



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

**Debora Silberman – Senior Trial Attorney
*BROOKLYN DEFENDER SERVICES***

Written with Jared Chausow, Senior Policy Specialist

Presented before

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Oversight Hearing on the Office of the Inspector General for the NYPD

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My name is Debora Silberman and I am a Senior Trial Attorney at Brooklyn Defender Services. BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 30,000 clients in Brooklyn every year. I thank the Committees on Public Safety and Oversight and Investigations for holding this hearing on the Office of the Inspector General (OIG) for the New York Police Department (NYPD) and providing us with the opportunity to testify.

A number of recent high-profile corruption and misconduct scandals demonstrate continued systemic problems at the NYPD. Recent bribery allegations involving both senior leadership staff and the gun licensing division have rightly attracted a lot of media attention. Today, I will discuss additional issues that have not received as much attention, and warrant scrutiny by NYPD-OIG and the Council.

Racial Disparities in Law Enforcement

Sharp racial disparities persist in NYPD enforcement practices. Arguably the clearest evidence of this dynamic exists in marijuana possession arrest patterns. Contrary to past media reports, low-level marijuana arrests have not ended. In fact, though arrest rates have declined since their peak under Mayor Bloomberg and NYPD Commissioner Kelly, they remain dramatically higher than they were during Mayor Giuliani's first term. Low-level marijuana possession remained the NYPD's top drug arrest in 2016, and fourth most common arrest overall. From 2014 through 2016, 86% of the 60,990 of those charged with low-level marijuana possession across New York City were identified as Black and/or Latino, despite government surveys showing equal or greater marijuana use by white people. A report by the Drug Policy Alliance (DPA) found that the NYPD had arrested 362 people in West Harlem for this offense, yet only 14 in the Upper East Side, which has more than three and a half times as many residents. The report also found that people of color were far more likely to be arrested for this offense even in majority-white neighborhoods.¹ None of this is surprising to me. In my nearly seven years as a public defender, I have never represented a white person on a marijuana charge.

Importantly, 64% of U.S. residents, including a majority of Republicans, support full legalization of marijuana consumption – no arrests, no prosecution, no tickets or fines.² BDS supports DPA's campaign to legalize and sensibly regulate marijuana in New York State and we do not believe any additional investigations or reports are needed to justify this long overdue reform. However, OIG-NYPD could use marijuana arrests as a launch point to investigate racial disparities in NYPD enforcement practices generally, as they are similarly present in arrests for fare evasion, sex work, and countless other offenses.

Police Perjury, or 'Testilying'

A recent *New York Times* article begins, "A federal judge in Brooklyn has told the city to prepare for a court hearing regarding the prevalence of lying by New York City police officers and whether the New York Police Department has done too little to discipline officers who testify falsely."³ As a public defender, I can assure you that such lying is prevalent and the NYPD has made no recognizable efforts to meaningfully address it. Likewise, the imbalance of power in the criminal legal system that pressures defendants to accept plea deals rather than go to trial also enables prosecutors to provide cover for police perjury, or "testilying," by making offers that defendants all-but-cannot refuse.

¹ Harry Levine, *60,000 Jim Crow Marijuana Arrests in Mayor De Blasio's New York* (Drug Policy Alliance & Marijuana Arrest Research Project 2017), https://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf.

² Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S.* GALLUP NEWS, Oct. 25, 2017, <http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx>.

³ Joseph Goldstein, *Brooklyn Judge Seeks to Examine Prevalence of Police Lying* N.Y. TIMES, Oct. 17, 2017, <https://www.nytimes.com/2017/10/17/nyregion/brooklyn-judge-police-perjury-nypd.html>.

The judge cited in the article was the highly-regarded Hon. Jack B. Weinstein of Federal District Court in Brooklyn. The case in which the judge issued this decision involved a 59 year-old bodega cashier charged with drug dealing. He had been fully strip-searched in addition to being arrested and detained before the case against him fell apart as surveillance video showed the arresting officers' account was false.

I have ample experience fighting police lying in court. As but one example, in 2014, I represented a man named Jeffrey Herring who was arrested for gun possession. (I am using his real name because his story was featured in the *New York Times* and because he has been cleared of wrongdoing, his case dismissed.) Mr. Herring insisted the gun was planted by the police and his story never wavered. After receiving a letter from the District Attorney's office on the day before a hearing with notice that one of the officers had previously been found incredible as a matter of law by a judge in Brooklyn Supreme Court, my colleague and I started to dig deeper. We discovered that the same team of arresting officers had troubling records of misconduct and false testimony relating to gun arrests with near-identical facts. They adhered to a pattern involving an apparently fictitious informant, as they did in my case. We discovered several more cases in which the same arresting officers were involved in gun possession cases that fell apart under scrutiny.

We were able to get the case against Mr. Herring dismissed and the Kings County District Attorney's office announced an investigation into the officers. Yet even after *The New York Times* reported on the apparent trend in misconduct by these officers and the trail of dismissed cases they left behind, the discredited officers remained on the force. They continued testifying as witnesses for the prosecution, still apparently adhering to the same basic pattern of perjury and evidence-tampering. A public defender with The Legal Aid Society working on another case they brought in had to learn about their unreliability through *The New York Times* article.⁴ The District Attorney's investigation had apparently ended and, as far as I know, the officers remain on the force. We believe the Brooklyn District Attorney continues to rely on them. The Council should also know that the new Gun Courts, designed to pressure faster and harsher pleas with longer jail sentences for cases involving alleged gun possession, are likely only exacerbating this phenomenon.

Of course, testilying is not limited to gun possession cases. I have fought it in countless other cases involving planted drugs, illegal searches, and other misconduct. In fact, I believe fabricated pretexts of marijuana use (i.e. by smell) and traffic infractions, which are generally difficult or impossible to disprove in court, have replaced stop-and-frisk as the primary mechanism for police searches.

⁴ Nick Pinto, *The Incredibles: Judges Said These Cops Can't Be Trusted, so Why Does the D.A. Rely on Them?*, VILLAGE VOICE, Nov. 1, 2016, <https://www.villagevoice.com/2016/11/01/the-incredibles-judges-said-these-cops-cant-be-trusted-so-why-does-the-d-a-rely-on-them/>.

Policing Communities Through So-Called “Gang” Raids

The NYPD’s enforcement actions against so-called “gangs” raise so many issues that they warrant a separate hearing by the Council, in addition to an investigation by the OIG-NYPD BDS, along with law professors, community activists, civil rights attorneys and others, signed on to a April 2017 letter on this subject written by policing expert and Brooklyn College sociology professor Alex Vitale to Philip Eure of the OIG-NYPD. The letter noted, in short:

Over the last several years, hundreds of people have been arrested and charged with state conspiracy or federal RICO violations as a result of NYPD investigations. In many cases, individuals are charged with conspiracy to commit murder or other violent crimes absent allegations of direct involvement, raising substantial concerns about arrest and prosecutions based on guilt by association rather than actual involvement in violent crimes. Media reports indicate that many of these cases are built at least in part on police monitoring of social media accounts and the creation of fake social media accounts to lure others to “befriend” them, giving police access to otherwise private information. Many of those targeted by these practices are juveniles and almost all of them are non-white. We have also become aware through press reports and Freedom of Information requests that the NYPD is using one or more databases to classify and track people as gang members. In addition, the defense bar reports that the NYPD is utilizing large data mining software such as Palantir and sharing that information with federal law enforcement agencies [almost certainly including immigration authorities]. We also understand that these investigations involve substantial electronic surveillance of people including access to CCTV data in public housing complexes, wiretaps, and possibly the use of Stingray technology. The individuals being prosecuted pursuant to these raids are facing lengthy prison sentences.

We are concerned that gang designations further alienate people who are already marginalized in society and may ultimately be counterproductive to public safety. Crucially, a previously FOILED document used by the NYPD to identify people as members of a gang included no past criminal conduct in its listed criteria, but rather their neighborhood, scars, associations and other loose categorizations. In our letter, we further ask for an investigation into how the NYPD uses its gang databases, or designations. Specifically, we asked how people are selected to be placed in the database, whether and how they may challenge it, and how it is used to direct enforcement actions, in addition to other questions. We believe the NYPD’s gang classifications are likely to be overinclusive and inaccurate, like the stop-and-frisk practices that have been found unconstitutional. However, as internal records, they have not, to my knowledge, been subjected to any judicial review.

We are particularly concerned that arbitrary or unfair gang classifications may be shared with immigration authorities. Recently, four individuals were arrested by Immigration and Customs Enforcement (ICE) at Brooklyn Criminal Court. They were appearing in court on Desk Appearance Tickets relating for misdemeanor trespass charges after police allegedly found them hanging out on a rooftop, and three had no criminal records, but ICE justified its courthouse arrests by purporting that the four were members of a gang.

Again, I ask the Council to hold a separate hearing on this crucial issue.

Arrests Outside Methadone Clinic and Needle Exchange

For many years, the NYPD has targeted areas surrounding methadone clinics and needle exchanges for enforcement and harassment. This is widely known in public health circles, and police have discussed reforms, yet aggravatingly, it persists.⁵ Often, the arrests involve deceptive buy-and-busts or other predatory tactics that sometimes result in serious charges against people who are actively and even successfully turning their lives around. Furthermore, it is impossible to know how many people have shied away from medication-assisted treatment and other widely-accepted and publicly-funded harm reduction resources due to fear of police presence. It appears that NYPD uses these resources as a tool in the so-called Drug War. Importantly, there is no evidence that prohibition policies and police intervention actually reduce drug supplies, whereas the harm reduction resources they are infringing upon have been proven to save lives.

Relatedly, the opioid epidemic has shone a spotlight on one critical but underreported impact of marijuana arrests. Research funded by the National Institute on Drug Abuse found that legally protected marijuana dispensaries were associated with reductions of 16 to 31 percent in opioid overdose deaths.⁶ By comparison, the Mayor's opioid overdose prevention initiative, HealingNYC seeks to reduce opioid deaths by 35 percent over the next 5 years, in large part through stepped up NYPD enforcement. Other experts have argued that the criminalization of marijuana led to the over-prescription and over-use of opioids and eventually the epidemic that we are struggling to address today. Simply put, marijuana seems to be a safer alternative to opioids in pain management, but criminalization undercuts that benefit.

Both the Council and the OIG should investigate the NYPD's continued execution of the Drug War and, more generally, our City's allocation of resources to reduce addiction and problematic drug use.

Thank you for your consideration of our comments. If you have any questions, please feel free to reach out to Jared Chausow in my office at 718-254-0700 ext. 382 or jchausow@bds.org.

⁵ John Knefel, *The Common Cure for Heroin Addiction is Also a Magnet for Police Harassment*, BUZZFEED, Feb. 19, 2015, available at https://www.buzzfeed.com/johnknefel/how-police-harassment-at-methadone-clinics-makes-quitting-he?utm_term=.rj94qpORg#.ekNOjm12P; see also VOCAL-NY, *Beyond Methadone: Improving Health and Empowering Patients in Opioid Treatment Programs* (2011), available at <http://www.vocal-ny.org/wp-content/uploads/2011/10/Final-Methadone-Report1.pdf>.

⁶ National Institute on Drug Abuse, *Study Links Medical Marijuana Dispensaries to Reduced Mortality From Opioid Overdose NIDA* (2016), <https://www.drugabuse.gov/news-events/nida-notes/2016/05/study-links-medical-marijuana-dispensaries-to-reduced-mortality-opioid-overdose> (last visited May 30, 2017).