

**STATEMENT OF OLEG CHERNYAVSKY
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NEW YORK CITY POLICE DEPARTMENT**

**BEFORE THE NEW YORK CITY COUNCIL
COMMITTEE ON PUBLIC SAFETY
REMOTE HEARING
WEDNESDAY, APRIL 28, 2021**

Good Morning, Chair Adams and members of the Council. I am Oleg Chernyavsky, the Assistant Deputy Commissioner for Legal Matters. I am joined today by Michael Clarke, the Managing Attorney of the NYPD's Legislative Affairs Unit and Captain Zahid Williams from the NYPD's Information Technology Bureau. On behalf of Police Commissioner Dermot Shea, I would like to thank you for this opportunity to discuss the seizure of property by the NYPD.

The NYPD is committed to ensuring that property that is taken into our custody is properly safeguarded and returned to its owner. We take our responsibility to accept, catalogue, safeguard, store, produce for court, and return property to its legal owner seriously. At the time of arrest, officers may classify property taken into custody in a variety of ways, including vouchering for safekeeping, as found property, as a decedent's property, as arrest evidence, as peddler property, or as investigatory evidence. The decision on how to classify property is unique to the facts and circumstances of each individual case.

While the Department's mission is to safeguard an arrestee's or decedent's personal belongings only to return those items once the owner comes to claim them, we have an even greater responsibility to act as custodian, and maintain chain of custody, of property that is arrest and investigatory evidence. Failure to maintain proper control of these latter categories of seized property may very well result in unsuccessful prosecutions for serious crimes, such as gun crimes, sex crimes, murders, robberies, and burglaries.

Fundamental to our precision policing model is the focus on those who commit the most serious crimes in order to build the best possible criminal case and the data bears this out. The Department is only interested in retaining custody of property that can help prosecutors in these serious crimes and does not seek to hold people's property unnecessarily. The NYPD is not interested in retaining a phone for arrest evidence that has no evidentiary value and the Department aims to limit such seizures to the most serious cases.

There are times that property recovered from an individual is necessary for prosecuting the crime for which a person was arrested. It is essential that we make sure we build as strong a case as possible to support the prosecution of serious cases by the District Attorneys' Offices. Cellphones, in particular, have become an integral tool in building criminal cases. These devices contain significant amounts of information that can help prosecutors prove the case beyond a reasonable doubt. Seizing these devices allows officers to ensure that the data contained on the phone is

neither lost nor erased, without the Assistant District Attorney being able to determine whether, and to what extent valuable evidence can be utilized.

It is important to note that the police department cannot simply search a phone because it has been vouchered. An investigator may look at the exterior of a phone, but officers do not have the legal right to access the contents of the phone without a probable cause warrant signed by a judge or consent of the owner of the property. It would be improper to access it otherwise and any evidence would be suppressed by a judge.

In 2020, the NYPD vouchered roughly 55,000 cell phones. Of those, the NYPD vouchered phones as arrest or investigatory evidence approximately 28% (15,462) of the time. 35,436 phones were vouchered for safe keeping and roughly 3,661 were vouchered as either found property or decedent's property. In 2020, the NYPD made 140,408 arrests, meaning that the Department was vouchering cell phones as arrest or investigatory evidence in just 11% of cases. Of the 15,462 cell phones vouchered as arrest or investigatory evidence, 3,666 were for possession of dangerous weapons (i.e. guns), 1,153 were for robbery, 556 were for murder or manslaughter, 550 were for burglary, 547 were for grand larceny, 503 were for felony assault, 329 were for sex crimes and 164 were for grand larceny of a motor vehicle.

Of the roughly 55,000 cell phones that were vouchered by the NYPD, 2,013 involved individuals under the age of 18. A little more than half, or 1,068, were vouchered as arrest or investigatory evidence. The 1,068 phones were vouchered from 731 unique individuals, meaning that in some cases, more than one phone was seized from a particular person. Of the 1,068 cell phones that were vouchered as arrest or investigatory evidence from juveniles, over 90% were evidence in serious felony cases. This includes 327 devices vouchered for possession of dangerous weapons, 227 for robbery, 85 for grand larceny, 75 for murder or manslaughter, 56 for burglary, 49 for grand larceny of a motor vehicle, 47 for felony assault, and 11 for sex crimes.

When property is vouchered for safekeeping, an individual merely needs identification and the voucher number to retrieve it. When property has been vouchered as arrest evidence, the individual will need to produce a release from the District Attorney's Office in order to obtain that property. The District Attorney's Office will release evidence at the conclusion of a case or where the ADA determines that the evidence is not necessary for a trial. Likewise, property seized for investigation will be returned with a release from the investigator, unless an arrest is made and the property is recategorized as evidence. In such cases, the evidence release policy is adhered to.

The NYPD seeks to make retrieval of an individual's property as easy and seamless as possible. Instructions to retrieve property are included in English and Spanish with every voucher. Additionally, instructions can be found on the NYPD's website and can be translated into more than 100 languages. Moreover, individuals can call 311 to find out the procedure for retrieving their property.

Thank you for the opportunity to speak with you today, and we are happy to answer any questions you may have.

**New York City Council
Committee on Public Safety
Oversight: Property Seizure and Arrest Evidence**

April 28, 2021

**Written Testimony of The Bronx Defenders
By: Maryann Rosa, Legal Advocate, Civil Action Practice
Adam Shoop, Legal Director, Civil Action Practice
Stacey Reimann, Legal Advocate, Civil Action Practice
Niji Jain, Staff Attorney, Impact Litigation Practice**

Good morning Chair Adams and Committee Members, my name is Maryann Rosa and I am a Legal Advocate in the Civil Action Practice at The Bronx Defenders (“BxD”).¹ Thank you for your attention to this issue and for the opportunity to testify before you today.

I. Introduction

As a result of Local Law 131, which was enacted in 2017 and requires the NYPD to disclose information on seized property and when and whether it is returned,² the public now has a greater awareness of what we legal services practitioners have known for years: that merely for having contact with the criminal legal system can mean lengthy seizure of essential personal property such as cell phones and money. Often, our clients’ property simply disappears entirely into a bureaucratic black hole because the retrieval process is opaque and unnecessarily complicated.

¹ The Bronx Defenders is a public defender non-profit that is radically transforming how low-income people in the Bronx are represented in the legal system, and, in doing so, is transforming the system itself. Our staff of over 350 includes interdisciplinary teams made up of criminal, civil, immigration, and family defense attorneys, as well as social workers, benefits specialists, legal advocates, parent advocates, investigators, and team administrators, who collaborate to provide holistic advocacy to address the causes and consequences of legal system involvement. Through this integrated team-based structure, we have pioneered a groundbreaking, nationally-recognized model of representation called *holistic defense* that achieves better outcomes for our clients. Each year, we defend more than 20,000 low-income Bronx residents in criminal, civil, child welfare, and immigration cases, and reach thousands more through our community intake, youth mentoring, and outreach programs. Through impact litigation, policy advocacy, and community organizing, we push for systemic reform at the local, state, and national level. We take what we learn from the clients and communities that we serve and launch innovative initiatives designed to bring about real and lasting change.

² 2017 NYC Local Law 131; Admin. Code § 14-169.

The New York City law governing police property seizure and retrieval, Admin. Code § 14-140, is not only confusing and complicated, but it has never been amended to remove or address key provisions that were declared unconstitutional by federal courts nearly 50 years ago. The State Legislature originally enacted this statute through the 1881 Code of Criminal Procedure.³ After several permutations resulting from shifts in the balance of power between New York State and New York City through municipal home rule, in 1943 the City adopted the version of 14-140 as it stands today.⁴ Since then, the statute has never been amended to incorporate court-ordered due process procedures, to repeal the portions of the law held unconstitutional by the Second Circuit Court of Appeals in 1972 for all forms of property, or to add due process safeguards ordered in 2007 for vehicles.⁵ Numerous courts have said that this is a matter “worthy of legislative attention” and criticized the City Council for its failure to replace the unconstitutional and obsolete provisions of 14-140 with, at the very least, the federal court ordered procedures.⁶

One of the principal rulings on 14-140 by the Second Circuit in 1972 was that the statute fails to ensure adequate notice -- that people whose property is seized receive a receipt and notice of the procedures to retrieve their property -- and that it impermissibly places the burden on claimants rather than the NYPD. Despite the court-ordered procedures, the NYPD routinely fails to meet its basic due process notice obligation. Even the court-ordered due process procedures are outdated and fail to meet the needs of people in the 21st century.

The Council should act to end these abusive practices and bring New York City in line with other jurisdictions around the country. This would include:

- Repealing and replacing 14-140 with streamlined, accessible procedures in plain language;
- Requiring a judicial hearing to review the NYPD’s designation of property and money as evidence -- a process which currently only exists for vehicles, but no other forms of property; and

³ When the Greater New York Charter of 1901 was adopted by the state legislature, the property seizure provisions of the 1881 law were included and expanded. Act of Apr. 22, 1901, ch. 466, §§ 331-35, 3 N.Y. Laws 141-43 (1901). Prior to the incorporation of municipal “home rule” into the New York State Constitution and its subsequent development, city charters were adopted and amended by acts of the state legislature.

⁴ 1943 NYC Local Law No. 47.

⁵ See *McClendon v. Rosetti*, 460 F.2d 111 (2d Cir. 1972) and *Krimstock v. Kelly*, 506 F. Supp. 2d 249 (S.D.N.Y. 2007).

⁶ See, e.g., *Property Clerk v. Seroda*, 171 A.D.2d 189, 195 (1st Dep’t 1987); *Frith v. City of New York*, 2011 U.S. Dist. LEXIS 87459, at *14, 2011 WL 3477083, at *5 (S.D.N.Y. July 7, 2011). See also *Property Clerk v. Hyne*, 147 Misc. 2d 774, 777 (Sup. Ct. N.Y. Cty. 1990) (“It is indeed unfortunate that the legislature has not seen fit to amend Administrative Code § 14–140 to reflect the specific requirements of the McClendon order.”); *Alexandre v. Cortes*, 140 F.3d 406, 413 (E.D.N.Y. 1998); *Contant v. City of New York*, 2012 U.S. Dist. LEXIS 49683, at * 20, 2012 WL 1158756, at * 12 (E.D.N.Y. 2012) (“[T]he City has failed to remedy the deficiencies in its process as set forth by Judge Lasker almost three decades ago.”)

- Abolishing the NYPD’s ability to permanently seize property and money as revenue through civil forfeiture under 14-140.

II. NYC Needs Streamlined, Accessible Property Seizure and Retrieval Procedures

In the last twelve months, BxD has assisted clients in almost 500 property retrieval cases. But even with the assistance of an advocate or attorney, our clients experience prolonged delays in retrieving property because of the overly complicated nature of the process. Currently, there is no one place or source containing the “law” governing property seizure and retrieval. 14-140 itself provides almost no instruction. Instead, the confusing-to-navigate procedures are found in an unpublished federal court order from the case *McClendon v. Rosetti*, which was later codified by the NYPD through its agency rulemaking authority.⁷ But for vehicles, a *different* set of procedures applies from a *different* federal court order from the case *Krimstock v. Kelly*.⁸ The most basic *McClendon* requirement is that the NYPD provide a property invoice, commonly known as a voucher, to the person whose property has been seized. Along with the voucher, the NYPD is also required to provide a copy of the procedures for retrieving the property, and for vehicles, a separate form advising the person of their right to a *Krimstock* due process hearing. A survey of BxD clients at criminal arraignments, however, showed that even after implementing remedial training efforts pursuant to the settlement in BxD’s *Encarnacion, et al. v. City of New York* federal litigation, 56% of people either still did not receive any voucher or received an incomplete voucher.⁹

Nowhere is the lack of an accessible procedure more evident than with property seized at the time of arrest and held purely for “safekeeping.” “Safekeeping” is intended to safeguard a person’s valuable personal property until they are released after their arrest. According to the NYPD’s Local Law 131 report, however, the NYPD vouchered \$6.7 million for safekeeping in 2020, but only returned \$4.6 million to claimants, keeping approximately \$2 million that should have been returned almost immediately following arraignment. Other forms of essential property are also detained and never returned. For example, in 2020 the NYPD reports:

- 55,511 seized phones, but only 33,851 returned
- 99,986 seized items of clothing, but only 47,513 returned
- 10,424 seized wallets, but only 4,710 returned
- 35,912 seized keys, but only 25,343 returned

⁷ *McClendon v. Rosetti*, 1994 WL 17107022 (S.D.N.Y. Mar. 28, 1994) (final order specifying property seizure and retrieval due process procedures in litigation begun in 1970); 38 R.C.N.Y. § 12-31 through 12-37 (codifying *McClendon* in NYPD rules).

⁸ *Krimstock v. Kelly*, 99 Civ. 12041 (HB) (S.D.N.Y. Sept. 27, 2007) (final order specifying vehicle seizure and retrieval process procedures in litigation begun in 1999).

⁹ Decl. of Niji Jain, Doc. No 96 (Oct. 29, 2020), *Encarnacion v. City of New York*, 16 Civ. 156 (DLC) (S.D.N.Y.).

- 38,602 seized ID documentation, but only 13,671 returned

Even if a person does receive their voucher with the accompanying procedures page, the process is still confusing. For example, for property held for safekeeping -- where the only requirements are to bring a copy of the voucher and appropriate identification -- the procedures instruction page states in part:

NOTICE TO PERSONS FROM WHOM PROPERTY HAS BEEN REMOVED
BY THE POLICE DEPARTMENT

The person from whose possession property was taken should retain and safeguard the invoice. The New York City Police Department can change the Invoice Category without further notice. In order to obtain the return of property the claimant or a representative authorized by a notarized letter to claim the property will be required to submit, in person or by mail, the Invoice and proper identification (one (1) government issued photo identification plus at least one (1) non-photo identification) to the office of the Property Clerk. A claimant demanding the return of property other than Arrest Evidence DNA Evidence or Forfeiture does not require a District Attorney's Release and may make such demand whether or not criminal proceedings have been instituted and, if instituted, whether or not such proceedings have been terminated. [...] Property held for Safekeeping must be claimed within 120 days from the date it was invoiced. After 120 days, property will be disposed of as per applicable NYC Law.

These "instructions" are not designed to be user friendly or to facilitate retrieval. And if the property was seized for another purpose, such as arrest evidence, forfeiture or investigatory, there are entirely different procedures, requirements, and timelines. Failure to meet any of the requirements or deadlines — regardless of the COVID-19 pandemic or whether the person is incarcerated, disabled, or has any other circumstance that would impact their ability to do this — will result in the NYPD treating the property as "unclaimed," which translates to revenue from cash and auction proceeds from other property.

III. A Hearing and Court Order Authorizing the NYPD Property Clerk to Hold Property as "Evidence" Should Be Required

The NYPD seizes money and property as "evidence" in two ways: "arrest evidence" and "investigatory." Property is held as arrest evidence when an arresting officer asserts that the money or property could have evidentiary value in the criminal case and wishes to give the District Attorney's office the chance to review whether it is needed for trial before the property is released to the claimant. This designation is derived from the *McClendon* procedures and there are at least some procedures specifying how to get it back. These procedures are limited though: they only provide that a claimant can ask the assistant district attorney for a release and then a supervising ADA if initially denied. On the other hand, unlike arrest evidence, investigatory evidence was defined by both the *McClendon* court and the NYPD to mean "property

unconnected to an arrest.”¹⁰ However, in our experience, the NYPD routinely designates property seized at the time of an arrest as investigatory, effectively placing it in a black hole. The NYPD’s sole regulation on investigatory evidence, promulgated prior to *McClendon*, states: “Property vouchered for investigation will require the claimant to obtain a release from the investigating officer, in writing, usually on department letterhead.” That provision and the NYPD Patrol Guide are otherwise entirely silent about any procedure for how a claimant would request a release from the investigating officer, or what happens if the investigating officer fails to respond to the request at all, or declines to provide a release--even when a criminal case is dismissed or never filed.

Common to both arrest evidence and investigatory is that they allow the individual NYPD officer’s unilateral designation at the time of arrest to determine whether property can be withheld for an indefinite period of time, without a judge ever reviewing the validity of the claim that it is needed as evidence. Prosecutors are only required to seek a court order to hold property as evidence in the case of vehicles, as required by *Krimstock*, where they must show that there are no lesser restrictive means than holding onto the vehicle, such as photographing it or conducting forensic testing. When prosecutors fail to timely comply with their obligations to get a court order, or cannot justify the basis for holding onto a car as evidence, criminal court judges have the authority under *Krimstock* to order the car to be released.¹¹ But this protection only applies to vehicles.

According to the Local Law 131 report, of cash that was supposed to be *temporarily* seized as arrest evidence in 2020, the NYPD only gave back 10%, retaining \$1.5 million from New Yorkers. This, despite the fact that, in our experience, it is completely unnecessary to designate cash as evidence because the actual dollar bills are deposited into the bank and are almost never physically presented as evidence at trial. In addition to cash, the NYPD seized over 1,700 vehicles as arrest evidence, but only returned 621. The Department also reported that it seized another \$1.4 million as investigatory evidence on top of the arrest evidence sum, and only 6% of that investigatory money was returned. Further, another 983 vehicles were seized as investigatory evidence, but only 283 were returned.

In one recent case, we represent a 40-year-old Albany woman who works as a home health aide and needs her phone for work. In March, her phone was seized when she was arrested in the Bronx. She was never provided with a voucher at the precinct or time of arrest. She was released after arraignment and within six days the charges against her were dismissed and sealed. After connecting with a BxD Legal Advocate who obtained a copy of the voucher indicating the phone was being held as investigatory evidence, the Property Clerk informed us that she or a

¹⁰ *McClendon v. Rosetti*, 1993 WL 158525 (S.D.N.Y. May 12, 1993); 38 RCNY § 12-38.

¹¹ *See, e.g., People v. Ramroop*, 50 Misc. 3d. 1090 (Crim. Ct. Bronx Cty. 2016).

representative must come in person to initiate a request to the investigating officer to change the category, even though there is no pending case. Because she lives in Albany, she cannot advocate for herself in person, and without representation (which is not guaranteed by law for all people in these situations) she would have no recourse. Her BxD Legal Advocate has attempted to contact the investigating officer numerous times, as well as to seek the help of NYPD's Legal Bureau, but even now, five weeks following dismissal of her criminal case, the NYPD still refuses to release her phone to her.

In another case, the lack of any identifiable procedure governing seizure and retrieval of property held as investigatory was made abundantly clear. The client's iPhone was seized as investigatory evidence at the time she was arrested. She attempted to retrieve it by going to the Property Clerk but was informed that since the criminal case was still pending, she needed a DA release. Unlike with arrest evidence, which cannot be auctioned or destroyed at the earliest until 120 days following the conclusion of the criminal case, there is no legal constraint on how long the NYPD can hold property as investigatory, or when they can dispose of it. In this case, she waited two years for her criminal case to end and again attempted to get her phone back, only to learn that it was already destroyed months earlier. The officer never changed the category to safekeeping or made any notation that it could have been released. She was never notified. The NYPD simply determined that it was of no value to them and destroyed it.

IV. The Council Should Abolish the Archaic Civil Forfeiture Provision of 14-140 that Originates from the 1881 Code of Criminal Procedure

The NYPD, through the Civil Enforcement Unit (CEU) within its Legal Bureau, relies on 14-140 as the basis to engage in the controversial practice known as civil forfeiture. CEU commonly ensnares both money and vehicles in this process. Unlike most civil forfeiture statutes (such as CPLR Article 13-A enacted in the 1980s), 14-140 does not actually contain any forfeiture provision, at least not in the sense that modern conceptions of due process would require. Subsection (e) -- one of the archaic provisions declared unconstitutional in *McClendon* -- contains a run-on sentence of over 250 words that simply purports to allow the NYPD to keep money or property when, among other things, it is "unlawfully obtained or stolen or embezzled or are the proceeds of crime or derived through crime or derived through the conversion of unlawfully acquired property or money or derived through the use or sale of property prohibited by law from being held, used or sold, or have been used as a means of committing crime or employed in aid or in furtherance of crime." Prior to *McClendon*, claimants had to sue the NYPD for return of property, and only after the court-ordered procedures is there any shred of due process. At all times, the burden is on claimants to trigger the NYPD's affirmative obligations imposed by *McClendon* and *Krimstock*.

According to the Local Law 131 report, the NYPD seized and designated \$7.6 million in cash for possible forfeiture, and only returned \$1.3 million to claimants. However, this does not mean that

the NYPD prevailed in forfeiture actions in court to keep \$6.3 million. According to the report, successful forfeiture actions accounted for \$0.00 of the over \$6 million retained by the NYPD. Because the NYPD is only required to file an action when a claimant satisfies the requirements of making a “demand” for return of their property, there are few if any money forfeiture cases even filed by the NYPD. Once the deadline passes to make the demand, the NYPD simply keeps the money as “unclaimed.” For 2020, the NYPD reports that \$5.9 million in cash “has become [sic] retained property because no person retrieved such currency.”

For vehicles, the NYPD reports that it seized and designated 1,170 vehicles for forfeiture in 2020, but only returned 466. But similar to seized money, the NYPD only reports that 15 of the vehicles it kept were as a result of a settlement or judgment in a civil forfeiture proceeding. More commonly, as alluded to in the report, vehicles are returned pursuant to an out-of-court settlement, with no judicial oversight, and many times no court case has ever been filed.

As conceded by former Commissioner Bratton, “most offenders eventually get their cars back under a negotiated settlement which requires them to pay a percentage of the car’s blue book value.”¹² There is no basis in 14-140, *Krimstock*, or any other law or regulation for this process, and the money the NYPD retains pursuant to these settlement fees remains is not disclosed under Local Law 131. Even prior to the payment of the fee to the NYPD, which in our experience it ranges from \$0 to \$3,000, and satisfaction of other settlement terms, the wrongful retention of vehicles by the NYPD amounts to collective punishment on entire families, who are also often without transportation until the vehicle is returned. The NYPD has never provided evidence to support its claim of deterrent value, but has nevertheless touted its vehicle seizure program as a “powerful disincentive” because the “men arrested [...] have to explain to their wives, families and friends why they have come home without their automobiles.” Put another way, one officer crudely joked about all the vehicles seized where people are alleged to have solicited sex for money: “We should call it operation Mini-van.”¹³

Troublingly, the NYPD can pursue these cases whether or not the criminal case ever results in a conviction, and even if it results in acquittal. In one case, a 21-year-old man accepted an Adjournment in Contemplation of Dismissal to resolve a misdemeanor charge, after which his case would be dismissed in 6 months. Frustrated by the fact that the NYPD said his car was subject to forfeiture, he enlisted the assistance of both BxD and his Bronx Assembly Member. In response to the Assembly Member’s plea on our client’s behalf, the NYPD attorney informed the Assembly Member that “an ACD, or even an acquittal, does not preclude the Property Clerk,

¹² William J. Bratton, *The New York City Police Department’s Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & Pol’y 447 (1995).

¹³ Eli Rosenberg, *Looking to hook johns Cops pose as prostitutes in sting*, N.Y. Daily News, June 5, 2014, <http://www.nydailynews.com/new-york/queens/undercover-police-stings-target-johns-queens-article-1.1817358>

NYPD from seeking forfeiture of property allegedly used to facilitate a crime.”¹⁴ Because of this, the client was forced to choose between accepting the NYPD settlement fee and terms as the quickest way to get his car back, or pursue his rights and fight the civil case. In his and many cases, he chose the quicker route.

V. Conclusion

The time for half measures is over. Scores of people like our clients should no longer have to suffer the harmful effects that property seizure laws have on their ability to secure their housing, maintain their employment, and meet familial obligations. We urge the Council to act now to end the harm that lengthy, unnecessary seizure of personal property can cause and that exacerbated the already distressing toll of the COVID-19 pandemic.

¹⁴ See, e.g., *Prop. Clerk v. Conca*, 148 A.D.2d 301 (1st Dep’t 1989) (holding that in a forfeiture case pursuant to Admin. Code Section 14-140, “even a judgment of acquittal, or a decision to abandon the criminal charges, is not determinative in the forfeiture proceeding as to whether a crime was committed. Instead, an independent determination must be made in [the] civil proceeding, based on a preponderance of the evidence, as to whether the seized property is subject to forfeiture in accordance with the provisions of the civil forfeiture statute.”)



Testimony of

David O'Brien
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and
Yamina Chekroun
Attorney – Civil Defense Unit
New York County Defender Services

Before the
Committee on Public Safety
Oversight Hearing – Property Seizure and Arrest Evidence

April 28, 2021

We are David O'Brien, Trial Attorney in the Juvenile Defense Unit, and Yamina Chekroun, Attorney in the Civil Defense Unit, at New York County Defender Services (NYCDS). NYCDS is a public defense office that represents New Yorkers in thousands of cases in Manhattan's Criminal Court, Supreme Court, and Family Court every year. Thank you, Chair Adams, for holding this hearing on the NYPD's widespread practice of seizing our clients' property – namely cell phones – during arrest processing and retaining this property for months and years on end, even when it has no bearing on the underlying case.

I. Background

NYCDS has extensive experience with this maddening problem. Our Civil Defense Unit assists our adult criminal defense clients with the collateral consequences of their criminal legal system involvement, namely the retrieval of seized property. If a client's car, cash, or other property is confiscated by the NYPD, our civil defense attorneys join the criminal defense team and fight to recover their property. The people we represent are frequently targeted by multiple systems of oppression, and NYCDS civil defense attorneys ensure that our clients' rights are protected by representing them in a wide range of civil legal issues. Retrieving phones that were seized by the NYPD in arrest processing has become a recurring and increasingly intractable problem for many of our adult criminal defense clients, and thus occupies much of our civil defense attorneys' practice.

Losing a phone comes with extra challenges for young people. Our Juvenile Defense Unit, which represents "Raise the Age" children in felony cases in both Supreme and Family Court, works with

some of the most vulnerable people in our city – children charged with crimes. Some of these children are incarcerated, and many are in dire need of support, services, and resources. NYCDS’s Juvenile Defense Unit grapples every single day with children whose cell phones or other devices were confiscated by the NYPD during their arrest processing. In almost every case, months upon months go by and neither our clients nor we can manage to get their phones back for them.

II. The Impossibility of Navigating Modern Life and a Virtual Criminal Legal System Without A Phone

For anyone, navigating modern life without a phone would be an almost impossible proposition. For those ensnared in the criminal legal system, it poses even more challenges, as digital devices have become vital to complying with court-ordered mandates. Since the COVID-19 pandemic prompted the closure of NYS courts last spring, the vast majority of court appearances in criminal and delinquency proceedings in New York City are occurring virtually. Criminal Court, Supreme Court and Family court use the “Microsoft Teams” application to conduct all kinds of appearances, ranging from arraignment to sentencings and dispositional hearings. Without a phone, clients cannot log into their court appearances. If an individual does not “appear” in court virtually, a warrant can be issued for their arrest, thus exposing our clients to targeting by the NYPD Warrant Squad in their own communities.

In addition, our clients are often required to participate in a variety of monitoring and service programming as part of their cases, all of which are now occurring virtually as well. To be clear, these programs are not simply offered for the betterment of our clients’ lives. Rather, they are court requirements that often govern the outcome of the case. Noncompliance can result in clients being held on bail or sentenced to a term of incarceration.

For children facing criminal charges, this is especially so. For example, virtual participation in court-ordered programs determine whether a child will earn Youthful Offender treatment and avoid a lifelong felony record, or whether the child is permitted to remain in the community at all. Without a phone, these clients cannot call their attorneys or their probation officers. They cannot participate in the programs they are mandated to attend virtually or the remote therapy sessions they are required to complete. They cannot conduct their court-ordered curfew checks. Without phones, our child clients cannot even attend virtual school, which not only inhibits their educational development, it also often counts as a strike against them when seeking a favorable disposition.¹

The inability to do all of these things can have grave repercussions for a young person, and there is nothing they can do about it. Some youth are able to borrow a phone or another device from a parent, but many parents work all day and take their phones with them. If parents stay home from work so that their child can fulfill their court or other court-ordered obligations – which many do – they lose money to support their family and sometimes even put their jobs at risk.

Moreover, the vast majority of young people in the criminal and juvenile justice systems come from low-income families. Often the phone that was confiscated was the only phone the family had. Thus, not only can the young person not borrow a phone from a family member, the entire

¹ Often, DOE tablets are broken, too slow to be functional for school, or are confiscated by the NYPD.

family is left disconnected. Just recently, a 16-year-old NYCDS client was arrested in his home and every electronic device in the house was confiscated. Now multiple siblings have no way of logging in to remote school. Combined with the DOE's abysmal provision of functional laptops or tablets to its students, this family has now been floundering for months.

For a 14-year-old client, whose case has been pending for almost a year with no action on the prosecution's part to move forward, and where there is no apparent relationship between the phone and the case against him, this confiscation has posed a maddening financial hardship. His mother is in a binding service contract for this phone and she continues to pay it each month despite not having the phone. She has had to do this through a house fire that destroyed everything she owned, through a hospitalization for COVID that kept her from work, and with no end in sight or answers about when they will get the phone back.

This new virtual world creates a variety of challenges for all system players, but it presents particular obstacles for youth, and it is crucial that the city address these obstacles if the criminal and juvenile justice systems are going to uphold basic values of fairness and equity during these unprecedented times. If the bulk of people being processed through the criminal justice system were white, it is hard to imagine their property and their dignity being disregarded in this way.

III. The Labyrinthian Process of Retrieval

The process of retrieving the confiscated phones entails a tangled, Kafkaesque bureaucratic nightmare for both our adult and youth clients.

A. Adult Clients

Unlike housing, licensing or other collateral issues that NYCDS's Civil Defense Unit handles on behalf of our adult criminal defense clients, property retrieval is fundamentally characterized by a lack of clarity, a lack of due process, and a lack of oversight. Our public defense clients, of whom people of color are disproportionately represented, are forced to navigate through a number of obstacles to retrieve personal property.

When the property is vouchered as arrest evidence, the process is even more labyrinthian, even though in the overwhelming majority of cases, the property is never even used as evidence in the prosecution's case. For example, when a cell phone is taken and vouchered by the NYPD as "Arrest Evidence", the individual is subjected to the following retrieval process:

1. As a preliminary matter, a person likely has no idea that their phone has been taken for any reason other than safekeeping, as often no instructions are given when the property is seized, and arresting officers do not always provide vouchers. Thus, after being arraigned, our clients typically begin their search back to the precinct where they were arrested. They go to the desk officer and ask for their property back, and only at this point are they informed that their property is being held as "Arrest Evidence." They are then instructed to "call their lawyer" to retrieve their phones, a maddening Catch-22 in and of itself.

2. At this point, they must borrow someone else's phone to call their lawyer and ask them how to get their phone back. The lawyer then asks for the voucher, because this is the only way they can identify and confirm the specific property category and the appropriate steps to take.²
3. If the individual does not have a voucher, which is common, they are instructed to go to One Police Plaza to obtain one, a process which entails waiting in long lines and going through layers of security.
4. Once they get the voucher, the person must send their lawyer a copy of it. Normally, a text photo would suffice, but without a phone, this adds an additional layer of complication. Thus, they must set up an in-person meeting with the attorney to present the voucher.
5. If the law office has the capacity, and many do not, they will request the District Attorney's release on behalf of their client. In Manhattan, if the client's lawyer does not have the capacity, the client must go to the Criminal Courthouse at 100 Center Street. They are required to enter through security and proceed to the Manhattan DA's office on the 7th floor with their ID and their voucher. The person at the window makes a request to the District Attorney to release their phone. Whether it's requested by the attorney or the client, the client will then have to wait 15 days for an answer.
6. In Manhattan, the prosecutor's release request is usually denied. By this point, it has been a full two weeks without a phone. Typically, no substantial reason is given. Often, the Manhattan DA's office merely reiterates the fact that it was vouchered as "arrest evidence" with no other supporting facts.
7. After the DA denies release, there's nothing our clients can do other than wait for the case to be disposed of. With the endless backlog caused by court closures, this could be months, or even years.

It is the experience of the Civil Defense Unit that these obstacles are, by design, implemented in such a way to make it nearly impossible for a person to retrieve their personal property in a reasonable manner.

B. Youth Clients

For our youth clients, the process is equally exasperating. In some cases, of course, a phone is legitimate arrest evidence, and in those cases, it makes sense that the NYPD would need to keep and access it for a period of time. However, these scenarios represent only a small fraction of the cases we see.

In theory, when someone is arrested, their phone should be "vouchered" either for safekeeping or as arrest evidence, and the owner should receive a paper voucher explaining which category their property falls into. If a phone is vouchered for safekeeping, the owner should be able to retrieve it as soon as they are released from custody. If a phone is vouchered as arrest evidence, the owner should be able to obtain a release, generally from the prosecutor's office, to retrieve the property.

² For example, evidence vouchered as "Forfeiture" by the NYPD requires a different set up steps from those described above.

But none of this goes as it “should.” The NYPD typically provides young people with no paperwork at all, and the client often has no idea if they are even permitted to get their phone back and if so, how. Oftentimes, the NYPD property clerk misinforms our clients about how to retrieve their property, adding additional, completely unnecessary steps to this already byzantine process. In many instances, phones are vouchered as arrest evidence when they have no discernable connection to the criminal case whatsoever, and in those cases, prosecutors routinely refuse to release these items.

NYCDS staff in our Juvenile Defense Unit have spent hours on the phone with local precincts, One Police Plaza, and prosecutors’ offices trying to figure out where our clients’ phones are and how we can get them back. We instruct our clients according to the information we are given, and they hit dead ends, spending hours and days traipsing around the city, negotiating with property clerks and police officers to no avail. Even for us – competent adults with a working knowledge of the system—it is a wild goose chase with no guide or instructions. Months go by and neither they nor we can manage to get their phones back.

IV. The Unique Hardship of Losing a Phone in a Pandemic

Our client’s basic needs – for housing, healthcare, food, employment, childcare, education, etc. – have increased exponentially during the COVID-19 pandemic, and across the board, the city’s response has been woefully inadequate. The pandemic has presented new and harrowing obstacles for system-involved individuals, and has worsened the many challenges they already faced. In “normal” times, losing a phone for months or even years is hardship enough. But in a time when that phone represents a person’s entire ability to engage with family, school, work, and, most relevant here, court appearances and obligations, and when cases are dragging on for many months longer than usual, that confiscation is completely unjust and unacceptable.

Personal electronic items such as cellphones are no longer merely means of communications. Rather, they are the only methods through which our clients can connect to essential services under the new COVID-19 protocols. For example, the New York City Human Resources Administration has closed most in-person Job Centers³. Instead, applicants are asked to apply online, and it is only through the mobile application that supporting documentation can be uploaded. A case will be rejected without supporting documentation, and our clients will go without the vital benefits such as food stamps, shelter payments, or rental arrears grants. This puts our clients at risk of hunger, eviction and homelessness, thereby increasing their risk of exposure to COVID-19.⁴ With historically high unemployment levels⁵, removing the device that connects individuals to social services benefits is a devastating consequence.

³ Almost every Job Center in New York City is marked as “Closed Until Further Notice”

See: <https://www1.nyc.gov/site/hra/locations/job-locations.page>

⁴ Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials Updated March 23 2021: <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>

⁵ State Labor Department Releases Preliminary March 2021 Area Unemployment Rates: https://dol.ny.gov/system/files/documents/2021/04/state-labor-department-releases-preliminary-march-2021-area-unemployment-rates_1.pdf

V. Conclusion

The current system of NYPD property seizure, specifically with respect to cell phones, poses myriad challenges for our clients – both adults and children. At best, it presents a maddening procedural nightmare that only takes days or weeks to fix. At worst, our clients lose their digital lifeline for months, years, and sometimes forever. Life without access to a digital device poses incredible barriers to education, jobs, public services, programs, and from being able to comply with court proceedings and directives. It is a serious issue that must be addressed immediately.

We urge City Council to intervene and stop this practice immediately. First, the NYPD must be ordered to properly categorize property, and stop classifying phones as “Arrest Evidence” where it has no discernible bearing on the underlying case. By creating a protocol that ensures that the property retained by the NYPD is legitimately needed as evidence, we ensure that individuals are not unfairly losing the right to personal property at the tremendous cost of losing the connection to their lifelines.

In addition, City Council must take action to ensure that prosecutors’ offices – including Corporation Counsel – are only preventing individuals from retrieving their property when it is a *genuine* piece of evidence in a case. Even in these instances, prosecutors must only retain this property for only as long as it is absolutely necessary. Moreover, in either case – whether the phone is vouchered for “Arrest Evidence” or for “Safekeeping” – clients and their families must receive clear, easy-to-follow instructions for how to get that property back as soon as possible.

Thank you again for your attention to this important issue. We are including with our testimony a one-page overview of this issue that NYCDS has generated to capture the scope of the problem and harm it brings upon our clients. If you have any further questions about this issue or our testimony, please contact us at ycheckroun@nycds.org or dobrien@nycds.org.

Youth Cell Phone Seizures by the NYPD

An Overview



NYPD SEIZURE OF PROPERTY POST-ARREST

When someone is arrested in New York City, the NYPD confiscates their property, including their cell phone.



WHAT SHOULD HAPPEN

- The cell phone should be vouchered for “safekeeping” and returned to the owner as soon as he or she can pick it up, unless it is evidence in the case.



WHAT ACTUALLY HAPPENS

- Instead of vouchering phones for “safekeeping,” and immediately returning them to their owners, phones are almost always vouchered as “arrest evidence” or “investigatory evidence.”
- This means that the phones remain in police custody for the entire life of the case (if not permanently), even when those phones have no connection to the alleged crime.



PHONE SEIZURE DATA

- NYPD data shows that the department seized more than 55,000 phones in 2020 and returned only 60% of them.
- In 2020, NYPD failed to return 22,000 phones to their owners

THE PROBLEM

NYPD routinely vouchering cell phones as arrest or investigatory evidence is not a new problem, but it has been exacerbated by the COVID-19 pandemic, and causes serious and long-lasting harm, particularly to young people. Many adolescents use their phones to:

- Participate in remote learning, leading to missed school as a result of an unjustified seizure
- Log into their court appearances, which are almost all occurring virtually
- Call their attorneys, their family members
- Reach probation officers, the programs they are mandated to attend virtually, the remote therapy sessions they are required to complete, and conduct their court-ordered curfew checks

COLLATERAL HARM

- The vast majority of system-involved youth are black and brown children from low-income families.
- Many families simply cannot afford to replace a child’s device once it is confiscated by the police.
- During the pandemic, children use their phones to log into school for remote learning. Without their phone, they cannot access their education.
- A confiscated phone may not only be the child’s phone, sometimes it is the only device in a family, leaving not only the system-involved child disconnected from school, but also their siblings.
- Parent/Guardians may opt to stay home from work so their child can use their phone for school which could lead to unemployment.
- People need their phones to log into remote court appearances and to attend court-mandated programming. If those appearances are missed, court outcomes can worsen.

THE SOLUTION

- The introduction of legislation that will regulate the ability of the NYPD to indiscriminately voucher property, specifically cell phones, tablets and laptops, as investigatory or arrest evidence in cases where that property has no connections to the arrest offense.
- Require the NYPD Patrol Guide to set forth a streamlined procedure for officers across New York City to follow so that people can recover their devices from the NYPD as soon after their arrest as possible.
- Require the NYPD to provide the City Council with data about the number of cell phones and laptops vouchered as arrest evidence, with a breakdown by precinct, age, race/ethnicity and gender of the property owner, as well as the average amount of time before property was released. For the laptops, require the NYPD to report how many seized laptops were property of the DOE.

April 2021



TESTIMONY OF:

**Maryanne Kaishian
Senior Policy Counsel**

BROOKLYN DEFENDER SERVICES

Presented before the New York City Council

Committee on Public Safety

Oversight Hearing on Property Seizure and Arrest Evidence

My name is Maryanne Kaishian and I am Senior Policy Counsel with the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and people-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy to nearly 30,000 people and their families in Brooklyn every year. Many of the people that we serve live in policed and surveilled communities and are regularly subjected to abusive behavior on the part of the New York Police Department (NYPD), including the wrongful seizure of their personal belongings and unreasonable, arbitrary obstacles laid out by the police to prevent their return. I want to thank the Committee on Public Safety, particularly Chair Adrienne Adams, for holding an important discussion on the NYPD's practices around property seizure and arrest evidence.

In my time at BDS, I have primarily represented young people who are charged with crimes, ranging from misdemeanors to serious felonies. The young people I serve are mostly Black and brown New Yorkers who have had varying levels of contact with the NYPD. Many people are victimized by racist and classist police practices such as constant police presence in their neighborhoods, surveillance, pretextual car stops, and routine stop-and-frisks. An often-overlooked element of these police interactions is the common NYPD practice of seizing property, particularly cell phones, from New Yorkers, oftentimes repeatedly and without legal authorization.

These seizures occur whether or not the owner is ultimately prosecuted for, or even accused of, criminal conduct. We know that phones and other items are routinely taken from victims and witnesses, as well as from people whose arrests were deemed faulty by prosecutors. Property is taken when it has no connection to alleged criminal conduct, and it is kept and sometimes sold by the police after they have stonewalled the rightful owner attempting to secure its return. **Furthermore, we have every reason to believe, given the NYPD’s data capabilities and testimony from cell phone and laptop owners about the state of their items after police seizure, that the NYPD is using its unchecked power to seize property as a warrantless, and illegal, intelligence-gathering tool.**

We urge the City Council to pursue responses to this harm that do not simply create new rules for the NYPD to decline to follow. As in so many areas of police practice, rules and legal constraints exist¹—they are simply disregarded. This is an issue of unchecked police power, unaccountability, and a persistent disregard for rules intended to safeguard the civil rights of people who encounter the police.

1. Hundreds of thousands of New Yorkers are impacted by property seizure every year, with police depriving nearly half of them of their personal property permanently.

Police disproportionately target Black, Latinx, and low-income people for stops, searches, and arrests.² The people who are most likely to encounter the police, and thus the most likely to have their property seized, are also the most likely to be subjected to police violence³—making it risky for them to intentionally engage with police, as would be required to retrieve their property—and the least likely to be able to afford legal assistance or replacements for expensive items such as cellphones. The NYPD practice of property seizure compounds the racial and economic inequities inherent to policing in our City and throughout the nation.

Earlier this year, the NYPD released official data on citywide property seizures from 2020 as mandated by Administrative Code 14-169.⁴ The data, while striking, marked a continuation of

¹ See Administrative Code § 14-140 Property clerk.

² Data from the Legal Aid Society from 2019 showed that nearly all people who were stopped and frisked by the NYPD—a practice that persists despite extensive litigation—were people of color, accounting for 90%. While other states were legalizing cannabis, Black people in New York were 15 times more likely to be charged with marijuana-related offenses in Manhattan than whites, despite accounting for about 17% of residents. In Kings County, where our organization is located, a 2019 report showed that 86% of all people charged with crimes in the borough over a six month period were people of color.

³ The New York Times, “Why Was a Grim Report on Police Deaths Never Released?”
<https://www.nytimes.com/2020/06/19/opinion/police-involved-deaths-new-york-city.html>

⁴ New York City Police Department, Report: Seized Property, available at:
<https://www1.nyc.gov/site/nypd/stats/reports-analysis/seized-property.page>.

trends from prior years for which there is available data. While fewer total items were taken, about the same percentage was returned. For example, in 2020, the NYPD took 55,511 phones and returned only 33,851. They took 99,986 items of clothing and returned less than half. They took 38,602 forms of identification, and about one third were returned. More than 300 vehicles taken for “safekeeping,” having no evidentiary value, were never returned. Roughly \$81 million in cash was forfeited through the offices of the city’s five District Attorneys.⁵ More cash was taken and never returned to the owners. The NYPD netted \$425,967.50 in the sale of items other than vehicles on the police auction website Propertyroom.com, the proceeds of which went to the NYPD pension fund.⁶ Many more items, in our experience, were taken and simply never catalogued.

While this data is staggering in the cumulative, it is important to remember that behind each data point is the story of an individual who has been deprived of their personal effects by the police. It has always been true that police seizure of personal property such as cars and phones is disruptive and potentially devastating to work, school, childcare, financial stability, and other daily considerations for the deprived person. But in the time of COVID-19, these seizures can be even more impactful. There are the added obstacles and dangers of traveling in person to retrieve property from precincts and NYPD property clerks where, in my experience and that of others, few employees elect to wear masks or socially distance. Cellphones are lifelines more than ever before, as people have no contact with their loved ones apart from FaceTime calls and texts. Many schools and jobs are entirely remote. People have avoided mass transit for health reasons only to have their cars wrongly seized. They have been struggling under an economy where many people have lost their jobs and the City has slashed funding for community initiatives only to have valuable and essential items taken and not returned. In short, police have the same unmitigated power as always, but an even greater likelihood of causing significant harm.

2. The “process” for property retrieval is unreasonable, arbitrary, and unpredictable.

As defense attorneys, we can attest that we—trained advocates and lawyers—find the NYPD’s property return “process” taxing, time-consuming, frustrating, and ad hoc. Even more dauntingly, this issue affects people who are left to navigate this system without legal counsel. Victims and witnesses of crimes, specifically shootings, have their phones seized by police but are not

⁵ While there is a criminal forfeiture statute in NY (N.Y. Penal Law § 480), most of this is surrendered through plea agreements whereby defendants agree to “forfeit” cash seized at arrest as part of a plea. Without this “voluntary” surrender of cash the DA has a very high burden to meet for criminal forfeiture and it is only applicable to certain felony drug convictions. This \$81 million is not to be confused with civil cash forfeiture litigation pursued by the NYPD. The civil forfeiture secured by District Attorneys are often in small amounts recovered by police from an arrested person’s pockets or belongings and are achieved through common cash-for-disposition schemes, where a person will surrender their right to pursue the return of their property or cash in exchange for a more favorable plea or case outcome.

⁶ New York City Police Department, Report: Seized Property, available at: <https://www1.nyc.gov/site/nypd/stats/reports-analysis/seized-property.page>.

provided with legal assistance to fight for their return. In an exercise of pure legal fiction, people whose cases district attorneys decline to prosecute—meaning these individuals are never arraigned and thus never connected to a defense attorney, and their cases are never docketed and thus never assigned to a prosecutor—are still required by the NYPD, impossibly, to provide a docket number and receive a release from the prosecutor on their non-existent cases. People who are detained, searched, and released similarly cannot provide required documentation for their belongings. Those who can, usually at the conclusion of their case, are often no better off.

The NYPD also requires that a person come to collect their belongings themselves and will not release property to legal counsel, inviting confrontations with officers who wrongly insist that the items cannot be returned. People who have histories of police-related trauma, including the instances where their property was seized without cause, are required to advocate for themselves with members of the NYPD who create arbitrary, inconsistent, and sometimes impossible requirements for property to be returned.

While much of the NYPD practice related to property seizure is targeted and intentional, people attempting to retrieve their belongings are also subjected to incompetence and capriciousness—sometimes being sent on wild goose chases to various NYPD property clerks before being informed that their property is gone without a trace. Many people are forced to abandon their property after multiple visits, having been sent on a stressful and fruitless quest that proves disruptive to work, childcare, school, and other considerations. As we can attest, the NYPD is not particularly good at keeping track of cash, valuables, and other items that come into their possession. People arrested wearing gold chains or jewelry will be told that their items were never vouchered, and they are never seen again. People whose phones were documented as being seized by police will be told that they are no longer in NYPD possession, with no information as to the items' whereabouts. Their only recourse is to file suit in small claims court, a time-consuming process where no legal counsel is afforded and where, as in criminal proceedings, the NYPD with its vast resources enjoys a significant advantage.

We have countless stories about the harms of illegitimate and unreasonable property seizures through the course of our representation of people in Brooklyn. For example, I represented a young person who witnessed a police assault. When he attempted to record the assault, his phone was taken “as evidence.” I represented other young people whose arrests were baseless and not pursued by prosecutors, but whose phones were taken during those encounters for “investigatory purposes” in unrelated cases—a workaround to the warrant requirement. I represented another young person whose cell phone was taken as the result of a case that the District Attorney declined to prosecute. He was unable to retrieve the phone, and I was also given the runaround. The NYPD demanded a docket number, proof of the disposition of a case that never existed, a voucher number that had never been provided, approval from a prosecutor that was never assigned to the case, and the consent of the arresting officer whose work had been deemed

insufficient. All the while, this young person was unable to attend his virtual school, as his smartphone was the only way he could connect until his family could save for a replacement.

Our office represented a mother whose car was seized as a result of her son's arrest. After 11 months of the prosecutor refusing to respond to requests for release, and the NYPD holding the car for forfeiture, the criminal case was dismissed. Even after dismissal, it took another month to cut through all the red tape, while represented by counsel, to actually be able to pick up her car. It was then that she learned that a brand new car seat and a toy scooter she had bought for her granddaughter had been removed from the car by the NYPD, vouchered separately, and destroyed by the NYPD only a month earlier. The current rules and regulations as they stand allowed the NYPD to remove her property from inside her car and destroy it, with zero notice to her or her attorney, who had been in conversations with the NYPD regarding her property all along. Another young person represented by our office had their property seized during a "wellness check" after they were the victim of a shooting. Other attorneys have witnessed phones being taken from shooting victims while they are hospitalized, or cars damaged during the commission of a crime unrelated to the car owners being seized permanently.

These stories are not aberrations. Rather, they are illustrations of the common manifestations of the NYPD's unchecked power to confiscate and possess any property they wish. The effects on people who are deprived of their property are significant and lasting.

3. The NYPD seizes and keeps items regardless of their alleged connection, if any, to criminal conduct by the owner.

As discussed above, the NYPD takes items from people regardless of the reason they are being confronted by the police. Whether or not someone is accused—not to mention convicted—of a crime, their property is often seized by members of the Department. We often speak with people who come to us for help retrieving their property. The circumstances vary widely, but a common thread is the frustration they feel at the lack of responsiveness and responsibility from the NYPD and prosecutors.

While the justification for seizing property incident to arrest is the need to obtain and preserve evidence needed in a criminal prosecution it is the NYPD, not the prosecutors, who determine how property will be vouchered and, as a result, what rules will govern its retention and return.

One might presume that property held as evidence in an ongoing criminal prosecution would be the most difficult for an owner to get back. Yet except for property vouchered for "safekeeping" – returnable as soon as the owner appears with sufficient identification— "arrest evidence" is the least contentious category the NYPD currently uses. While the hoops a defendant must jump through to retrieve property vouchered as "arrest evidence" are still substantial and confusing there are regulations laying out procedures and deadlines governing the process for requesting

and obtaining a district attorney's release and for demanding property's return from the property clerk. In contrast, a growing number of New Yorkers are struggling to retrieve property vouchered as "investigatory". This designation, seemingly created out of thin air to circumvent the burdensome due process that accompanies retention of property vouchered as evidence, is alleged to be a justification to retain property indefinitely without court order and without oversight. Phones, clothing, and other property are often held for months without any prosecutorial involvement and the NYPD's "procedures" dictate that the only remedy is to convince the arresting officer to change the property's designation to safekeeping manually. No other personnel at the NYPD or the law department will concede anyone else has authority to mark the investigation as concluded or release the property.

We recently worked with a client who was the victim of a shooting. While he was in surgery the NYPD seized his phone and his clothing from the hospital and vouchered it as "investigatory" property. Despite there being no criminal charges against him, his phone and only means of communicating with his family and friends while in the hospital was held without recourse for two months. The NYPD continues to refuse to release his clothes, after one detective bragged to a social worker from our office that there are no limits on how long he can hold property vouchered as "investigatory."

However, this is not to suggest that simply creating rules around voucher categories will solve this problem, as it is clear that the NYPD's interest is in creating ways to hold property for as long as possible. It is imperative that any solution focuses

4. What the NYPD does with technology in their possession is shrouded in secrecy.

Since approximately 2018, the NYPD has had the technological capability to break into electronic devices, particularly cell phones, regardless of the password or encryption status of those devices.⁷ Two spytech companies—GrayShift and Cellebrite—provide tools that allow law enforcement to crack almost any cell phone.⁸ Those same companies, amongst others, also sell tools that will create complete digital images (i.e. a precise copy) of a device's contents. These tools not only copy the direct physical items saved on the device (e.g. photos taken by the cell phone), but also can copy data that is stored in applications or in the cloud (e.g. facebook data, google maps data, or Apple iCloud data).⁹ The NYPD routinely uses digital forensic tools to image cell phones, laptops, and other digital devices.

⁷ Agreement to Provide Gray Key Device and Licenses for the New York City Police Department, dated Aug. 17, 2018, available at https://www.documentcloud.org/documents/20392994-18s119-executed-agreement-with-redactions-accepted_redacted-legal-10897172.

⁸ Jack Nicas, "The police can probably break into your phone," NYTimes (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/technology/iphone-encryption-police.html>

⁹ Logan Koepke, Emma Weil, Urmila Janardan, Tinuola Dada, and Harlan Yu, "Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones." Upturn (Oct. 2020), <https://www.upturn.org/reports/2020/mass-extraction/>.

As the United States Supreme Court recognized in 2014, “[a cell] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form.” *Riley v. California*, 134 S.Ct. 2473, 2491 (2014). That information is available to the NYPD from every seized phone in a matter of minutes. As long as the NYPD does not attempt to directly use seized information in a criminal prosecution, but instead only uses that data for intelligence gathering, database construction, and investigative leads, no court process regulates the NYPD’s digital search capabilities. Even if the NYPD returned digital devices that had been imaged, as long as they did not encounter some form of technical error, it is not as if those devices would display a message (or retain any clear indication) that they had been cracked or imaged.

Despite being required by the Public Oversight of Surveillance Technology (POST) Act, passed this summer and effective this year, to disclose an impact and use policy for its surveillance technologies, the NYPD has flouted public accountability and transparency around its spy tech. Digital forensic access tools are not an exception here. The NYPD’s published impact and use policy for these tools did not include any substantive description of (1) the technologies used in this arena, (2) whether the department routinely uses these tools without court oversight and when, or (3) the actual disparate impact of this facet of the NYPD’s domestic spying program.

Without true accountability and transparency around NYPD’s activities involving seized digital devices, like phones or laptops, we (as defenders) are left only with what is known about the department’s capabilities (as discussed above) and the alarm-raising reality that officers are routinely and unjustifiably seizing digital devices from our clients and communities.

Conclusion

There is no single purpose for the NYPD’s practice. Some items are stolen and sold in a scheme that would be identified as a criminal enterprise by the police were the roles reversed, with police profiteering from theft. Some technology is almost certainly hacked into or ruined by multiple attempts at warrantless entry. Other items are forcibly taken by police as a way to intimidate and frighten those identified for enforcement, depriving people of their personal belongings simply because they can. No matter the motivation, we face the stark reality of a city whose police force takes and keeps people’s property at seemingly every opportunity, exacerbating and exploiting existing racial and economic inequities, emphasizing its power over people, and creating a boon for the Department’s bottom line.

It is essential that the imposition of any new rules be both enforceable against the NYPD and crafted to avoid burden-shifting to the person whose property has been taken, such as by creating

avenues of relief where the onus is on the aggrieved party to follow up, show up, and fight an intransigent bureaucracy.

CATHOLIC COMMUNITY RELATIONS COUNCIL

80 Maiden Lane, 13th Floor, New York, NY 10038

Testimony of Joseph Rosenberg
Executive Director, Catholic Community Relations Council
Before the New York City Council Committee on Public Safety
Intro. 2108 - Increasing Penalties for Damages to Houses of Worship
April 28, 2021

Good morning Chair Adams and members of the Council Committee on Public Safety. I am Joseph Rosenberg, Director of the Catholic Community Relations Council, representing the Archdiocese of New York and the Diocese of Brooklyn on local legislative, policy, and political matters.

Both the Archdiocese of New York and the Diocese of Brooklyn strongly support Int. 2108 and we thank Councilmember Fernando Cabrera for introducing and championing this legislative initiative. Int. 2108 would increase the penalties from \$500 to \$1,000 for the willful defacing or damage to houses of worship and articles used for religious services such as religious figures, religious monuments, sacred scrolls, altars, furniture, musical instruments, and books.

At a time when hate crimes have been increasing in our City and throughout the nation, this bill is timely and important. It recognizes that attacks of vandalism on and in churches, synagogues, and mosques are not just attacks on these houses of worship but on all New Yorkers who seek solace and support in their respective religious faiths.

Both the Archdiocese of New York and the Diocese of Brooklyn reported over 42 attacks on Catholic churches in New York City since 2015. These incidents resulted in over \$450,000 worth of damages, including the destruction of religious statuary, smashing of windows, defacing of church walls, and destruction of the Stations of the Cross. The exterior walls of St. Patrick's Cathedral were twice defaced over the last 5 years by spray paint.

Attacks against houses of worship are assaults against all of us and our Constitutional right to worship peacefully. These attacks cannot be tolerated and we appreciate the Council's support in recognizing and addressing this.

Accordingly, we strongly support Int. 2108 and urge its passage by the New York City Council.

Thank you.

THE LEGAL AID SOCIETY

Justice in Every Borough.

The Legal Aid Society Testimony Criminal Defense Practice and Juvenile Rights Practice

**New York City Council
Committee on Public Safety
Property Seizure and Arrest Evidence**

April 28, 2021

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The Legal Aid Society

Since 1876, The Legal Aid Society (Legal Aid) has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil and juvenile practices, our staff handles approximately 300,000 cases for low-income families and individuals.

Criminal Defense Practice

Legal Aid's Criminal Defense Practice serves as the primary defender of indigent adults prosecuted in the state court system in New York City. The Practice includes experienced trial offices in every borough—an Appeals Bureau, a Parole Revocation Defense Unit, a Prisoners' Rights Project, a Community Justice Unit, and a Special Litigation Unit. In each area, the Practice has developed innovative model projects that garner expertise and push both the practice and discourse of criminal justice forward. In the past year, the Practice represented nearly 230,000 clients in trial, appellate, and post-conviction matters and have pushed for critical reforms that end injustice and discrimination based on race, gender, and poverty.

Juvenile Rights Practice

Legal Aid is the primary provider of legal representation to children and youth prosecuted in New York City's Family Courts and Criminal Courts. Legal Aid has dedicated teams of lawyers, social workers, paralegals and investigators devoted to serving the unique needs of children and youth charged as juvenile delinquents, juvenile offenders and adolescent offenders. Children as young as seven years old can be prosecuted as juvenile delinquents in Family Court, and children as young as 13 can be prosecuted as adults in Criminal Court. Since the implementation of Raise the Age, the Juvenile Rights Practice and the Criminal Defense Practice's Adolescent Intervention and Diversion Project have adopted an integrated representation model to ensure seamless and comprehensive representation of 16 and 17-year-old youth who appear in the Youth Part and are removed to Family Court. Legal Aid is also the primary provider of legal representation to children whose parents are charged with abuse or neglect in Family Court. In addition to representing our clients in trial and appellate courts, we also pursue impact litigation and other law reform initiatives.

Introduction

Every year, hundreds of thousands of people, overwhelmingly Black and Latinx, are arrested in New York City. Each person is searched and in the course of that search, police seize property--cell phones, identification, money, cars, metrocards, keys, and countless other items essential to life in New York City.

Unless there is a legal justification for the police to retain seized property, it should be promptly returned to its owner. However, a very different, troubling practice persists where the New York City Police Department (NYPD) broadly categorizes any property seized as *evidence*, even where there is no nexus to an alleged crime. The NYPD then refuses to release it without the approval of a prosecuting attorney. Occasionally, prosecutors agree to release, but when they fail to agree, or fail to respond, our clients are left with few options for recovering their property. Some wait months or years for a case to resolve in order for their property to be released. Others give up entirely.

Our clients lose money to pay rent and buy food, lack phones to communicate with family and employers, attend remote school or court proceedings, and are denied access to vehicles essential for transportation, income, and housing. The NYPD's practice is widespread, deeply troubling, and unlawful. We urge the City Council to take swift action to end the practice by amending the administrative code to create (1) a clear timeframe for release of property, (2) a presumption in favor of returning property to those from whom it was seized, and (3) an opportunity to seek the intervention of a judge whenever NYPD claims an interest in prolonged retention.

Property Seized from Adults and the Broken System for Retrieval

When a person is arrested and processed in New York City they are subjected to a full search. During the course of that search, officers are directed to seize the following items:

- a. Anything that is deemed to be unlawfully carried;
- b. Anything deemed required as evidence;
- c. Anything that, although lawfully carried, is deemed dangerous to life, able to facilitate an escape, could be used to attempt/commit suicide or assault another individual;
- d. Anything that can be used to deface or damage property;
- e. Personal items, including identification cards and debit/credit cards, but excluding clothing;
- f. Any press card issued by the NYPD;

- g. Any Auxiliary Police Shield, Civil Defense Shield/Identification Card;
- h. Legally possessed prescription drugs;
- i. Handgun license;
- j. Rifle/Shotgun Permit; and
- k. New York City Police Department retiree identification card or identification card of retired uniformed members of the service of the former New York City Housing Police Department or the New York City Transit Police Department.

NYPD Patrol Guide § 208-03(12).

Police typically tell clients that they may retrieve property after they have been arraigned in court and have seen a judge, but that retrieval process seldom occurs in practice.

After police seize property, they are required to invoice each item by entering it into their Property and Evidence Tracking System (PETS). When property is entered into PETS, officers are to categorize it in one of the following ways:

- a. Arrest Evidence;
- b. DNA Arrest Evidence;
- c. Investigatory;
- d. DNA Investigatory;
- e. Forfeiture;
- f. Decedent's Property;
- g. Found Property;
- h. Safekeeping;
- i. Peddler Property;
- j. Determine True Owner;
- k. Parking Enforcement;
- l. Photo Release;
- m. Rotation Tow;
- n. Other.

NYPD Patrol Guide § 218-01.

The way that seized property is categorized plays a significant role in whether our clients can retrieve it quickly, with property held as “evidence” or “investigatory” purposes, virtually impossible to recover quickly, if at all.

Once officers have categorized property, they are required to print an invoice, or a voucher, and provide the arrested person with a copy of the voucher showing all of the information that was seized and how it was categorized. Title 38 of the Rules of the City of New York, Section 12-32(a) (hereinafter 38 RCNY). Officers are also required to give the person the opportunity to examine the voucher and either sign to verify that it contains a complete list of the property taken or indicate any disagreement with the voucher. 38 RCNY § 12-32(b)-(c). Like so many city rules governing property seizure, this practice is rarely followed.

After an officer is supposed to provide an arrested person with a voucher, the person is then typically transported from the precinct to the courthouse for arraignment.

At arraignments, the district attorney is required to provide the following notification to people who have had their property seized:

- (i) The person from whose possession the property was taken should retain and safeguard the voucher;
- (ii) In order to obtain the return of the property, the claimant or a representative authorized by a notarized writing to claim the property will be required to submit, in person or by mail, the voucher and proper identification to the office of the police property clerk located at a central location in each borough. The property may be disposed of by the police property clerk according to law unless the claimant demands the property no later than 120 days after the termination of criminal proceedings.
- (iii) A claimant demanding the return of property other than arrest evidence does not require a district attorney's release and may make such a demand whether or not criminal proceedings have been instituted and, if instituted, whether or not such proceedings have been terminated. As used herein, "property other than arrest evidence" refers to non-contraband property taken from an arrestee merely for safekeeping or taken from the person or possession of an individual prior to, simultaneous with or subsequent to an arrest which is unrelated to the matter for which the individual was arrested. Following receipt of a demand for such property, the property clerk may return the property or otherwise proceed pursuant to the provisions of 38 RCNY §§ 12-36 and 12-37.
- (iv) A claimant demanding the return of arrest evidence from the property clerk should obtain prior to the demand either a district attorney's release or a supervising district attorney's statement

refusing to grant a release, although presentation of either or both of these documents to the property clerk is not required for making a timely demand. If demand for the property is made without a district attorney's release, or a supervising district attorney's statement, the claimant shall have 270 days from such demand to obtain a district attorney's release or a supervising district attorney's statement refusing to grant a release. If a release or statement refusing to grant a release is not provided to the property clerk within such period, the property may be disposed of according to law.

- (v) If a claimant timely provides the property clerk with a district attorney's statement refusing to grant a release, the claimant must thereafter obtain a district attorney's release to obtain the return of the property.

38 RCNY § 12-32(f), 38 RCNY § 12-32(e).

The district attorney's notice should also "set forth the procedures by which a claimant may obtain a district attorney's release and the procedures by which a claimant may seek review in the event that a release is denied." 38 RCNY § 12-32(f). Yet again, this notice is almost never given by the prosecutors in arraignments.

Post-Arraignment Bureaucratic Maze

After a person is arraigned and either released on their own recognizance, released after posting bail, or released because they have taken a plea and fulfilled any jail sentence imposed, the person is instructed to return to the precinct to retrieve their property.

This is where the bureaucratic maze of property recovery begins.

For many of our clients, returning to the precinct where they had just been arrested can be a hostile and traumatic process. Our clients may have just been arrested for offenses that involved physical conflict with officers assigned to that precinct, such as alleged assault or resisting arrest. Nevertheless, our clients are expected to return to the same officers and request return of their property, a process that many of our clients are understandably fearful to undertake.

When our clients make the decision to return to the precinct where they were arrested, they are met with a series of obstacles to actually retrieving their property.

As an initial matter, our clients must show identification to retrieve the property. NYPD Patrol Guide §218-02(1), 38 RCNY § 12-32(e)(ii). Although this may not seem like an unreasonable requirement, when a person is arrested, officers typically seize *any and all identification* at the time of an arrest. So when a person who has been arrested returns to the precinct to retrieve their property, including their seized identification, the police make the confounding claim that it cannot be returned unless that person can first produce identification distinct from the one that was seized.

If the person is able to produce a distinct form of identification that the NYPD accepts as valid, that person is often asked to provide the NYPD with a copy of the voucher for their property. This presents another significant obstacle because many people are never actually given a copy of vouchers by the NYPD to begin with, despite rules requiring the NYPD to issue vouchers. See 38 RCNY § 12-32(d). So our clients are frequently told they cannot retrieve property without a voucher they were never given, and never knew they needed. This is such a common problem that when the Bronx Defenders brought a lawsuit against the NYPD in 2016 challenging the legality of the NYPD property seizure policies, one of the settlement terms was that individuals would simply be provided with property vouchers upon release from arraignments, a basic requirement under the City's rules.

Even when the NYPD gives our clients vouchers--which is infrequent--the vouchers are often given to an incarcerated person without any explanation as to how important the voucher is. The person who is held in custody is often moved from holding cell to holding cell, before seeing an attorney and a judge, and then often given more paperwork once they leave court. As a result, it is not uncommon for our clients to lose vouchers before they can return to the precinct.

The Categorization Problem

Even if a person is able to meet the threshold voucher and identification requirements, they may be told that some of their property cannot be released to them. At this point, our clients learn, likely for the first time, that return of property depends on how the NYPD classified it when it was initially vouchered. Only property that was vouchered for safekeeping may be retrieved immediately. See 38 RCNY § 12-32(e)(iii). When property is vouchered for some purpose other than safekeeping, the NYPD often never explains why the person's property is not being returned and typically tells the person to contact their attorney or contact the district attorney's office.

Many clients give up trying to get their property back after making an initial attempt, either because they do not have an attorney, cannot contact anyone at the DA's office, or are never told why the property is being held and how to retrieve it.

Some property is vouchered for forfeiture, the legal process by which the government formally moves to permanently deprive a person of their property. If property has been vouchered for forfeiture, the person must be informed of their right to a hearing, so they can advocate to retain their property.

Some property may be vouchered as investigatory and cannot be released until an assigned investigator has completed their investigation. After an investigation, the property will be reclassified,¹ and depending upon the reclassification status, may or may not be released to the person upon further request.

Some property may be vouchered as evidence. In that case, the NYPD will not release it without authorization from the District Attorney's Office. See 38 RCNY § 12-32(e)(iv). Sometimes District Attorney releases can be obtained with a simple telephone call from the defense attorney. However, all too often obtaining a District Attorney release becomes a bureaucratic goose chase.

Tracking Down a District Attorney Release

Property releases cannot be obtained from the District Attorney's Office unless and until there is an assistant district attorney assigned to the case. When a person is first arrested, their case is first sent to the District Attorney's Early Case Assessment Bureau. The Early Case Assessment Bureau makes an initial assessment of the case, decides what charges to file, and then sends the case to the assistant district attorneys handling the arraignment. After the arraignment, the case should be assigned to an

¹ The property reclassification system has also caused significant delays in property being returned. If the NYPD, on its own, determines that the property no longer needs to be held as evidence, it cannot be released until it is reclassified within the NYPD PETS system. However, only the investigating officer can reclassify the property. So if the investigating officer is not on duty, on vacation, on leave, busy, or otherwise unavailable, the property is not reclassified until they return.

In addition to property being reclassified to allow for its release, some attorneys have also had property reclassified to prohibit release. In some cases where a DA release has been obtained, the NYPD reclassified the property for forfeiture and then sought to retain the property. See 38 RCNY § 12-36(a)(i), allowing the property clerk to initiate forfeiture proceedings up to 25 days after a claimant provides the property clerk with a district attorney's release for the property.

assistant district attorney that will handle the case. However, this process is not immediate and often takes days.²

Once an assistant district attorney (ADA) is assigned to the case, they may consent to the release of property after reviewing the case. This review can take weeks or even months. Some ADAs never respond to requests for release or simply refuse to release the property without offering any explanation. If an ADA will not agree to release property, or ignores the request entirely, the only procedure for seeking return of the property is set out in 38 RCNY § 12-34 and essentially consists of sending the ADA a letter requesting the property's return.

38 RCNY § 12-34(a) provides that a request for a district attorney release may be made either in person or by mail by either the claimant³ or a representative of the claimant that the claimant has authorized by a notarized writing. The request for a district attorney release must also be accompanied by a copy of the voucher or an explanation for the voucher's loss or absence, proper identification, and suitable case identification, unless the district attorney, in their discretion, decides to waive any of the foregoing requirements. 38 RCNY § 12-34(b).

After receiving a proper request, the district attorney is to determine within 15 days whether to grant the request and release the property or deny the request and continue to have the NYPD retain the property. 38 RCNY § 12-34(c), (e). The district attorney is supposed to grant the request unless: (a) the criminal proceedings have not yet terminated, and the property is or may be needed as evidence or (b) the criminal proceedings have terminated but the district attorney determines that the property needs to be retained as evidence due to:

- (i) A pending appeal;
- (ii) A collateral attack or notice that a collateral attack will be commenced;
- (iii) Another specifically identified criminal proceeding or
- (iv) An ongoing identifiable criminal investigation.

38 RCNY § 12-34(d).

² Often, attorneys will resort to asking the district attorney's office on the record to consent to release. This is typically done at the first appearance after arraignments, when clients first notify attorneys that they were unable to retrieve their property.

³ "Claimant" is defined as "the person from whose person or possession property, other than contraband, was taken or obtained, who is seeking from the police property clerk the return of such property in the police property clerk's possession or property that has been transferred by the police property clerk to the district attorney of any of the five counties of the city. 38 RCNY § 12-31.

A district attorney's determination not to provide a release to a claimant because the property is or may be needed as evidence is supposed to be made in good faith. 38 RCNY § 12-34(d). When a district attorney makes that determination, they are required to provide the reason they refused the request in writing no more than 15 calendar days after receiving the request. 38 RCNY § 12-34(e).

Assistant district attorneys regularly disregard this procedure and fail to respond within 15 calendar days of a request. And if an ADA actually provides a response, their written response frequently fails to provide any reason for refusing the request for release.

When an ADA denies the request or fails to follow the procedures set forth in 38 RCNY § 12-34, the only procedural mechanism for review contained within 38 RCNY § 12-34 is to request review by a supervising ADA. See 38 RCNY § 12-34(e). The supervising ADA is supposed to provide a review within 10 days of the request for review. 38 RCNY § 12-34(e). If the supervising assistant district attorney refuses to release the property, they are to state particularized reason(s) for the refusal in writing and their reasons must conform with the requirement that there has been a determination, in good faith, that the property is or may be needed as evidence. 38 RCNY § 12-34(c), (d), (e)

Like their subordinates, supervising ADAs frequently violate city rules and fail to provide a response within 10 days that states the particularized reasons for the denial, if they provide any response at all.

When the supervising ADA fails to follow the procedures established by city rules, the only further mechanism for relief within the rules allows the claimant to reapply to the district attorney for release. See 38 RCNY § 12-34(f). However, that option only applies when the supervising attorney actually issues a written statement upholding the denial, which as already stated, does not always happen. See 38 RCNY § 12-34(f).

This is often the bureaucratic dead end.

Some attorneys resort to filing motions before the court that has jurisdiction over the pending case, a process that often lacks reliance on specific city or state laws. Some motions *may* result in successful return of the property, but they can also delay criminal proceedings. When a motion is filed by the defense, the case typically gets adjourned for motion practice, which suspends a speedy trial clock and can extend criminal proceedings by months.

If a person does not want a motion for return of their property to diminish their right to a speedy trial, must still wait for the case to wind its way through the system. Sadly, the fastest way for a case to reach resolution is often for a person to plead guilty. Law enforcement retention of essential property becomes yet another leverage point for prosecutors to coerce unfavorable plea deals.

Disposition of Seized Property

Bureaucratic hurdles far too often result in people giving up on retrieving property altogether, or unknowingly having their window to do so lapse. In those cases, the property is then “disposed of” by the property clerk.

City rules explicitly provide that a person’s property may be disposed of by the property clerk if the person fails to produce either a district attorney release or a denial from a supervising district attorney within 270 days. 38 RCNY § 12-35(d). Further, the Administrative Code allows money and property that remains in the custody of the property clerk for three months without a lawful claimant--in the case of money--to be transferred directly into the city’s general fund and, in the case of property,⁴ sold at auction with the proceeds then transferred into the general fund. NYC A.C. § 14-140(e)(1). In lieu of auctioning the property, the Administrative Code authorizes the property to be used for the purpose of any city, state or federal agency, including the NYPD. NYC A.C. § 14-140(e)(1).

In 2020 alone, a total of \$5,987,998.75 in “unclaimed” currency became retained property and was transferred to the general fund.⁵ Further, \$425,967.50 was generated through the liquidation of retained property (other than motor vehicles and currency).⁶ Although the hurdles imposed by the NYPD result in a windfall for the city, that windfall comes at the detriment of New Yorkers.

⁴ This provision does not apply to abandoned vehicles.

⁵ https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/seized-property/seized-property-report-2020.pdf

⁶ https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/seized-property/seized-property-report-2020.pdf

Impact of Cell-Phone Seizure on Youth

More than 55,000 phones were seized by the NYPD in 2020. Yet, only 60% of those phones have been returned to their owners. While the NYPD does not disclose the average amount of time before the phones were returned, nor the data broken out by precinct, age, race or gender, it is clear that this practice has a severe impact on poor Black and Latinx individuals, and on young people in particular. We know from our youth clients that cell phones are routinely kept by the NYPD for indeterminate and lengthy periods of time, disconnecting young people and their families from school, work, court, friends and family. When NYPD seizes a young person's phone, the phone should be vouchered for "safekeeping" and returned to the owner as soon as they can pick it up unless the phone is evidence in the underlying case, or the police have a search warrant for the contents of the phone. Yet, in most instances, cell phones are held in police custody for the entire life of the case, if not permanently, when those phones have no connection to the alleged crime.

Although retrieving vouchered property is onerous for all youth, it is particularly challenging for youth involved in the Family Court. Before cases are either transferred to or filed in Family Court, the case goes through the NYC Department of Probation (DOP) for review for possible adjustment – diversion from court. Cases referred for adjustment are under DOP supervision for up to 90 days, meaning that young people continue to go without their phones or other seized items during this time. Only after adjustment is complete can the youth request a letter of release.

In addition, since March 2020, Corporation Counsel, the prosecuting agency in NYC Family Courts, no longer files petitions alleging juvenile delinquency unless it intends to seek remand (incarceration) of the child. As a result, even if a case is not referred for adjustment, Corporation Counsel is unlikely to file a petition in Family Court. There is currently an enormous backlog of potential juvenile delinquency petitions arising from arrests over the past year which await resolution. Even those youth who have had delinquency petitions filed face significant delays in the prosecution of their cases. With the adjustment process as well as COVID related court delays in filings and prosecutions, it can be months or even a year before a young person can retrieve their phones.

Young people of color are disproportionately impacted by this practice. Appalling and longstanding racial disparities exist in the juvenile legal systems; justice-involved children and teens are almost exclusively poor, and Black or Latinx. Close to 90% of New York City youth admitted to secure detention after arrest self-identified as Black or Hispanic. Additionally, many youth of color have experienced trauma and at least one significant issue beyond poverty that causes instability in their lives. This

instability can be exacerbated when youth are disconnected from their schools, their loved ones and their communities.

The pandemic also exacerbates the serious and long-lasting harm this practice has on young people. Many children use their phones to participate in remote learning. Without a phone, they are at greater risk of missing classes, failing to complete assignments and falling behind academically. Moreover, if a youth is arrested in the home, police may seize all electronic devices in the home, including laptops and tablets issued by the Department of Education for youth and their siblings to participate in remote learning. Sometimes the phones and devices that are confiscated are the only devices that the family has, and the entire household is deprived of all access to the internet.

Without a phone, youth are also disconnected from other critical services. They cannot, for example, attend court-mandated programs or engage in remote therapy sessions. Youth also cannot communicate with their attorneys, probation officers, or fulfill their court-ordered curfew checks. Some families have to ensure an adult is home during the day, so the young person can attend school, court and meet with probation or service providers. This can strain the entire family – forcing some parents and caregivers to take days off and put their jobs at risk.

Cell phone seizure often takes a social and emotional toll on youth as well. Now, more than ever, a phone can be a young person's lifeline to engage with their loved ones and their community. One of our clients – a teen from the Bronx – lost his phone for months even though it was not connected to his case. He was unable to communicate with many of his friends or participate in online social activities. He felt isolated and disconnected from his extended family, at a time when social isolation and anxiety was at its worst, due to the pandemic.

Another teen was caught up in an NYPD sweep at a basketball game when someone was allegedly robbed nearby. Although he had no connection to the alleged robbery, NYPD arrested him and took his cell phone. Even after the young person got a voucher for the phone, the NYPD continued to create barriers to the phone's return, including claiming that the teen or his family, who are immigrants, had to have additional identification in order for the phone to be released. The process was incredibly stressful and took weeks before the phone was released.

This practice has an even greater impact on our clients who are also involved in the child welfare system and may be in stranger foster care or group care facilities. One of our clients, a Brooklyn teen who has been in foster care for several years, was arrested in October 2020. His phone was confiscated and with it the phone numbers

of his friends and family members. Without his phone, he lost many of the connections he relied on as his support system. This has only increased his feelings of isolation, during an already stressful time. To date, he still does not have his cell phone.

As young people's lives become increasingly virtual, it is imperative that NYPD process and voucher phones expeditiously and provide a simple, streamlined process for release to young people.

Conclusion

In 2013, in a case where police retained a person's tablet for more than 30 days without seeking a warrant, now Supreme Court Justice Gorsuch, asked the following question:

What, after all, is 'reasonable' about police seizing an individual's property on the ground that it potentially contains relevant evidence and then simply neglecting for months or years to search that property to determine whether it really does hold relevant evidence needed for trial or is totally irrelevant to the investigation and should be returned to its rightful owner?

United States v. Christie, 717 F.3d 1156, 1162 (10th Cir. 2013) (Gorsuch, J.).

The obvious answer to Justice Gorsuch's question--obvious to everyone other than law enforcement--is *nothing*. Nothing is reasonable about the practice of arbitrary and indefinite retention of property, property that is essential to modern life.

We urge the Council to partner with us and develop a legislative fix to this chronic problem—a legislative fix that creates a clear timeframe for release, a presumption in favor of returning property to those it was taken from, and an opportunity to seek the intervention of a judge whenever NYPD claims an interest in retaining our clients' property.

Thank you for the opportunity to testify and for addressing this critical issue.

Hearing Follow-Up

As discussed at the hearing, most phones seized by police and held as “evidence” for a District Attorney’s Office are never the subject of a search warrant, and therefore never actually used as evidence.⁷ Despite NYPD claims to the contrary at the hearing, there is no reason for phones to be held by prosecutors for weeks or months in cases where applications for a search warrant will never be made, nor is it reasonable under the Fourth Amendment for law enforcement to hold property for extended periods of time without seeking a warrant.⁸

Under state discovery laws, within 35 calendar days of a person’s arraignment,^{9,10} a prosecutor must disclose and permit inspection of “all tangible property that relates to the subject matter of the case[.]” C.P.L. § 245.20(1)(o). By that time, the prosecution is required to designate for the defense which items it intends to introduce in its case-in-chief at trial and a pre-trial hearing. C.P.L. § 245.20(1)(o). The prosecution’s discovery obligations impose an affirmative duty to make timely inspection of all property that has been seized and determine whether it will be used as evidence. Therefore, there is no reason for the prosecution to delay making these assessments, nor is there any reason for failing to respond to requests that property be returned.

⁷ In 2014 the United States Supreme Court determined that, absent exigent circumstances shown in a particular case, the police cannot search an individual’s cell phone just because that cell phone is seized from the individual at the time of arrest. Riley v. California, 573 U.S. 373 (2014). Instead, the Court determined that a warrant is generally required to search a cell phone, even when that phone is seized incident to arrest. Riley v. California, 573 U.S. 373, 401 (2014).

⁸ In 2020, the United States Court of Appeals’ Second Circuit determined that a New York State Police Officer who seized a tablet during the course of arrest and then waited 31 days before applying for a warrant to search the tablet acted with unreasonable delay in applying for the warrant and therefore violated the tablet owner’s right to be free from unreasonable seizure. United States v. Smith, 967 F.3d 198 (2d Cir 2020).

⁹ This time period is shortened to 20 calendar days from arraignment if the accused is in custody. See C.P.L. § 245.10(1)(a)(i).

¹⁰ “Arraignment” here refers to arraignment on an indictment, superior court information, prosecutor’s information, information, simplified information, misdemeanor complaint or felony complaint. C.P.L. §§ 245.10(1)(a)(i), (ii).



Statement from Chelsea Kraimer, Senior Participant Success Manager/Social Worker and Director of Reentry Services, Getting Out and Staying Out

Cellular phones are central to the everyday lives of the young people we serve at Getting Out and Staying Out. Access to phones means that court-involved young people we serve can access educational and employment opportunities, and mental health programming at GOSO, as well as required court appearances and court-mandated check-ins, most of which have moved online. Far too many of the young people we serve who have phones confiscated by the NYPD encounter serious delays in accessing their property even though the phones seized usually have nothing to do with their current case. Not having a phone can lead to further needless criminalization of people of color in our City for those unable to be in contact with their legal teams to attend court or comply with mandated conditions. Phones are costly to replace, and the current unjust policy disproportionately has a negative impact on the primarily black and brown people we serve at GOSO. Not having a phone means gaps in communication in many ways—but it can even be as simple and important as a young person not being able to contact a family member.

We ask our Mayor and our Council to ensure that the process of NYPD returning property is streamlined and subject to increased transparency so that justice-impacted young people in our City are not facing yet another major barrier to success.