaine defendants do not play a sophisticated role in the drug trade. Nearly two-thirds (61.5 percent) of defendants were identified as a street-level dealer, courier, lookout, or user. Among powder cocaine defendants, this proportion was 53.1 percent. Although the distribution of offender roles is similar between the two substances, the median quantity and applicable mandatory minimum is vastly different. The median quantity for a crack cocaine street-level dealer is 52 grams, which triggers a 10-year mandatory minimum sentence. For a powder cocaine street-level dealer, the median quantity is 340 grams, which would not even expose a defendant to a five-year mandatory minimum. This has led the United States Sentencing Commission to conclude that crack cocaine penalties “apply most often to offenders who perform low-level trafficking functions, wield little decision-making authority, and have limited responsibility.”⁷⁴ Moreover, regarding the racial disparity that has been exacerbated by federal crack cocaine sentencing, the Commission reported that “[r]evising the crack cocaine thresholds would better reduce the [sentencing] gap than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.”⁷⁵

39. Due in large part to the racially disparate application of mandatory sentences, African Americans, on average, now serve almost as much time in federal prison for a drug offense (58.7 months) as whites do for a violent offense (61.7 months).⁷⁶ Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62 percent, compared with a 17 percent increase among white drug defendants.⁷⁷ Much of this disparity is attributable to the severe penalties associated with crack cocaine.

RECOMMENDATIONS:

- The United States government should take steps to end all mandatory sentencing practices, returning judicial discretion to judges;
- The United States government should amend penalties for crack cocaine to be equivalent with those for powder cocaine, at the current quantity threshold of powder cocaine; and
- The United States government should require the preparation of racial/ethnic impact statement to be submitted in conjunction with all sentencing and corrections legislation anticipated to effect measurable change on the incarcerated population.

SIDEBAR. Although Kemba Smith had no prior criminal record, mandatory minimum sentencing laws made her and an increasing number of women casualties of excessive

⁷⁴ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002, at 100.

⁷⁵ United States Sentencing Commission, *supra* note 66, at 132.

⁷⁶ Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, NCJ 210299, October 2005, at 112.

⁷⁷ *Id.*; Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1994*, NCJ 163063, April 1998, at 85.

punishments that are grossly disproportionate to the conduct for which they have been convicted. At the age of 24, after pleading guilty to conspiracy to distribute crack cocaine for her boyfriend's drug enterprise, Kemba, 7 months pregnant at the time, was sentenced to 24 ½ years in prison with no possibility of parole.

Kemba, raised in a protective, middle-class community near Richmond, Virginia, had spent the previous four years in an abusive relationship with Peter Hall. In 1989, Kemba had met Hall as a 19-year-old sophomore at Hampton University. He was eight years her senior and unbeknownst to Kemba, the leader of a \$4 million crack cocaine distribution network and one of the Federal Bureau of Investigation's 15 Most Wanted.

Their relationship was a tumultuous one. Kemba would end up making several unsuccessful attempts to leave Hall, who abused her physically and emotionally. When Hall was discovered murdered, the government held Kemba accountable for the total amount of the drugs in his conspiracy charge. "I did not traffic in drugs, but I knew my boyfriend did. I knew that while living with him that he did not have a job and we were living off the proceeds of his drug crimes. I never claimed innocence and this is the reason why I pled guilty," Kemba testified before the Inter-American Commission on Human Rights in 2006.

Yet, due to mandatory minimum sentencing guidelines, the court was unable to take into consideration that Kemba's compliance to participate in Hall's illegal activities, such as delivering money to his associates, were done out of fear for her life. It was only through a rare granting of clemency by President Bill Clinton, that Kemba was released from prison after spending six and half years incarcerated.