



United States Compliance
with the
United Nations Convention on the
Elimination of All Forms of Racial Discrimination

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About NACDL and The Sentencing Project

The National Association of Criminal Defense Lawyers (“NACDL”), a professional bar association founded in 1958, is the preeminent organization in the United States advancing the mission of the criminal defense bar and criminal justice reform. NACDL’s direct membership and network of more than 90 local, state and international affiliates comprise tens of thousands of practicing criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law faculty, and judges. NACDL embraces a public service agenda, with an institutional mission to ensure due process, safeguard fundamental constitutional principles, and advocate for rational and humane criminal justice policies.

The Sentencing Project is a national nonprofit organization engaged in research and policy analysis on criminal justice issues. The Sentencing Project’s influential studies update the public, policy makers and the media on the challenges confronting the American justice system, and promote effective and fair strategies for reform. Founded in 1986, the Sentencing Project has become a leader in the effort to bring national attention to disturbing trends and inequities in the criminal justice system, including that this country is the world's leader in incarceration, that one in three young black men is under control of the criminal justice system, that five million Americans cannot vote because of felony convictions, and that thousands of people have lost welfare, education and housing benefits as the result of convictions for minor drug offenses.

EXECUTIVE SUMMARY

The United States signed the United Nations Convention on the Elimination of All Forms of Racial Discrimination (“CERD”) on September 28, 1966, and ratified it on October 21, 1994. Article 2 of CERD requires the state party “to pursue by all appropriate means and without delay a policy of eliminating racial discrimination.” CERD also calls on the government to “take effective measures to review governmental, national, and local policies” that have a racially discriminatory effect.¹ More specifically, in Article 5, CERD requires the state party “to prohibit and eliminate racial discrimination in all its

¹ U.N. Convention on the Elimination of All Forms of Racial Discrimination, Article 2(c), March 7, 1966, *available at* <http://www2.ohchr.org/english/law/cerd.htm>.

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 frequently falls short of its obligations under Article 2 and Article 5 in the criminal justice arena. Members of minority communities are disproportionately present at all stages of the American criminal justice system. Because of the disparity, any showing of procedural or substantive unfairness in policing, courts, or corrections can be presumed *a priori* to disproportionately impact communities of color.

This statement will address the United States’ failure to comply with its obligations under Article 2 and 5(a) of CERD in the criminal justice area, addressing the longstanding racial disparities in indigent defense and sentencing, as well as racial disparities in emerging areas of the criminal justice system, particularly zero tolerance policies and drug courts. The statement concludes with specific recommendations on steps the federal government can take to eliminate racial disparities in the criminal justice system and improve compliance with CERD.

INDIGENT DEFENSE

The Committee on the Elimination of Racial Discrimination (the “Committee”) is a group of independent experts that monitors implementation of CERD by its State parties. The Committee issued General Recommendations to provide State parties with guidance on how to comply with CERD. General Recommendation XXXI³ on the prevention of racial discrimination in the administration and functioning of the criminal justice system equates the “guarantees of a fair trial and equality before the law” with, among other things, 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, the actual application of the right to counsel in criminal cases across the country routinely fails to meet even the most rudimentary requirements of “a fair trial and equality before the law.” America’s public defense systems are inadequately monitored and overseen, and egregiously underfunded. 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. As a result, the crisis in America’s public defense system has a disproportionate impact on communities of color. General Recommendation XXXI, ¶ 4(b), *supra*, notes that “potential indirect discriminatory effects” can be regarded as an indicator of racial discrimination for the purposes of determining whether the State party is complying with CERD.

Members of minority communities utilize indigent defense services more than any other racial group because they are more likely to live in poverty as a result of multiple

² *Id.* Article 5(a).

³ General Recommendation XXXI is available at http://www2.ohchr.org/english/bodies/cerd/docs/GC31Rev_En.pdf.

factors articulated in other sections of this statement. 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%.⁴ 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.⁵ 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.⁶ Disparities are similar in the federal system; 65% of black inmates report using public defense services compared with only 57% of white inmates.⁷

NACDL recently completed a comprehensive study of misdemeanor courts, which involved site visits to courts in numerous jurisdictions, as well as interviews and surveys with public defenders across the country. This research supports the notion that those served by public defenders are disproportionately people of color. For example, during a site visit in Lynwood, Washington, "four out of seven men (57 percent) on the in-custody calendar were observably men of color," whereas in Lynnwood, only 26 percent of the population is non-White.⁸

As noted above, General Comment XXXI, *supra*, 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." Contrary to this requirement, public defense services in the United States are not governed by any national, governmental standards. Indeed, frequently even state governments fail to provide any oversight for indigent defense services. Many states, including 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.⁹ In essence, there is nothing that requires that the indigent defense system appoint an attorney with appropriate knowledge, skill and training, nor anything that directs the attorney to undertake the minimal basic activities necessary for a defense, such as an investigation, a client interview, and motions practice. As a result, most of the systems are in disarray. A recent report of the National Right to Counsel Committee observed that, because of a lack of standards and oversight, in many places inexperienced

⁴ 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.

⁵ 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).

⁶ Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, Bureau of Justice Statistics Special Report (Nov 2000), at 3.

⁷ *Id.*

⁸ R. Boruchowitz, M. Brink & M. Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (April 2009), at 47, available at <http://www.nacdl.org/misdemeanor>.

⁹ 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.

attorneys are assigned felony and even homicide cases.¹⁰ For example, in one location, an attorney right out of law school was immediately assigned 270 felony drug cases.¹¹

Public defense services in most parts of the United States are also dramatically under-funded. The National Right to Counsel Report observed that even before the current economic crisis, “many indigent defense systems across the country were already facing serious budget shortfalls and cutbacks.”¹² The economic crisis has worsened this situation and “37 states [faced] mid-year budget shortfalls for fiscal year 2009.”

The federal government provides minimal to no financial support for indigent defense in state courts. An ABA study similarly concluded that funding for public defense services is “shamefully inadequate.”¹³ In the study, 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.”¹⁴

The impact of the public defense crisis on communities of color is also demonstrable. As Janet Reno, former United States Attorney General, once said, “a good lawyer is the best defense against a wrongful conviction.”¹⁵ Because the people who use underfunded and inadequate 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.¹⁶ As current United States Attorney General Eric Holder recently observed, despite the efforts made previously, “it is clear . . . that the crisis in indigent defense has not ended.”¹⁷

¹⁰ See *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, National Right to Counsel (April 2009), at 91, available at http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf.

¹¹ *Id.*

¹² *Id.* at 59.

¹³ *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/>.

¹⁴ *Id.* at 8.

¹⁵ 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>.

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

¹⁷ Eric Holder, Remarks at the American Council of Chief Defenders Conference, June 24, 2009, available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090624.html>.

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. The failure of the federal government to take any steps to combat this crisis constitutes a violation of the U.S. Government's obligation under articles 2 and 5 of the CERD to guarantee "equal treatment" before the courts.

SENTENCING

The United States has also failed to comply with CERD in the area of criminal sentencing by largely ignoring the problems inherent in mandatory minimum sentencing and the crack and powder cocaine disparity, both of which continue to have racially disparate impacts on people of color.

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 impose 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 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 defendant's role and culpability. This is tantamount to a "one size fits all" sentencing scheme.

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."¹⁸

African Americans comprise 13% of the United States population and 14% of monthly drug users, but represent 37% of those persons arrested for a drug offense and 56% of persons in state prison for a drug conviction.¹⁹ Because African Americans use

¹⁸ Tonry, M. (1996). *Malign Neglect: Race, Crime, and Punishment in America*. Oxford University Press, USA, at 105.

¹⁹ 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

controlled substances at the same rate as their representation in the general population, there is nothing in the patterns of drug use to explain the disproportionalities in arrests, sentencing, and incarceration rates.

Mandatory minimum sentences have consistently been shown to have a disproportionately severe impact on African Americans. A study by the United States Sentencing Commission found that African Americans were 21% more likely to receive a mandatory minimum sentence than white defendants facing an eligible charge.²⁰ 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.²¹ 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.²² As a result, African American drug defendants are 20% more likely to be sentenced to prison than white drug defendants.²³

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.²⁴ However, the 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.²⁵ Despite average rates of drug use among the general population, African Americans who use drugs are more likely to be arrested than other groups. 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.

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

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.

²⁰ United States Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, 1991.

²¹ Barbara S. Meierhoefer, *General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentencing Imposed*, Federal Justice Center, 1992.

²² United States Sentencing Commission, *Fifteen Years of Guideline Sentencing*, 2003, at 89.

²³ *Id.* at 122.

²⁴ 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.

²⁵ *Id.* at 1990.

violence.²⁶ 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.

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.²⁷ 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.

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% of those persons sentenced in federal court for a crack cocaine offense are African American.²⁸ 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.²⁹

On average, crack cocaine defendants do not play a sophisticated role in the drug trade. Nearly two-thirds (61.5%) of defendants were identified as a street-level dealer, courier, lookout, or user. Among powder cocaine defendants, this proportion was 53.1%. 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

²⁶ As has been documented repeatedly, history has proven all of these concerns unfounded. See The Sentencing Project, *Federal Crack Cocaine Sentencing*, 2007.

²⁷ 21 U.S.C. 844

²⁸ 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.

²⁹ United States Department of Justice, *Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties*, March 2002.

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.”³⁰ 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.”³¹

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).³² Between 1994 and 2003, the average time served by African Americans for a drug offense increased by 62%, compared with a 17% increase among white drug defendants.³³ Much of this disparity is attributable to the severe penalties associated with crack cocaine.

EMERGING AREAS OF CONCERN

The criminal justice system in the United States is changing and evolving. New policing strategies and court procedures are constantly being introduced, and when viewed as successful, these strategies and procedures can spread quickly. Unfortunately, many of these new developments increase, rather than ameliorate, concerns about racial disparities, and thus concern about compliance with CERD.

Policing and Broken Windows Strategies

In the area of policing, one of the most significant changes of the past 30 years has been an increased focus on enforcement of petty crimes, typically called “broken windows” enforcement or “zero tolerance.” Strictly enforcing low-level criminal laws, or quality-of-life crimes, such as laws against vandalism, panhandling, and minor theft, is believed by some to deter further low-level criminal activity and prevent more serious crimes from occurring.³⁴ However, numerous scholars have noted that these policies encourage broad police discretion and that, as a result, they can have enormous and

³⁰ United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy*, May 2002, at 100.

³¹ United States Sentencing Commission, *supra* note 22, at 132.

³² Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, NCJ 210299, October 2005, at 112.

³³ *Id.*; Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 1994*, NCJ 163063, April 1998, at 85.

³⁴ James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29. The underlying thesis concerning the impact of expanded enforcement of minor crimes has recently been subject to significant challenge by social scientists as well. See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City & a Five-City Social Experiment*, 73 U. Chi. L. Rev. 271 (2006).

problematic impact on minority communities.³⁵ Indeed, the first proponents of broken windows enforcement even conceded that this approach to policing lends itself to the police's becoming “the agents of neighborhood bigotry.”³⁶ A number of subsequent studies have demonstrated that the group most affected by broken windows enforcement strategies is the poor, which as observed above, means disproportionately people of color.³⁷ “The Baltimore City Council acknowledged as much in a report on arrest rates, stating that the ‘unintended consequence’ of vigorous policing in the city is ‘the disproportionate arrest of both African Americans and the poor.’”³⁸

General Recommendation XXXI states that state parties should “eliminate laws that have an impact in terms of racial discrimination.” Given the clear evidence of disproportionate impact, the federal government’s failure to curtail broken windows police practices, or, at a minimum, take steps to eliminate their disparate racial impact, is a violation of CERD.

Drug Courts

In the area of court procedures, one of the largest developments over the past 30 years is the formation and proliferation of drug courts. The first drug court opened in Miami in 1989, and today there are more than 2,000 drug courts in operation across the country.³⁹ Intended to address the problems of drug addiction and its impact on the criminal justice system, drug courts provide court administered treatment. If successful, the defendant frequently can have the criminal case dismissed, but if unsuccessful, the defendant frequently faces jail time as punishment.⁴⁰ While the advent of drug courts is widely viewed as a positive development, their administration raises considerable concerns about impact on minority communities.

Drug court admissions procedures frequently create opportunities for discrimination. Frequently, admissions criteria are not objective, but ad hoc. Judges, or even prosecutors, often have the unfettered power to determine whether a defendant will be permitted to go to drug court.⁴¹ Also, drug courts often have a policy of not permitting repeat offenders to access the program.⁴² As a result, drug courts are significantly less accessible to defendants of color. Studies regarding the population admitted to drug courts bear this out. For example, in a study of four counties within California, drug

³⁵ See, e.g., Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 *Yale L. J.* 2249, 2254 (1998).

³⁶ *Id.* (citing Wilson & Kelling, *supra* n. 34, at 35).

³⁷ Ralph Taylor, *Breaking Away From Broken Windows: Baltimore Neighborhoods and the Fight Against Crime, Grime, Fear, and Decline* (2001), at 371-74.

³⁸ Reed Collins, *Strolling While Poor: How Broken-Windows Policing Creates a New Crime in Baltimore*, 14 *Geo. J. ON POVERTY L. & POL’Y* 419, 426 (2007) (citing Balt. City Council Pub. Safety Subcommittee, *Report on the Police Performance Enhancement Program and Recommendations to Improve the Process for Expungement of Arrest When No Charges Are Filed* (Sept. 2005), at 12).

³⁹ *America’s Problem Solving Courts: The Criminal Cost of Treatment and the Case for Reform*, National Association of Criminal Defense Lawyers (Sept. 2009), at 16.

⁴⁰ *Id.* at 16-17.

⁴¹ *Id.* at 22-23.

⁴² *Id.*

courts admitted a proportionately greater number of Caucasian offenders, “even though persons of color comprise a disproportionately large percentage of the low-level drug offender population eligible for drug court services.”⁴³ For example, in Alameda County in 1997, African Americans comprised 18.8% of the residents and 78.5% of the county’s adult felony drug defendants. Yet, the drug court in Alameda County reported that the vast majority - 65% - of their participants were Caucasian.⁴⁴

NACDL recently completed a nationwide study of drug courts.⁴⁵ An NACDL Task Force heard testimony from prosecutors, judges, defense lawyers and defendants involved with drug courts across the country. The testimony at these hearings confirmed the findings of the California study, that admission to drug court is frequently denied to defendants of color. As a public defender from Utah explained about adult clients,

Minority clients rarely get accepted in the first place. For whatever reason, they are more apt to have prior criminal history that keeps them out of drug court. The problem I’ve seen is that for whatever reason, I have been able to get to waive the admissions rules for some clients and those clients are always white. In one case, I didn’t even refer a guy because of his problematic record and the drug court cop called me and asked why I hadn’t referred him and said since my client’s mom was a cop, my client would get into drug court if I would only refer him.⁴⁶

Because of the enormous discretion granted to judges, the disparity, intended or not, may continue throughout the case, including sanctions and termination. As another Utah lawyer noted, “I have seen white defendants who re-offend offered second and third chances, while members of minority groups are treated immediately as being in violation.”⁴⁷ Perhaps as a result, African Americans have a high failure rate in drug courts, as much as 30 percentage points higher in some courts.⁴⁸

At a minimum, the data that exists regarding drug courts is cause for significant concern regarding disparate racial impact, and, under CERD, the situation must be monitored, evaluated, and corrected as necessary.

⁴³ Gary Uleman, et. al., *Substance Abuse and Crime Prevention Act of 2000, Progress Report* (March 2002), at fn. 30 (citing National Association of Drug Court Professionals *Law Enforcement/Drug Court Partnerships: Possibilities and Limitations, A Case Study of Partnerships in Four California Counties* (June 2000) (noting that “the majority of drug court participants in all programs were identified as Caucasian or non-Hispanic white.”)).

⁴⁴ *Id.* (citing National Association of Drug Court Professionals *Law Enforcement/Drug Court Partnerships: Possibilities and Limitations, A Case Study of Partnerships in Four California Counties* (June 2000)).

⁴⁵ *America’s Problem Solving Courts*, *supra* n. 39.

⁴⁶ *Id.* at 43 (citing Questionnaire response 95, question 15).

⁴⁷ *Id.* (citing Questionnaire Response 321, question 17).

⁴⁸ *Id.* (citing Michael M. O’Hear, *Rethinking Drug Courts: Restorative justice as a Response to Racial Injustice*, 20 *Stan. L. & Pol’y Rev.* 463, 480 (2009)).

RECOMMENDATIONS:

By failing to appropriately address racial disparities in the criminal justice system, the United States falls far short of compliance with its obligations under CERD to ensure “[t]he right to equal treatment before the tribunals and all other organs administering justice,”⁴⁹ and to “take effective measures to review governmental, national, and local policies” that have a racially discriminatory effect.⁵⁰ However, there are immediate steps that Congress can take to improve compliance with CERD.

Research

- The United States government should mandate, or at least encourage, 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 by all means necessary including by conditioning of funding. These statistics would facilitate proper evaluation of the indigent defense system and its particular impact of the system on communities of color.
- Congress should coordinate and fund a study to determine whether zero tolerance policies contribute to racial disparities within the criminal justice systems. This study should be conducted by an entity that is independent of government, such as a university or impartial research foundation.
- The United States should evaluate issues of racial and ethnic fairness in the practices of U.S. Attorney offices. An analysis of prosecutorial decision making should disclose whether and to what extent (a) racial and ethnic disparities are attributable to criminal justice policies and practice; (b) any policies and practices that do produce disparities are fully justified as appropriate responses to criminal behavior; and (c) disparities may be attributable in whole or in part to discrimination or unconscious bias.

Policy

- Congress should adopt the recommendation of the American Bar Association (“ABA”) that it establish and fund a National Center for Public Defense Services to serve as an independent, national oversight authority that would strengthen

⁴⁹ U.N. Convention on the Elimination of All Forms of Racial Discrimination, Article 5(a).

⁵⁰ *Id.* at Article 2(c).

state public defense services by conducting and hosting public defense programs and by administering federal funds for state public defense programs.

- Congress should provide federal technical assistance and training for state, local, and territorial public defense systems, and the attorneys who participate in them, comparable to the federal government’s support for the prosecution function.
- 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, as well as eliminate similar egregious sentencing disparities.
- The United States government should mandate the preparation of racial/ethnic impact statements to be submitted in conjunction with proposed sentencing and corrections legislation to project measurable change and any unwarranted disparity on the incarcerated population.

Funding and Funding Conditions

- Congress should provide sufficient financial support as applicable to the states, local government, and territories for the provision of public defense services in state criminal and juvenile delinquency proceedings comparable to the federal government’s support for the prosecution function.
- As a condition of receiving federal criminal justice funding, state criminal justice systems should be required to: (1) promulgate and adhere to public defense standards that are consistent with the ABA’s *Ten Principles of a Public Defense Delivery System*; the National Juvenile Defender Center/National Legal Aid & Defender Association’s (“NLADA”) *Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems*; and NLADA’s *Performance Guidelines for Criminal Defense Representation*; and (2) include public defense systems in state and local justice planning.
- The United States government should establish incentives for states to evaluate the effectiveness of mandatory sentences.
- As a condition of receiving federal criminal justice funding, state and county drug courts should be required (1) to adopt objective, public admission criteria; (2) to eliminate any bar for admission relating to past criminal conduct; and (3) to gather comprehensive racial statistics.