



**BROOKLYN
DEFENDER
SERVICES**

BDS Response to the Governor's Proposed Changes to Asset Forfeiture in the FY19 Executive Budget

Brooklyn Defender Services' (BDS) is a public defender office located in Brooklyn. BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, in 35,000 cases in Brooklyn every year. Our civil justice practice advises and advocates for our clients whose assets are seized by the New York Police Department in relation to criminal cases, in addition to providing other civil legal services.

While BDS appreciates the Governor's focus on limiting the predatory practice of asset forfeiture, the proposed changes in the executive budget proposal fall short, particularly as they relate to cases in New York City.

To meaningfully protect New Yorkers from the abuses of property seizures and forfeitures by police, true civil forfeiture reform must:

- 1. Preempt local asset forfeiture laws;**
- 2. Establish reasonable limits on police holding property seized at arrest;**
- 3. Establish reasonable limits on police retention or liquidation of so-called "unclaimed" property; and**
- 4. Reduce administrative burdens and bureaucracy for property owners seeking return of their property.**

The Governor's Proposal

The legislation in the FY19 Executive Budget would amend the civil practice law to require law enforcement to return property seized from defendants if the action does not terminate in the defendant's conviction for a crime. This change in the law would be a modest positive step forward, but it will not protect the vast majority of people whose property is seized by police, including any New York City resident whose assets are seized by the NYPD.

The Problem of Local Preemption

The proposed change in the law would only affect forfeiture actions brought pursuant to Civil Practice Law and Rules (CPLR) chapter 13. However, the vast majority of low-level forfeiture occurs not on the state level but rather pursuant to municipal rules. For example, in New York City, the NYPD seizes, holds, and forfeits property pursuant to City Administrative Code 14-140 and not pursuant to CPLR 1310. The Governor's proposed reform would therefore have no effect on the NYPD or their abuse of local seizure powers. Currently, over five (5) million dollars' worth of property is forfeited annually pursuant to the city's Administrative Code, not the CPLR. ***Without an amendment to the proposed legislation to stipulate that it would preempt these local laws, the change will have no effect in New York City and thousands of legally innocent New Yorkers will continue to be deprived of their property each year.***

For an example of what will happen here if the amendment occurs with no change to municipal law or preemption, see this article on the problem with New Mexico's state law, which is similar to the one in the Executive Budget proposal.¹

Certain other local law enforcement may rely on the state statute and therefore be impacted the proposed changes, but because this law change does not explicitly preempt local law, local policymakers could simply write new laws through which forfeiture actions could be undertaken in the absence of a criminal conviction.

Property Seizures and Semi-Official Retention, Not Official Forfeiture Actions, are the Bigger Problem

One common misconception in "civil forfeiture" policy discussions is that all property seized and retained by police ends up being "forfeited" in court. In reality, the majority of the harm to impacted New Yorkers is caused by the property *seizure* itself, which occurs under a variety of justifications (i.e. as evidence, contraband, for "safeguarding," and for forfeiture) with no meaningful checks or oversight. More specifically, people are harmed by the delays and bureaucratic morass they must overcome in order to get their property back. (In other cases, police may simply take property and not report it.)

Where the reforms as currently drafted do apply, they will provide additional due process only to those who can afford to wait through the months- or years-long process for criminal case dispositions to get their property returned; most likely, this will include people of privilege facing allegations of "white collar" crimes. However, the low-income New Yorkers who are vastly overrepresented in the criminal legal system often cannot wait so long. Instead, they are compelled to pay a "settlement" of perhaps hundreds of dollars to get their property returned. Others simply give up.

¹ <http://blog.tenthamentcenter.com/2017/02/new-mexico-cities-working-around-asset-forfeiture-law-new-bill-would-close-the-loophole/>

For this reason, meaningful reform to forfeiture practices should include reforms and limitations of law enforcement's authority to seize property indiscriminately and hold it indefinitely. After all, the harm caused by civil forfeiture, and the eroding of police trust that follows, does not occur because of big ticket seizures of bank accounts and houses via court order. Instead, it happens because average New Yorkers need their cars, phones, and rent money (currently being seized without cause) in order to keep their jobs, make medical appointments, connect with family and remain safely housed.

For more information on the difference between seizure and retention of property through forfeiture proceedings, please see this article, "Police Can Use a Legal Gray Area to Rob Anyone of Their Belongings."²

What Real Reform Would Look Like

As long as police maintain unparalleled power and face little accountability, unjust takings will likely continue to occur. However, the state can help protect New Yorkers from these abuses. First, reforms to asset forfeiture laws must make clear that local laws shall not preempt them. This change alone, even with the limited reach of the Governor's proposal, would help some people around the state whose property is officially forfeited before or after their cases are dismissed or resolve with Adjournments in Contemplation of Dismissal or Non-Criminal Violations. However, to make a real difference for most people impacted by police property seizures, the reforms must establish protections for people whose property is held during the pendency of a case, in addition to those whose cases have resolved.

Three ways to do that are:

1. Establish Reasonable Limits on Police Holding Property as Evidence

Right now, the NYPD holds property almost indefinitely while they decide whether to pursue forfeiture and/or while they wait for the criminal case to progress to determine whether a plea or verdict will make their job easier. With an attorney, property owners are sometimes able to get their property returned, but this is uncommon and extremely burdensome. Temporary custody of the property by the NYPD should not shift the burden to the property owner to prove they have done nothing wrong before it is returned. If the individual is innocent until proven guilty they should also retain the legal right to their property until a court says otherwise. Property should never be taken without due process absent exigent circumstances. The exigency is supposed to be based on the need to preserve evidence. As soon as that ceases to be the case (for example, once a District Attorney release is obtained or a case is disposed), it must be returned.

Legislation is needed to require police to return property on a quick and clear timeline unless they take affirmative steps to retain it, subject to judicial review. Police can assess the value of

² <https://www.theatlantic.com/technology/archive/2016/08/how-police-use-a-legal-gray-area-to-rob-suspects-of-their-belongings/495740/>

property before it is returned and even have the owner sign off on the estimated value; if they intend to pursue forfeiture after a conviction they can obtain a judgment for the value, if the property or exact currency is no longer available.

The legislature may choose to include exceptions to the requirement that law enforcement take action to affirmatively keep lawful property, e.g. when there is a dispute about whether seized items were contraband (cigarettes, new paraphernalia, etc.), but as it stands now the burden is on the owner to prove an exception exists that allows them to retrieve the property. It must be the other way around.

2. Establish Reasonable Limits on Police's Retention or Liquidation of "Unclaimed" Property

Under current policy, property is deemed abandoned and either retained or liquidated by the NYPD if it is "unclaimed" 120 days after disposition of the criminal case. This is highly problematic because many people do not know to start looking for their property until the case is over. They may lack the necessary ID. They may be incarcerated or otherwise unable to navigate the substantial bureaucratic hurdles between them and their property.

Property is also deemed abandoned if after requesting its return the owner does not submit a DA release within 270 days of the initial demand. This is also problematic. If a person requests their property the day after arrest, they now have to provide a DA release within 270 days. Their criminal case may go on longer than that and they should not be beholden to the DA (or even their defense attorney) to coordinate obtaining that release.

The NYPD should be required to promptly return property no longer needed as evidence even absent affirmative requests from the owner. They should have to prove they notified the person of how and when to retrieve property before it can be abandoned. Time limits should be extended and property should be liquidated only after multiple attempts at contacting the owner. Law enforcement should be required to prove they notified the individual at arrest, by mail, and through their attorney for any property marked evidence, of when and how to retrieve property. Any time limits should start only after proof the individual was notified that their property was available to be retrieved. The NYPD already has a similar process for seized vehicles and storage fees. They do not charge owners for storage during evidence or forfeiture holds until the individual has both a DA release and an NYPD enforcement unit release. Once they can legally retrieve the vehicle, they are charged for storage if they fail to do so.

3. Reduce Administrative Burdens and Bureaucracy for Property Owners

Right now, confused property owners often go to the precincts in which they are first detained seeking a return of their property, only to be told that local officers cannot help. They often do not even know the property clerk office exists. Every precinct should be required to post published materials explaining rights and procedures and any relevant timelines for securing property returns. Also, police must allow documents from the criminal case to act as ID sufficient to claim related property. The legislature should require clear 'Know Your Rights' materials or information in the appropriate languages to be provided in person and by mail to people whose property is seized. The Legislature should also require prosecutors or police to

provide a written voucher for any property seized and mail a copy to the defendant's home address and require prosecutors to present the voucher for any property being held as evidence to the defense attorney. It is absurd that the defendant and their attorney may be unaware of what property is being held as evidence in the case they are appearing in and speaks to the urgent need for reform of our state's criminal discovery laws, as well.

Conclusion

Absent effective accountability mechanisms for police misconduct, abusive property seizures will continue but these procedural protections would go a long way toward ensuring justice and fairness for our clients.

If you have further questions about BDS' concerns or recommendations related to civil forfeiture, please contact Bill Bryan, Supervising Attorney – Civil Justice Practice, at bbryan@bds.org or 718-254-0700 ext. 351 or Jared Chausow, Senior Policy Specialist, at jchausow@bds.org, 718-354-0700 ext. 382.