

<p>DISTRICT COURT,</p> <hr/> <p>PLAINTIFF: PEOPLE OF THE STATE OF COLORADO</p> <p>DEFENDANT:</p> <hr/> <p>Attorney for Defendant:</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case No.</p>
<p>OFFER OF PROOF OF ADDITIONAL EVIDENCE FOR THE ABBRIEVATED PROPORTIONALITY REVIEW</p>	

Defendant Doe submits this offer of proof of additional evidence he would like the court to consider during the abbreviated proportionality review:

1. This court has requested an offer of proof on what evidence Mr. Doe would like to submit on race and the Black Lives Matters movement.
2. Mr. Doe does not intend to call an expert on the subject but submits the following secondary sources for the court’s consideration. Mr. Doe argues that racial inequality should be considered when evaluating his level of culpability.

ARGUMENT

Recent events have spotlighted the pervasive and historic problem of racial disparities in criminal justice treatment in the United States. Black Lives Matter is an activist movement which began as a hashtag (#BlackLivesMatter) after George Zimmerman was acquitted in the shooting death of Trayvon Martin, an unarmed Black teenager killed in Florida in July 2013.

The movement became more widely known and popularized after two high-profile deaths in 2014 of unarmed Black men (Eric Garner in Staten Island, NY and Michael Brown in Ferguson, MO). Neither of the police officers involved in their deaths were indicted (i.e., formally charged with a crime). The name *Black Lives Matter* signals condemnation of not only the unjust killings of Black people by police but the demand that society value the lives and humanity of Black people as much as it values the lives and humanity of white people. Encyclopedia Britannica, *Black Lives Matter*, <https://www.britannica.com/topic/Black-Lives-Matter>, last visited September 14, 2020.

Black male offenders in federal prison, for example, received sentences on average 19.1 percent longer than similarly situated white male offenders during the Post-Report period. 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>, last visited September 16, 2020.

A famous study from 2004 demonstrated that there was strong evidence that race played a role in the determination of which homicide cases result in a death sentence, whereby cases with white victims are considerably more likely to receive a death sentence. David C. Baldus, "Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception," with George Woodworth, 53 DePaul Law Review 1411 (2004).

Analyzing more than 30,000 Wisconsin cases over a seven-year period, a study found significant racial disparities in the plea-bargaining process. White defendants were 25 percent more likely than Black defendants to have their most serious initial charge dropped or reduced to

a less severe charge; Black defendants were more likely than whites to be convicted of their highest initial charge. Berdejó, Carlos, *Criminalizing Race: Racial Disparities in Plea Bargaining*, Boston College Law Review, Vol. 59, 2018, Loyola Law School, Los Angeles Legal Studies Research Paper No. 2017-39, available at <https://ssrn.com/abstract=3036726>, last visited September 16, 2020.

In general, Black Americans are nearly six times more likely than whites to be in prison at any one time. A total of 1 in 3 Black men born in 2001 is predicted to spend time in prison. Some studies identify that have higher incarceration rates are because they have higher rates of street crime (violent crime and property crime). Others say that Black Americans have higher incarceration rates mainly because of racial bias, however unconscious, by police, prosecutors, and judges, and because the police target their behavior and neighborhoods, both are true. The *Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, (2018). Implicit biases are activated involuntarily and without one's awareness or control. As such, these biases are not consciously accessible even through introspection. Implicit biases are formed by implicit attitudes (unconscious preferences) and implicit stereotypes (nonconscious mental associations between a group and a trait. Over a decade of research shows that implicit racial stereotypes can be activated easily and can lead to biased decision-making, particularly in the criminal justice setting. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 *SEATTLE U. L. REV.* 795, 803 (2012).

To another extent, higher incarceration for Black individuals' rates do reflect their higher crime rates. This is not because of any biological deficiencies, a racist explanation popular a

century ago. Barkan, Steven, *Race, Crime, and Justice: The Continuing American Dilemma*, Keynotes Criminology Criminal Justice, Oxford University Press (2018). Rather, it's because they are so much more likely than whites to live in poverty and near poverty; to live in low-income urban neighborhoods whose social and physical features contribute to crime rates; and to be victims of racial discrimination and microaggressions. Isom D., *Microaggressions, Injustices, and Racial Identity: An Empirical Assessment of the Theory of African American Offending*. *Journal of Contemporary Criminal Justice*. 2016;32(1):27-59.

doi:10.1177/1043986215607253, last visit September 13, 2020. Criminologists have written that if white people somehow lived in these exact same circumstances, their crime rates would be as high as Black people's crime rates. Thomas L. McNulty & Paul E. Bellair *Explaining racial and ethnic differences in adolescent violence: Structural disadvantage, family well-being, and social capital*, *Justice Quarterly*, 20:1, 1-31, (2003), DOI: 10.1080/07418820300095441, last visited September 13, 2020.

An ACLU 2017 poll found wide support for criminal justice reform, including addressing racial inequality.

- 91 percent of Americans say that the criminal justice system has problems that need fixing.
- 71 percent say it is important to reduce the prison population in America
- the majority of Americans recognize racial bias in the criminal justice system — only one in three agree that Black people are treated fairly by the criminal justice system.

Smart Justice Campaign Polling On Americans' Attitudes On Criminal Justice Conducted with Benson Strategy Group, ACLU, National Survey Fielded October 5-October 11, 2017 Among

1,003 Americans nationwide, <https://www.aclu.org/report/smart-justice-campaign-polling-americans-attitudes-criminal-justice>, last visited, September 16, 2020.

Even among victims, a recent study on restoring the well-being of victims of crime found that, overwhelmingly, crime survivors want a criminal justice system that prioritizes prevention and rehabilitation over punishment. Among the highlights:

- More than half of victims—6 in 10—would prefer a system that dealt shorter prison sentences and invested more resources in prevention and rehabilitation programs. This is true even among survivors of serious violent crime.
- Another 6 in 10 want prosecutors to consider victims’ input on what would help the defendant recover, even when that does not include a long prison sentence.
- By a margin of about 3 to 1, victims want to hold people accountable not just through prison, but also through rehabilitation, mental health treatment, drug treatment, community supervision, and community service.

Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice, Alliance for Safety and Justice (ASJ) (Oakland, CA), Press Release 2, <https://allianceforsafetyandjustice.org/crimesurvivorsspeak/>, last visited September 13, 2020.

Increasing research shows that excessive penalties for violent crimes are not only ineffective—incapacitating people who no longer pose a public safety threat and producing little deterrent effect—they also divert investment from more effective public safety programs. The Next Step, Ending Excessive Punishment for Violent Crimes. The Sentencing Project, 2019, available at <https://www.sentencingproject.org/publications/the-next-step-ending-excessive-punishment-for-violent-crimes/>.

What does this data say about Mr. Doe’ sentence?

Perhaps even more significantly is what the data indicates about Mr. Doe' level of culpability. Not only his race, but the severe poverty and socioeconomic conditions he endured as a child placed exposed him to increased risk of his ultimate antisocial behavior.

Evolving standards of decency recognize that keeping Mr. Doe' locked up for virtual life, takes away valuable resources from addressing social inequality—crime causing conditions. An excessive sentence neither restores the victim's family where it does not keep the community safe, but instead diverts resources towards what could otherwise be spent on productive community safety programs. People are marching the streets right now, to address such inequality and demand for reform. There is national consensus that locking up Mr. Doe for nearly his entire life is not the solution, but an acerbation of the problem.