



**Written Submission of the American Civil Liberties Union on
Racial Disparities in Sentencing**

**Submitted to the
United Nations Special Rapporteur on Minority Issues
November 18, 2021**

The American Civil Liberties Union (ACLU) welcomes this opportunity to submit written testimony to the United Nations Special Rapporteur on minority issues for his official visit to the United States. Our submission focuses on the significant racial disparities in sentencing decisions in the United States, which result from disparate treatment of Black and brown people at every stage of the criminal legal system, and are consistent with a larger pattern of racial disparities that plague the U.S. criminal legal system. The human rights violations associated with such racial disparities are particularly egregious in the United States, and we hope that the Special Rapporteur will consider these violations and take action to address them as part of his final report to the U.N. Human Rights Council.

International human rights bodies have repeatedly documented the disparate treatment of Black people in the United States criminal legal system. In 2018, the Inter-American Commission on Human Rights issued a comprehensive report on racial discrimination in the U.S. policing system which has also covered racial discrimination in sentencing.¹ The Inter-American Commission noted that “racism at every stage of the criminal justice process tends to create a vicious circle, where disparities in policing, arrests, and pretrial detention lead to disparities in charges and convictions, and ultimately in incarceration and reincarceration rates.” In June 2021, the United Nations High Commissioner for Human Rights released a report detailing the “compounding inequalities” and “stark socioeconomic and political marginalization” that Black people and people of African descent in the United States and other countries face. The report calls for “reimagining policing and reforming criminal justice systems that do not keep racial and ethnic minorities safe and which have consistently produced discriminatory outcomes for Africans and people of African descent.”² The United States should heed these recommendations and reckon with the impacts of systemic racism in the criminal legal system and reform its laws to eliminate racial disparities in sentencing.

We welcome the opportunity to submit this testimony and urge the Special Rapporteur to take up the issue of racial disparities in sentencing in the United States as part of his official visit

and report on this issue to the UN Human Rights Council. We ask that the Special Rapporteur recommend that the government of the United States amend its sentencing laws to prevent any discriminatory impact and take other measures to rectify unjust and discriminatory sentences against Black people and members of other minority groups.

I. Racial Disparities in Sentencing in the United States

There are significant racial disparities in sentencing decisions in the United States.³ Sentences imposed on Black males in the federal system are nearly 20 percent longer than those imposed on white males convicted of similar crimes.⁴ Black and Latinx defendants sentenced in state and federal courts face significantly greater odds of incarceration than similarly situated white defendants and receive longer sentences than their white counterparts in some jurisdictions.⁵ Black male federal defendants receive longer sentences than white defendants arrested for the same offenses and with comparable criminal histories.⁶ Research has also shown that race plays a significant role in the determination of which homicide cases result in death sentences.⁷

The racial disparities increase with the severity of the sentence imposed. The level of disproportionate representation of Black people among incarcerated people who are serving life sentences without the possibility of parole (LWOP) is higher than that among parole-eligible individuals serving life sentences. (Because Congress abolished federal parole for all federal offenses in the Sentencing Reform Act of 1984, all life sentences in the federal system are LWOP sentences.⁸) The racial disparity is even higher for people sentenced as juveniles to LWOP, and higher still among individuals sentenced to LWOP for nonviolent offenses. Although Black people constitute only about 13 percent of the U.S. population, as of 2016, they constitute 48 percent of all people serving life and “virtual” life sentences of 50 years or longer; 55.2 percent of those serving LWOP; and 63.4 percent of those who received LWOP for offenses committed as a juvenile.⁹ As of 2012, the ACLU’s research shows that 65.4 percent of people serving LWOP for nonviolent offenses are Black.¹⁰

The racial disparities are even worse in some states. In seven states and the federal system, the percentage of Black people serving life and “virtual” life sentences is over 60 percent.¹¹ In Georgia and Louisiana, the proportion of Black people serving LWOP sentences is as high as 75.1 and 73.5 percent, respectively.¹² In the federal system, 58.9 percent of people serving life and “virtual” life sentences are Black.¹³

To be clear, these racial disparities are not unintentional. From the beginning, the War on Drugs was intended to decimate the Black community. John Ehrlichman, the Watergate co-conspirator and President Nixon’s domestic affairs aide, told a reporter decades after Nixon declared the War on Drugs: “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin and

then criminalizing both heavily, we could disrupt those communities.”¹⁴ Ehrlichman continued: “We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.”¹⁵ The 50-year drug war has achieved only the harmful purposes President Nixon intended—disrupting, vilifying, and oppressing communities of color.

These racial disparities result from disparate treatment of Black and brown people at every stage of the criminal legal system, including stops and searches, arrests, prosecutions and plea negotiations, trials, sentencing, parole, and probation revocation decisions.¹⁶ Race matters at all phases and aspects of the criminal process, including the quality of representation, the charging phase, and the availability of plea agreements, each of which impact whether people charged as juveniles and adults face a potential LWOP sentence. In addition, racial disparities in sentencing can result from sentencing policies that have significant disparate racial effects, particularly tough-on-crime and War on Drugs sentencing policies, like imposing harsher sentences on people designated as so-called “habitual offenders” or “career offenders,” enhanced sentences for violations occurring in or near a school zone, and federal policies adopted by Congress in 1986 and 1996 that established mandatory minimum sentencing laws as well as the original 100-to-one sentencing disparity between crack and powder cocaine offenses.¹⁷ Additionally, people of color are less likely to benefit from diversion programs and alternative courts, which routinely bar individuals with criminal history.¹⁸ Racial disparities in parole grants and denials result in disparities in time served.¹⁹ Additionally, there are stark racial disparities in parole and probation revocation decisions.²⁰

Prosecutors’ charging decisions are one cause of the racial disparities observed at sentencing, as prosecutors have the discretion to decide whether to charge an offense that triggers a mandatory minimum sentence or offer a plea deal to a lesser charge. One study found that Black people face significantly more severe charges than white people, even after controlling for characteristics of the offense, criminal history, defense counsel type, age and education of the accused, and crime rates and economic characteristics of the jurisdiction.²¹

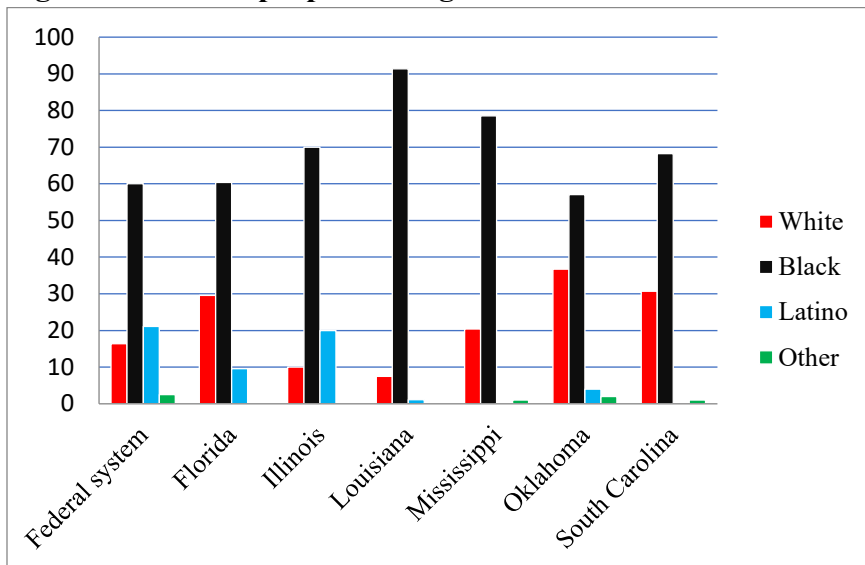
Available data also suggests that there are racial disparities in prosecutors’ exercise of discretion in charging offenses that result in sentencing enhancements under three-strikes and other habitual offender laws.²² For instance, a 1995 legal challenge²² revealed the racially biased role of prosecutorial discretion in the application of Georgia’s two-strikes law. Georgia prosecutors have discretion to decide whether to charge offenders under the state’s two-strikes sentencing scheme, which imposes life imprisonment for a second drug offense. They invoked the law against only 1 percent of white defendants facing a second drug conviction, compared to 16 percent of Black defendants.²³ As a result, 98.4 percent of people serving life sentences under the law were Black.²⁴ In California, studies similarly show that Black people are sentenced under the state’s three-strikes law at far higher rates than their white counterparts.²⁵

Scholars have also noted that federal 18 U.S.C. § 851 sentencing enhancements, which at a minimum double a federal drug defendant’s mandatory minimum sentence and can raise the maximum sentence that can be imposed by the court from 40 years to life without parole if the defendant has two prior qualifying drug convictions in state or federal courts, are applied by federal prosecutors in an arbitrary and racially discriminatory manner and exacerbate racial disparities in the criminal legal system.²⁶ While the U.S. Department of Justice and U.S. Sentencing Commission do not develop or publicize data on racial disparities in prosecutors’ application of this federal drug sentencing enhancement, the U.S. Sentencing Commission has reported that “[b]lack offenders qualified for the [§ 851] enhancement at higher rates than any other racial group.”²⁷

Racial Disparities in Life-without-Parole Sentencing for Nonviolent Offenses

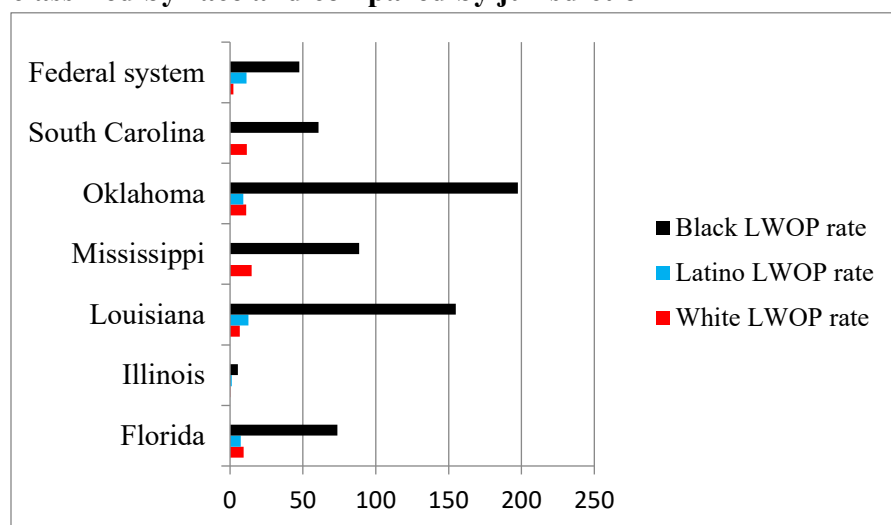
In general, studies have found that greater racial disparities exist in sentencing for nonviolent crimes, especially property crimes and drug offenses.²⁸ In particular, there are staggering racial disparities in life-without-parole sentencing for nonviolent offenses. Based on data provided to the ACLU by the U.S. Sentencing Commission and state Departments of Corrections, the ACLU estimates that nationwide, 65.4 percent of people serving LWOP for nonviolent offenses are Black compared to the 17.8 percent who are white and the 15.7 percent who are Latinx. According to data collected and analyzed by the ACLU, Black people comprise a glaring 91.4 percent of the nonviolent LWOP prison population in Louisiana (the state with the largest number of people serving LWOP for a nonviolent offense), 78.5 percent in Mississippi, 70 percent in Illinois, 68.2 percent in South Carolina, 60.4 percent in Florida, 57.1 percent in Oklahoma, and 60 percent in the federal system.

Figure 1: Race of people serving LWOP for nonviolent offenses, by jurisdiction²⁹



Black people constitute a far greater percentage of the nonviolent LWOP population than of the census population as a whole. In the federal system, where parole is abolished,³⁰ Black people are 20 times more likely to be sentenced to LWOP for a nonviolent crime than white people. In Louisiana, the ACLU found that Black people were 23 times more likely than white people to be sentenced to LWOP for a nonviolent crime. The racial disparities range from 33-to-1 in Illinois to 18-to-1 in Oklahoma, 8-to-1 in Florida, and 6-to-1 in Mississippi. Black people are sentenced to life without parole for nonviolent offenses at rates that suggest unequal treatment and that cannot be explained by white and Black defendants' differential involvement in crime alone.³¹

Figure 2: Rate of people serving LWOP for nonviolent offenses per 1,000,000 residents, classified by race and compared by jurisdiction



Racial Disparities in Juvenile Life-without-Parole Sentencing

There are stark racial disparities in the imposition of life without parole sentences for people sentenced as juveniles in the United States. Nationally, about 77 percent of people serving juvenile LWOP sentences are Black and Latinx, while Black youth are serving these sentences at a rate 10 times higher than white youth.³² In California—the state with the highest number of people serving LWOP for crimes committed as children—Black youth are serving the sentence at a rate that is 18 times higher than the rate for white youth, and Latino youth are sentenced to life without parole five times more than white youth.³³ In Michigan (the state with the second-highest number of people serving LWOP for crimes committed as children), youth of color comprise only 29 percent of Michigan’s children, but are 73 percent of the state’s children serving life without parole.³⁴ As of 2016, 63.4 percent of people serving LWOP for crimes committed as juveniles were Black.³⁵

Recent research also shows that that the race of victims and offenders may be a factor in determining which minors are sentenced to life without parole, as Black youth with white victims are far more likely to be sentenced to life without parole than white youth with Black victims. The percentage of Black youths serving LWOP for the homicide of a white victim (43.4 percent) is nearly twice the rate at which they are arrested for suspected homicide of a white person (23.2 percent).³⁶ In contrast, white youths with Black victims are only about half as likely (3.6 percent) to be sentenced to LWOP for homicide as their proportion of arrests for suspected homicide of a Black victim (6.4 percent).³⁷

These outcomes are the result of racial biases that affect who is arrested, who is charged, who is detained, and who receives the harshest punishments. For example, a 1990 statistical evaluation of police intake decisions in five Michigan counties revealed that, even when controlling for other statistically significant factors such as drug charges, weapons possession, or prior convictions, “race continued to exert an independent and significant influence on detention...[while] youth of color were more likely to be charged with more serious offenses, they were also more likely to be detained independent of offense seriousness.”³⁸

Racial Disparities in Crack and Powder Cocaine Sentencing

Racial disparities are particularly pronounced in cocaine sentencing. As part of the Anti-Drug Abuse Act of 1986, Congress ignored empirical evidence and created a 100-to-1 disparity between the amounts of crack and powder cocaine required to trigger certain mandatory minimum sentences. In fact, crack and powder cocaine are simply two forms of the same drug, and the only difference between them is that crack includes the addition of baking soda and heat. As a result of Congress’s inaccurate perception of differences in the harmfulness and dangerousness between crack and powder cocaine, sentences for offenses involving crack cocaine were made much longer than those for offenses involving the same amount of powder cocaine. Thus, for example, someone convicted of an offense involving just five grams of crack cocaine was subject to the same five-year mandatory minimum federal prison sentence as someone convicted of an offense involving 500 grams of powder cocaine. The 100-to-1 ratio resulted in vast unwarranted racial disparities in the average length of sentences for comparable offenses because the majority of people arrested for crack offenses are Black. By 2004, under the 100-to-1 disparity, Black people served virtually as much time in prison for a nonviolent drug offense (58.7 months) as white people did for a violent offense (61.7 months).³⁹ In 2010, 85 percent of the 30,000 people sentenced for crack cocaine offenses under the 100-to-1 regime were Black.⁴⁰

In the past fifteen years, the United States Sentencing Commission has made two adjustments to the federal Sentencing Guidelines that reduced, though did not eliminate, the unfounded sentencing disparity between crack and powder cocaine offenses in the Guidelines. First, in 2007, the Sentencing Commission amended the Sentencing Guidelines by lowering the

sentencing ranges for most crack cocaine offenses and applied the new guidelines retroactively. Then, in 2010, in long overdue recognition of the unfairness of the sentencing disparity, Congress passed the Fair Sentencing Act (FSA), which reduced the disparity between the amounts of crack and powder cocaine required to trigger certain mandatory minimum sentences from 100-to-1 to 18-to-1. In 2011, the Sentencing Commission amended the Sentencing Guidelines consistent with the FSA and then voted to apply the new guidelines retroactively to individuals sentenced before the FSA was enacted.⁴¹ In 2018, Congress enacted the FIRST STEP Act which made the Fair Sentencing Act reforms retroactive and permitted people incarcerated in federal prisons for cocaine convictions to apply for resentencing. The passage of the FIRST STEP Act allowed for the resentencing of 3,705 people convicted of cocaine offenses, 91 percent of whom are Black.⁴² Sentences were reduced by six years on average.⁴³ However, racial disparities in crack cocaine sentencing persist. In 2020, 77 percent of people convicted of crack cocaine offenses were Black, but 66 percent of crack cocaine users are white or Latinx.⁴⁴

While the FIRST STEP Act and Fair Sentencing Act were steps toward increased fairness, the 18-to-1 ratio continues to perpetuate the outdated and discredited assumptions about crack cocaine that gave rise to the unwarranted 100-to-1 disparity in the first place. In September 2021, the U.S. House of Representatives passed the Eliminating a Quantifiably Unjust Application of the Law (EQUAL) Act to eliminate the current 18-1 sentencing disparity between powder and crack cocaine and retroactively apply that change. The bill, which passed in the House with a strong bipartisan vote and was endorsed by the Justice Department, currently awaits a vote in the Senate.⁴⁵

However, the elimination of the sentencing disparity between powder and crack cocaine is an incremental step forward in addressing harsh and racially disparate sentences. Instead, Congress should repeal all existing mandatory minimum sentencing laws and cease passing new ones. Between 1980 and 2013, the federal prison population grew by 750 percent, and that growth is due to lengthy drug sentences.⁴⁶ Indeed, nearly half of the people in federal prison are there for drug offenses.⁴⁷ Congress must end all mandatory minimum sentencing, beginning with the drug mandatory minimums.

Racial Disparities in Parole-Eligible Life and “Virtual” Life Sentences

The population serving life and “virtual” life sentences of 50 years or more is disproportionately people of color, who compose two-thirds (67.5 percent) of this population.⁴⁸ Nationally, 48.3 percent of people serving life and “virtual” life sentences are Black, and 51.9 percent of the people serving “virtual” life sentences are Black.⁴⁹ These racial disparities are even more pronounced in some states. In Alabama, Georgia, Illinois, Louisiana, Maryland, Mississippi, and South Carolina, over 66 percent of people serving life and “virtual” life sentences are Black.⁵⁰

Racial Discrimination in the United States Capital Punishment System

Racial bias continues to taint the capital punishment system in the United States, from the decision to seek the death penalty, to jury selection and the imposition and execution of death sentences. The death penalty is disproportionately imposed on people of color.⁵¹ In 2019, 42 percent of people under sentence of death in the United States were Black, and 42.3 percent were white,⁵² although Black people make up only 13 percent of the overall population. Further, numerous studies from across the country conclusively demonstrate that the murder of white people results in capital prosecution in far higher percentages than murders of people of color.⁵³ The disparities based on the race of the victim are often heightened in cases where the accused individual is Black.

Despite the U.S. Supreme Court's longtime prohibition on discrimination in jury selection in *Batson v. Kentucky*,⁵⁴ people of color are typically excluded from capital juries at more than twice the rate of white prospective jurors, and very frequently even higher rates.⁵⁵ A comprehensive study of capital trials in North Carolina, by Michigan State University researchers, for example, showed that prosecutors used peremptory strikes to remove qualified Black jurors at more than twice the rate that they excluded all other jurors.⁵⁶ Of the 159 people on North Carolina's death row, 31 were sentenced by all-white juries and another 38 had only one person of color on their sentencing juries. Appellate courts in Tennessee and North Carolina have never reversed a case under *Batson*, even in a case in which the prosecutor admitted he had struck two women from the jury because they were "[B]lack women."

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*⁵⁷ that the equal protection clause of the United States constitution provided no remedy to a condemned prisoner presenting a federal court with statistical evidence of systemic racial bias, regardless of the strength of the scientific methodology of the research. Many constitutional scholars rank the *McCleskey* decision on par with perhaps the two most shameful cases in the Court's history.⁵⁸ *McCleskey* continues to prevent successful federal challenges to the racially biased practices in the country's death penalty system.

In 2009, in response to the *McCleskey* decision, North Carolina passed the Racial Justice Act (RJA). This legislation required courts to enter a life sentence for any death row defendant who proves that race was a factor in the imposition of his sentence and allowed defendants to show evidence of racial bias with statistical evidence. Following months of litigation, and several weeks of evidentiary hearings, in April 2012, a trial judge made a historic finding under the RJA of persistent, intentional and systemic racial discrimination in the case of Marcus Robinson, a Black death row prisoner, and commuted his death sentence to life without parole.⁵⁹ After an evidentiary hearing of comparable length and compelling evidentiary presentations, the trial court set aside three additional death sentences under the RJA in December 2012.⁶⁰ Then, in June 2013, the North

Carolina legislature repealed the RJA.⁶¹ The state of North Carolina appealed the four cases of the people who won relief under the RJA to the North Carolina Supreme Court and successfully argued the State should have been afforded more time to prepare its defense to the RJA claims. On remand, the State reversed course and sought to reinstate the four death sentences and foreclose any future RJA litigation in their cases.⁶² In June 2020, the North Carolina Supreme Court ruled that the retroactive repeal of the RJA was unconstitutional, restored the protections of the RJA for individuals who filed claims before the law was repealed in 2013, and reinstated the life sentences for the four who had initially prevailed under the law.⁶³

While the size of the federal death row is miniscule compared to the number of condemned prisoners held in state prisons, 2020 showed just how corrupt and lethal the federal government's administration of the death penalty can be. During the closing days of the Trump Administration, there was a surge in federal capital prosecutions and Attorney General Barr directed the federal government to resume executions for the first time in 17 years. In just six months, the federal government conducted an unprecedented, unjust, and unlawful execution spree, taking the lives of 13 people. Among those executed during this record-breaking string of back-to-back executions was Lezmond Mitchell, whom the federal government killed on August, 26, 2020 despite the objections of the Navajo Nation, and despite a federal statute intended to prevent federal executions of indigenous people over the objections of Native American tribes. In all 13 federal executions carried out by the Trump Administration, the federal government sidestepped due process, public health recommendations, and legal precedent in its rush to kill.

A study of the federal death penalty released in 2000 found that 89 percent of defendants prosecuted capitally were people of color.⁶⁴ Fifty-five percent of the people on the federal death row are either Black or Latinx.⁶⁵ The federal government has not made any discernable progress in rooting out racial discrimination in the administration of the federal death penalty.

Persistent Racial Disparities in the Criminal Legal System

Racial disparities in sentencing are consistent with a larger pattern of racial disparities that plague the U.S. criminal legal system from arrest through incarceration. There are stark racial disparities in police stops, frisks, and searches. For example, of the 92,383 reported pedestrian stops made by the New York Police Department between 2014 and 2017, 80 percent were of either Black or Latinx people.⁶⁶ Black and Latinx people are arrested at disproportionate rates and are disproportionately represented in the nationwide prison and jail population. For example, Black people compose 13 percent of the general population but represent 27 percent of total arrests and 38 percent of persons convicted of a felony in a state court and in state prison.⁶⁷ In California, Black people are only 6 percent of the population but comprise 29 percent of the state prison population and in Texas, they comprise 12 percent of the state's total population but constitute 33 percent of the state prison population.⁶⁸ These racial disparities are

particularly pronounced in arrests and incarcerations for drug offenses. Despite similar rates of drug use, Black people are incarcerated on drug charges at a rate 10 times greater than white people.⁶⁹ Black people represent 12 percent of drug users, but 38 percent of those arrested for drug offenses, and 59 percent of those in state prison for drug offenses.⁷⁰ Although Black and white people use marijuana at comparable rates, Black people are 3.73 times more likely to be arrested for marijuana possession.⁷¹ In some counties, Black people are 10, 15, even 30 times more likely to be arrested.⁷²

Similarly, the racial disparities in juvenile LWOP sentencing are symptomatic of racial disparities throughout the juvenile justice system. For U.S. children, the racial disparities grow with each step into the criminal legal system—from arrest, to referral, to secure confinement. Black youth account for 15 percent of all youth, 35 percent of all juvenile arrests and 41 percent of youth in custody.⁷³ Black youth are twice as likely to be arrested as white youth. Among minors who are arrested, Black children are more likely to be referred to a juvenile court and more likely to be processed rather than diverted.⁷⁴ Among those minors adjudicated delinquent (i.e. found guilty), Black children are four times as likely to be sent to secure confinement as white children and are more likely to be transferred to adult facilities.⁷⁵ Among youth who had never been incarcerated in a juvenile prison, Black people are more than six times as likely as white people to be sentenced to prison for identical crimes.⁷⁶ Black children are also more likely to be prosecuted as adults and incarcerated with adults: Black youth compose 35 percent of youth judicially waived to adult criminal courts and 58 percent of youth sent to state adult prisons.⁷⁷

II. Suggested Recommendations to the United States Government

The ACLU commends the Special Rapporteur on minority issues for taking up the important issue of racism in the criminal legal system of the United States. We thank the Special Rapporteur for the opportunity to submit information about the significant racial disparities in sentencing decisions in the United States. The ACLU urges the Special Rapporteur to raise this issue with U.S. government officials during his visit to the United States and to make the following recommendations to the government of the United States:

1. End all mandatory minimum sentencing laws, as candidate Biden promised. Congress must end all mandatory minimum sentencing, beginning with the drug mandatory minimums, by passing measures like the Mandatory Minimum Reform Act, which repeals the drug mandatory minimums. It must also pass legislation to end all mandatory minimum sentencing laws, including the Justice Safety Valve Act, which allows courts to sentence below the mandatory minimum for any offense.
2. Ensure retroactive relief for people previously sentenced under the mandatory minimum regime of the War on Drugs. Congress enacted meaningful sentencing

reforms in the FIRST STEP Act of 2018, but people who were sentenced before the law was passed did not benefit. No person should continue serving a sentence Congress has since deemed excessive and unjust. Congress should pass legislation to fix sentencing disparities and not create new ones. Congress must pass the First Step Implementation Act (H.R. 3510/S. 1014), which will make the FIRST STEP sentencing reforms retroactive. Any additional sentencing reforms Congress passes should include retroactive application of the new law. The EQUAL Act (H.R. 1693/S. 79), for example, eliminates the crack/powder disparity and ensures its sentencing reform is made retroactive.

3. End the War on Drugs to prevent the discriminatory impact of draconian drug laws. Decriminalize low-level drug offenses that disproportionately entangle Black people in the criminal legal system.⁷⁸ Congress should pass the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act (H.R. 3617), which will decriminalize marijuana at the federal level while enabling states to set their own regulatory policies without threat of federal interference. States should legalize marijuana and offer expungement and re-sentencing for past convictions, so that hundreds of thousands of people — disproportionately Black and brown — do not remain marginalized for prior offenses.⁷⁹ Simply possessing drugs for personal use must be decriminalized by repealing the federal simple possession statute, 21 U.S.C. § 844. In addition, simple possession of a controlled substance and positive drug tests must not be permissible grounds for incarceration when a person is under federal supervision, including pretrial supervision and supervised release. Accordingly, Congress must pass the Drug Policy Reform Act of 2021 to end criminal penalties for personal use drug possession, and pass legislation to end penalties for personal use while under court supervision. The Justice Department should also decrease the number of low-level drug offenders prosecuted in federal court.⁸⁰
4. Congress and state legislatures should abolish the sentence of life without parole, for any offense at any age. Make elimination of LWOP sentences retroactive and enable people currently serving life without parole to have their cases reviewed by a court for reassessment and resentencing, to restore parole eligibility and for a possible reduction of sentence.
5. Lift the ban on second chances. After Congress abolished federal parole in the Sentencing Reform Act of 1984, people serving a federal sentence lost any possibility of a second chance, regardless of how strong the evidence is that they are prepared to return to the community. Congress must pass measures to review lengthy sentences, including the Second Look Act, which gives people who have served 10 or more years of their sentence the opportunity to file a motion in court and present their case for a lower sentence.

6. Initiate studies to examine racial disparities in sentencing, including racial disparities in prosecutors' exercise of discretion in seeking sentencing enhancements under three-strikes, § 851 federal drug enhancements, and other habitual offender laws and disparate racial effects of drug policies such as mandatory minimum sentences and school zone drug enhancements.
7. Abolish the federal death penalty as President Biden promised and encourage states to follow suit.
8. Fulfill U.S. commitments made as part of the Universal Periodic Review (UPR) process including studying the racial disparities of the death penalty in the United States and fully implement the recommendations of other international and regional human rights bodies to end racial discrimination in the administration of capital punishment.
9. In the event that capital prosecutions and executions continue, the United States should institute a permanent independent review committee to determine whether racial bias played a role in capital cases on a case by case basis, and/or pass legislation or binding administrative rules to ensure the same.

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¹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *Police Violence Against Afro-descendants in the United States* (2018), available at [://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf](http://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf),

² UNITED NATIONS HUMAN RIGHT COUNCIL, *Promotion and protection of the human rights and fundamental freedoms of Africans and of people of African descent against excessive use of force and other human rights violations by law enforcement officers*, A/HRC/47/CRP.1, available at https://www.ohchr.org/Documents/Issues/Racism/A_HRC_47_CRP_1.pdf.

³ See, e.g., Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U OF MICHIGAN LAW & ECON, EMPIRICAL LEGAL STUDIES CENTER PAPER NO. 12-002 (2012); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON JOURNAL (2011); THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE (2005), available at http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf.

⁴ U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (Jan. 30, 2013), available at <http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing>.

⁵ Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 CRIMINAL JUSTICE 427 (2000), available at <http://www.justicestudies.com/pubs/livelink3-1.pdf>.

⁶ Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Charging and its Sentencing Consequences*, U OF MICHIGAN LAW & ECON, EMPIRICAL LEGAL STUDIES CENTER PAPER NO. 12-002 (2012).

⁷ See, e.g., D.C. Baldus & C. Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L.R. 1411 (2004).

⁸ Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, HR 35-36, 98th Cong., 2nd sess., <https://www.ncjrs.gov/pdffiles1/Digitization/123365NCJRS.pdf>.

⁹ ASHLEY NELLIS AND RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 11-14, 17, 20-23 (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf;

¹⁰ AMERICAN CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES (2013), available at www.aclu.org/livingdeath.

¹¹ ASHLEY NELLIS, THE SENTENCING PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 14 (2017), available at <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf>. The states with over 60 percent African-American lifers and virtual lifers are Alabama, Georgia, Illinois, Louisiana, Maryland, Mississippi, and South Carolina.

¹² *Id.*

¹³ *Id.* at 15.

¹⁴ Dan Baum, *Legalize it All: How to Win the War on Drugs*, HARPER'S MAGAZINE (April 2016), available at <https://harpers.org/archive/2016/04/legalize-it-all/>.

¹⁵ *Id.*

¹⁶ See, e.g., Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON JOURNAL (2011); JOSHUA ROVNER, THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM (2014), available at http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf;

¹⁷ M. Crow & K. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing*, 19 CRIMINAL JUSTICE POLICY REVIEW 63 (2008).

¹⁸ THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUALITY IN THE CRIMINAL JUSTICE SYSTEM 15 (2015), available at <https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf>.

¹⁹ Michael Winerip, Michael Schwartz and Robert Gebeloff, *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. Times, Dec. 4, 2017, available at <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>.

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²⁶ See, e.g., Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1139, 1169 (2010); Lynn Adelman, *What the Sentencing Commission Ought to be Doing: Reducing Mass Incarceration*, 18 MICH. J. RACE & L. 295 (2013). For example, under the § 851 drug sentencing enhancements, if a federal drug conviction involves a particular quantity of drugs (such as 50 grams of methamphetamine, 280 grams of crack cocaine, or five kilograms of powder cocaine) and the defendant has two prior qualifying drug convictions in state or federal courts, no matter how old those convictions are, he or she *must* be sentenced to mandatory LWOP. These enhancements are solely within the unreviewed discretion of the Department of Justice prosecutors. See 21 U.S.C. § 851 (2012).

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²⁹ Federal data based on data provided by the U.S. Sentencing Commission documenting the race of 2,948 people admitted to federal prison between 1999 and 2011 and sentenced to LWOP for nonviolent offenses. This federal data does not represent the race of federal prisoners currently serving LWOP for nonviolent offenses, which the Bureau of Prisons refused to provide in response to a FOIA request filed by the ACLU. State data provided by state Departments of Corrections, except that of Louisiana, which is based on ACLU documentation of the cases of 187 Louisiana people serving LWOP for nonviolent offenses, or 43.6% of the total 429 people serving the sentence for nonviolent crimes. The Louisiana Department of Corrections did not provide offense-specific race data in response to a FOIA request filed by the ACLU.

³⁰ Sentencing Reform Act of 1984, Title II of the Comprehensive Crime Control Act of 1984, HR 35-36, 98th Cong., 2nd sess., <https://www.ncjrs.gov/pdffiles1/Digitization/123365NCJRS.pdf>.

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