



TESTIMONY OF:

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Standing Committee on Judiciary

Standing Committee on Correction

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And Law Enforcement Officer Safety**

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EXECUTIVE SUMMARY

My name is Lisa Schreibersdorf. I am the Executive Director of Brooklyn Defender Services (BDS). BDS provides innovative, multi-disciplinary, and client-centered criminal, family and immigration defense, civil legal services, social work support and advocacy to more than 45,000 indigent Brooklyn residents every year. I thank the New York State Assembly Standing Committees on Codes, Judiciary, and Correction, and the New York State Black, Puerto Rican, Hispanic, and Asian Legislative Caucus for this opportunity to testify on the defining issue of our time, namely criminal justice reform.

As interest in reforming our justice system grows among policymakers, BDS offers the wisdom and expertise of our staff and the stories of our clients. We can provide the facts and real experiences necessary to inform smart changes to make our laws more fair, effective, and humane. As a comprehensive indigent legal service organization, we are committed to helping enact systemic reforms that will improve outcomes for our clients before, during and after contact with the criminal, family, civil or immigration court systems.

While there are many aspects of the criminal justice system that warrant fundamental reform, I will focus my testimony on key issues affecting BDS clients. I will also discuss mitigations that would dampen the adverse impacts of contact with the criminal justice system, and opportunities to divert particularly vulnerable individuals at an early stage in the system. However, the primary driver of reform must be restricting the use of law enforcement intervention and incarceration to a measure of last resort and reinvesting the savings produced by declining jail and prison populations into the communities from which jailed people and prison inmates come. By reducing the number of incarcerated people, our City and State can redirect scarce resources to education, community centers, free community programs, infrastructure and employment to meet the needs of this population. To be sure, thanks in part to reforms enacted by the State Legislature, the prison population is down more than 28 percent since its peak in 1999, and New York City has reduced its jail population by more than 60 percent since 1991. But these figures obscure the reality that incarceration rates throughout the United States, including in New York, remain nearly unparalleled worldwide.

It is important to understand mass incarceration in a broader context of over-criminalization. A growing number of policymakers and other stakeholders in the justice system now favor Alternatives to Incarceration programs and other diversions, and rightly so. But we must not overlook the reasons people are getting swept up into the system in the first place, including over-criminalization. Certainly, the Legislature deserves credit for successfully rolling back some of the harsh sentencing laws for drug-related offenses enacted in past decades, and Governor Cuomo has pushed a number of criminal justice and prison reform initiatives, in addition to closing 13 underutilized prisons. **That said, New York State continues to enact new laws increasing sentencing, post-release restrictions and other punishments without any evidence or indication of improved public safety outcomes, and criminalizing things that do not improve with law enforcement intervention.**

Using police officers, incarceration, and criminal records to attack endemic social problems is generally among the most expensive and least effective approaches. Even low-level offenses, no

matter how absurd, can accumulate and result in sentences approaching those of more serious offenses, with devastating collateral consequences. Moreover, this approach is a waste of taxpayers' money. The cost of custody for every person in New York City jails is \$167,731 per year, according to the Independent Budget Office. This figure excludes the costs of lost productivity, adverse health impacts, shelter stays related to adverse housing impacts, foster care, and, notably, the increased likelihood of reincarceration. Reforming our criminal justice system to make it more fair and humane is critical and urgent, but again, the primary driver of reform must be ending our society's reliance on criminalization and incarceration in lieu of effective policies and programs to address mental illness, poverty, addiction, homelessness, immigration, and widespread invidious discrimination.

HUMAN AND LEGAL RIGHTS VIOLATIONS IN NEW YORK'S PRISONS AND JAILS

Recommendations

- 1.) *Restrict the use of incarceration to a measure of last resort and reinvest the savings produced by declining jail and prison populations into the communities from which detainees and inmates come.*
- 2.) *Reform bail proceedings to end pre-trial incarceration except in cases of significant risks to public safety. Provide for (a) voluntary supervised release as an alternative to bail; (b) regular review of bail by the court with a presumption that bail should be lowered or eliminated if a person cannot post that bail; (c) presumptive release for a person with a mental illness if they are going to a treatment facility or a valid treatment plan has been proposed to the court.*
- 3.) *Enact the HALT Solitary Confinement Act S.2659/A.4401 (Perkins/Aubry), A.1346A (O'Donnell) and A.1347 (Rozic) to end the torture of solitary confinement in New York's prisons and jails.*
- 4.) *Ensure the provision of high-quality, personalized, confidential health care—including mental health care—in all correctional facilities.*
- 5.) *Require that all correctional facilities offer regular access to private, unmonitored space for attorney-client conversations, including video-conferencing and unmonitored phone calls.*
- 6.) *Provide funding to local governments for Crisis Intervention Teams to respond to calls for Emotionally Disturbed Persons and others in need of mental health treatment and other community-based services rather than law enforcement intervention.*

By countless indicators, incarceration throughout the United States, including in New York, is a historic travesty. There are more than twice as many people under correctional supervision across the country than were in the Gulag at its peak in the early 1950's.¹ Until the spread of mandatory minimum sentencing regimes of President Nixon's War on Drugs in the 1970's, the national incarceration rate remained relatively stable—between 100 and 200 inmates per 100,000 people—for about a century. Then, it began to rise steeply and, following the Sentencing Reform Act of 1984, skyrocketed before leveling out above 700 in recent years.² In New York State, the average rate was less than 75 inmates per 100,000 people for a century, and more than quintupled during this period.³ The current incarceration rate in New York is lower than that of most other U.S. states, and fell by a quarter since its peak in 1999. Still, it is nearly double that of Maine, which has the lowest incarceration rate and the lowest number of violent crimes per capita in the nation, and about three and a half times that of Germany.^{4,5}

¹ U.S. Nat'l Park Serv., GULAG Fact Sheet.

² A Plague of Prisons

³ Ernest Drucker, A Plague of Prisons 50-51 (New Press, The 2013).

⁴ National Institute of Corrections, State Stats, <http://criminaljustice.ny.gov/drug-law-reform/documents/dlr-update-report-may-2014.pdf>.

⁵ Mike Riggs, Why America Has a Mass Incarceration Problem, and Why Germany and the Netherlands Don't, City Lab - the Atlantic, Nov. 12, 2013.

A report by the Brennan Center for Justice and VERA Institute of Justice found that, nationwide: “Half of the people in state prisons are there for nonviolent offenses; half the people in federal prisons are there for drug offenses. At least 30 percent of new prison admissions are for violations of parole; and more than 20 percent of those incarcerated have not been convicted and are simply awaiting trial.”⁶ In fact, approximately three quarters of those in Rikers are awaiting trial. These figures, as well as the reduction in crime that has co-occurred with the reduction in prison and jail populations in New York, bely the argument that mass incarceration keeps us safe.

The stark and persistent racial disparities in incarceration rates and every other aspect of the criminal justice system have led many to call it the New Jim Crow. Blacks represent approximately 18% of the total New York State population, 50% of those incarcerated and 60% of those who are held in solitary confinement.⁷ For the century before the 1973 Rockefeller Drug Laws, Blacks were incarcerated in rates between three and six times that of whites in New York. After the drug laws took effect, the disparity jumped to a rate of twelve to fourteen times that of whites. (The incarceration rate of whites has remained relatively stable throughout New York history, despite the harsher sentencing regime.)⁸ Of course, all marginalized communities are disproportionately impacted by mass incarceration. For example, a survey on transgender discrimination conducted by the National Gay and Lesbian Task Force found that 16% of respondents reported having been incarcerated at some point in their lives.⁹ There is no excuse for locking up so many of our fellow New Yorkers.

Once incarcerated, people endure all manner of human and legal rights violations—from the torture of solitary confinement to the calculated deprivation of one’s ability to participate in her own defense in court. The conditions inside do not befit any public facility in the world’s wealthiest nation, much less one that is allegedly intended to serve as a venue for the rehabilitation of our society’s most vulnerable individuals. Even as violent crime is dropping throughout New York, the U.S. Department of Justice (DOJ) has found a rising “culture of violence” on Rikers Island. Our clients regularly report sexual and violent attacks at the hands of Corrections Officers and their fellow detainees. Without us, they have no voice. They risk time in “the Box,” if not their lives, when trying to speak out. It is easy to write off Rikers as a waiting room for the worst of the worst, but in reality jails are “warehouses for the poor, ill and addicted”—those whom our government and society have failed.¹⁰

⁶ Dr. James Austin & Michael P. Jacobson, *How New York City Reduced Mass Incarceration*: (Brennan Center for Justice et al. eds., 2013).

⁷ *Solitary Confinement in New York: The Facts*, The New York Campaign for Alternatives to Isolated Confinement, <http://nycaic.org/facts/>.

⁸ Ernest Drucker, *A Plague of Prisons* 60-61 (New Press, The 2013).

⁹ Jaime M. Grant, Ph.D., Lisa A. Mottet, J.D. & Justin Tanis, D.Min., *Injustice at Every Turn* (Nat’l Ctr. for Transgender Equal. & Nat’l Gay & Lesbian Task Force 2011).

¹⁰ Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted*, a Report Says, 2015 *The New York Times*, Feb. 11, 2015 at (2015).

Segregated Confinement

Among the starkest, most horrifying human and legal rights violations perpetrated by our criminal justice system are those that occur in segregated confinement, or “the box.” As you may know, people in segregated confinement in New York’s prisons and jails spend 22 to 24 hours a day locked in a cell the size of a parking spot with only a small sliver window. They are required to receive one hour of exercise alone in a cage, though this accommodation is often denied.¹¹ They do not receive any meaningful programs or therapy and, in state prisons, cannot make phone calls. They do not have access to commissary, and thus cannot purchase additional food to supplement their reduced food allotment, or hygiene products. Those of our clients who are in segregated confinement consistently report to our Jail Services Coordinator that they are deprived of, among other things, showers, food, mental health services, medical services, opportunities to practice their religions, opportunities to receive education, and sanitary living conditions. This deprivation, lack of normal human interaction, and extreme idleness can cause immense psychological damage and suffering, as well as sickness and death.¹²

Statewide, there are approximately 4,500 people in segregated confinement in prisons, and hundreds more in local jails. The average isolation sentence in state prisons is five months—an eternity in such a monotonous environment. Four out of five sentencing sentences are for non-violent infractions, most commonly “failure to obey an order.”¹³ The infractions can be as minor as having too many cigarettes or too much postage. Absurdly, 95% of all “disciplinary hearings” end in findings of guilt. Corrections officers adjudicate based on the testimony of other corrections officers. There is not even a pretense of due process in these hearings, and hearing transcripts are not released to defendants. In such opacity, corruption and abuse is inevitable.

There are currently hundreds of inmates in punitive segregation on Rikers Island, most of whom reside in the Central Punitive Segregation Unit (“CPSU”) at the Otis Bantum Correctional Center. In 2013, the average length of CPSU confinement was approximately 50 days, more than three times longer than the duration that the United Nations Special Rapporteur on Torture defines as “torture.”¹⁴ That same year, the New York City Board of Correction (BOC), which is charged with overseeing DOC, issued a report detailing the experiences of three mentally ill adolescents (ages 16-18) who were sentenced to more than 200 days in punitive segregation at Rikers.¹⁵ Those adolescents described their experiences as torturous, with virtually no opportunity for mental or physical stimulation and significant deprivation of essential services—including complete cessation of their special education services, no meaningful recreational services, no meaningful mental health services, and inadequate medical care.¹⁶

¹¹ Staff Report, Barriers to Recreation at Rikers Island’s Central Punitive Segregation Unit (New York City Bd. of Corr. 2014).

¹² Michael Schwartz & Michael Winerip, Gross Incompetence Cited in Rikers Island Death, *The New York Times*, Jan. 22, 2015.

¹³ Scarlet Kim, Talyor Pendergrass and Helen Zelon, *Boxed In*. (NYCLU 2012).

¹⁴ The Solitary Project, *Voices from the Box* (The Bronx Defenders 2014).

¹⁵ Staff Report, Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island (New York City Bd. of Corr. 2013).

¹⁶ *Ibid.*

Crucially, reductions in solitary have a direct impact on reducing violence. For example, Mississippi, working with the National Institute of Corrections, reduced its solitary population by more than 75%, resulting in a 50% reduction in prison violence.¹⁷

The HALT Solitary Confinement Act, A.1346A & A.1347

The HALT Solitary Confinement Act - S.2659/A.4401 (Perkins/Aubry) would end the torture of solitary confinement in New York's prisons and jails. It would create evidence-based alternatives, namely Residential Rehabilitation Units (RRU), to address people's needs and behaviors through effective treatment rather than counterproductive isolation and deprivation. It would restrict the criteria that can result in separation to the most egregious conduct in need of an intensive therapeutic intervention, replacing the existing system of arbitrary judgements made by corrections officers with no consideration given to due process or rehabilitation. Crucially, the bill ends long term isolation for all New Yorkers, capping it at 15 days, in line with the international human rights standard established by the United Nations Special Rapporteur on Torture. The bill would prohibit correctional agencies from placing particularly vulnerable groups, including adolescents under the age of 21, pregnant and nursing women, and people with mental illness, in isolation for any length of time. Lastly, the bill would require training to equip RRU staff, public reporting on the use of segregation and RRU's, and oversight over implementation.

Together, A.1346A (O'Donnell) & A.1347 (Rozić) would prohibit the use of segregated confinement for juveniles under the age of twenty-one, people with mental illness or developmental disabilities, people who are pregnant, or those who have given birth within the past eight weeks, and mothers living with infants in prison nursery programs. A.1346A would further establish segregated confinement as a measure of last resort, allowable only under the supervision of the Commissioner, and only for "the minimal period as may be necessary for maintenance of order or discipline." It would also direct the Commissioner of DOCCS to compile and publish disaggregated data on the use of segregated confinement, including related suicide attempts and self-harm, on a quarterly basis.

BDS sincerely thanks the sponsors of all three of these bills, and urges their immediate passage. Their enactment would end a shameful chapter in New York, namely the explosive growth in the use of segregated confinement. As of this hearing, thousands of our fellow New Yorkers are suffering the torture of solitary confinement, and the Legislature has the power to change that.

Segregated Confinement of Individuals with Mental Illness

According to the American Psychiatric Association, prolonged isolation "may produce harmful psychological effects," including "anxiety, anger, cognitive disturbance, perceptual distortion, obsessive thoughts, paranoia, and psychosis. For persons with serious mental illness, these effects may exacerbate underlying psychiatric conditions, such as schizophrenia, bipolar

¹⁷ U.S. Senator Dick Durbin, Durbin Statement on Federal Bureau of Prisons Assessment of Its Solitary Confinement Practices (2013).

disorder, and major depressive disorder.”¹⁸ In *Madrid v. Gomez*, the U.S. District Court found that “placing [people with mental illness or developmental disabilities] in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe.”¹⁹

According to a September 5, 2013 report to the BOC by Dr. James Gilligan and Dr. Bandy Lee, experts in the field of mental health in prisons, “the proportion of mentally ill inmates in the New York City jail population is larger than ever before and growing.”²⁰ Indeed, Rikers Island is the largest provider of mental health services in the state, though its infrastructure and personnel are entirely ill-equipped and unqualified to work with this population. According to the New York City Department of Health and Mental Hygiene (DOHMH), about 25 percent of the City jail intakes present with some kind of mental illness, including about 5 percent who present with serious mental illness such as schizophrenia. (This tracks, generally, the overall population.) Our experience leads us to believe that the incidence of mental illness is actually much greater than DOHMH’s data, an understanding supported by off-line conversations with medical staff in city jails who report a serious problem with identifying health and mental health needs upon intake. Furthermore, many otherwise healthy people develop mental health symptoms such as depression, suicidality and trauma while incarcerated, in addition to communicable illness.

Those of our clients who have a mental illness almost always fare poorly in jail. Many of them end up in solitary confinement as a punishment for actions and behaviors related to their mental illness—mostly for disobeying orders, not acts of violence. In our City jails, there is a punitive segregation unit reserved for those with mental illness who infract called the Restricted Housing Unit (RHU). It did not surprise us, then, to read in the Gilligan and Lee report that, as the mentally ill population in the City jail system grew, the total number of inmates in punitive segregation grew, too—increasing 61.5% between 2007 June 2013.²¹ Once isolated and deprived in this way, individuals with mental illness rapidly deteriorate. Indeed, Gilligan and Lee note, “From a medical/psychiatric standpoint, no one should be placed in prolonged solitary confinement, as it is inherently pathogenic—it is a form of causing mental illness.”²²

In 2008, New York State enacted the SHU Exclusion Law, which mandates that people with a “serious mental illness” (SMI) who face disciplinary confinement that could exceed 30 days be diverted to a Residential Mental Health Treatment Unit. The law represented an important acknowledgement of the dangers of extreme isolation, and spared many people the compounding misery of enduring serious mental illness in the Box. However, it left behind the vast majority of SHU residents, including many with debilitating mental illnesses not designated SMI. Furthermore, the statutory definition of SMI allows ample space for correctional health staff to underdiagnose, and data suggests this to be occurring. Crucially, A.1346A establishes a more inclusive standard and a more comprehensive exclusion, but advocates and legislators will have to monitor DOCCS and local corrections agencies to ensure that the subject populations are actually protected as the law intends.

¹⁸ James H. Scully, Jr., M.D., Testimony Before the U.S. Senate Subcommittee on the Constitution, Civil Rights, and Human Rights (The Am. Psychiatric 2012).

¹⁹ *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995)

²⁰ James Gilligan, M.D. and Bandy Lee, M.D., Report to the New York City Board of Correction (New York City Bd. of Corr. 2013).

²¹ *Ibid.*

²² *Ibid.*

Segregated Confinement of Juveniles

Much like individuals with mental illness, young people often exhibit behaviors related to their brain chemistry that result in sentences of punitive segregation. It is said in our office that our young clients will be in solitary within a month unless we find a way to get them out of jail. This is because they are routinely penalized for actions that are typical of teenagers. Indeed, BOC has found that more than a quarter of all juveniles in Rikers are in punitive segregation.²³ U.S. Attorney Preet Bharara found “DOC relies far too heavily on punitive segregation as a disciplinary measure [for young people], placing adolescent inmates—many of whom are mentally ill—in what amounts to solitary confinement at an alarming rate and for excessive periods of time.”²⁴ Once in isolation, most of these young people start showing signs of serious mental problems. They tend to get so distraught over being left alone with their thoughts for so many hours that they do self-destructive things that increase their time in solitary. (Failure to obey an order is among the most common infractions leading to solitary sentences for all populations statewide.) Thus begins the cycle of solitary in which many become trapped. All too often, young people find only one way to escape; a study conducted by DOHMH found far higher incidences of suicide and other self-harm among juveniles who had been in solitary confinement in Rikers.²⁵ A 2012 task force convened by U.S. Attorney General Eric Holder also linked solitary confinement of juveniles to higher rates of suicide.²⁶ The United Nations Special Rapporteur on Torture has called for an outright prohibition of the practice for juveniles.²⁷

The adverse impacts of placing vulnerable individuals—and, indeed, anybody—in segregated confinement extend far and wide. Concomitant with the rise in the disciplinary use of solitary in our City jails has been a rise in violence inside those same institutions. For example, Gilligan and Lee found that, between 2004 and 2013, as the number of people in solitary sharply increased, the rate of use of force incidents tripled.²⁸ In particular, U.S. Attorney Bharara found “that a deep-seated culture of violence is pervasive throughout the *adolescent* facilities at Rikers [italics added].”²⁹ While tragic, this rise in violence is not surprising to those of us who have witnessed the effects of extreme isolation. Moreover, these facts directly contradict the common refrain that DOC’s discretionary use of solitary is necessary to ensure the safety of inmates and staff.

²³ Staff Report, Three Adolescents with Mental Illness in Punitive Segregation at Rikers Island (New York City Bd. of Corr. 2013).

²⁴ U.S. Attorney of the S. Dist. of NY, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island (U.S. Dep’t of Justice 2014).

²⁵ DOHMH, Solitary Confinement and Risk of Self-Harm Among Jail Inmates, 104 Am. J. of Pub. Health (2014).

²⁶ Report of the Attorney General’s National Task Force on Children Exposed to Violence (U.S. D.O.J. 2012).

²⁷ Juan E. Méndez, Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the United Nations 2011).

²⁸ James Gilligan, M.D. and Bandy Lee, M.D., Report to the New York City Board of Correction (New York City Bd. of Corr. 2013).

²⁹ U.S. Attorney of the S. Dist. of NY, CRIPA Investigation of the New York City Department of Correction Jails on Rikers Island (U.S. Dep’t of Justice 2014).

Gilligan and Lee add that this data must be viewed in the context of a decline in the overall jail population and in violent crime across the City. In what is often called “the safest big city in the world,” Rikers is an island of violence, trauma, and despair. That said, we know the impacts of isolation do not end at the fortified perimeter. **25,000 people are released from New York State prisons every year, including 2,000 who are released directly from solitary—many without any rehabilitation programs and services.**

Segregated Confinement of New and Prospective Mothers

The argument against the use of punitive segregation for people before, during, and after childbirth is self-evident. Such segregation is inherently pathogenic, traumatizing and stress-inducing, and risks compromising the health and well-being of a newborn child, literally visiting the alleged sins of the mother upon her child. Stress and depression have been linked to premature births and low birthweights. Reproductive health can also be compromised by segregated confinement’s restrictions on access to OB/GYN care and exercise. In addition, the lack of privacy and confidentiality inherent to facilities in which all communication is made through corrections officers can discourage people from seeking treatment, especially for issues related to sexual health, risking adverse outcomes for both mother and child.

Notably, in contravention of New York’s 2009 Anti-Shackling Law, many women in DOCCS custody continue to be shackled before, during, and after childbirth, particularly in solitary. This abhorrent practice can cause physical harm to mother and child and inhibits the formation of a strong bond between them.³⁰ *The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*, known as the Bangkok Rules, prohibit the placement of pregnant or nursing women in solitary confinement. Under the terms of a 2014 interim settlement agreement in a federal civil rights law suit, *Peoples v. Fischer*, DOCCS agreed to a presumption against placing pregnant women in the Solitary Housing Unit, unless there are exceptional circumstances.³¹ This bill would codify and expand that agreement to ensure that the state does not back slide, regardless of the final outcome of the case, and that local correctional facilities are covered by the policy. Our City and State must comply with international standards for human rights and commit in law to end solitary for all new and prospective mothers.

Experiences of BDS’s Clients and Staff

The experiences of BDS’s clients and staff plainly illustrate the horrors of our City’s and State’s use of solitary confinement. In considering their stories, it is critical to remember who we represent. Our representation begins at arraignment and extends throughout the pendency of the case. **By definition, our clients have yet to be convicted or sentenced and are thus presumed innocent of what they have been accused.** Nevertheless, thousands of them are incarcerated, due solely to the fact that they cannot post bail. In other words, they are in jail because they are poor. The presumed innocence of this population, a fundamental tenet of our justice system, is often forgotten in discussions about penology and jail conditions. This

³⁰ Tamar Kraft-Stolar, *Reproductive Injustice* (Corr. 2015).

³¹ *Peoples v. Fischer*, 11-CIV-2694 (SAS)

disregard is especially evident in State and City policies relating to the use of segregated confinement. The Gilligan and Lee report found the prolonged solitary confinement that is standard procedure at Rikers Island to be “one of the most severe forms of punishment that can be inflicted on human beings short of killing them.”³² The UN Special Rapporteur on Torture has called for a prohibition on punitive segregation for pre-trial detainees.

The following stories involve adolescent BDS clients who would be protected from segregated confinement under this legislation.

Mr. S

Mr. S is a young man who suffers from schizoaffective disorder and a learning disorder. During his incarceration, Mr. S was the victim of stabbing and burning attacks when he resisted pressure to join gangs. After staff failed to de-escalate conflicts with Mr. S over issues like lost property, he was issued infractions for disobeying orders, and he was eventually placed in the RHU—a punitive segregation unit for people with mental illness. The isolation endured by Mr. S contributed to his decompensation, and he began to experience more regular auditory and visual hallucinations. Mr. S became increasingly depressed and hopeless while in the RHU. At one point, he shared his sense of hopelessness with staff, and in response, he was placed on suicide watch in an empty cell, with nothing more than a smock. After coming off of suicide watch, Mr. S was denied all out-of-cell time and access to privileges he had earned through program compliance for the next three weeks. In short, staff’s response to a perceived suicidal statement was to categorically isolate Mr. S in his cell, 24 hours a day for a month. Mr. S discharged to the community directly from isolation.

Mr. F

Mr. F is a young man who suffers from paranoid schizophrenia. While incarcerated, Mr. F decompensated and began experiencing confrontations with custody staff, many of whom, lacking adequate training to de-escalate incidents involving individuals in his mental state, approached Mr. F aggressively. Mr. F received infractions during his incarceration and spent several months in the RHU at the George R. Vierno Center (GVRC) on Rikers Island. This isolation caused Mr. F to decompensate further, losing the few privileges he came to earn in the unit and lengthening his stay in the RHU. Eventually, Mr. F’s condition worsened and he was transferred into another isolation unit, which housed mentally ill individuals deemed violent—12 Main at GRVC. In this unit, Mr. F was isolated further and experienced worsening depression, anxiety, anger, lethargy, loss of appetite, frustration, hopelessness, insomnia, physical pain, and hallucinations associated with his schizophrenia. He reported to our staff a feeling of being trapped. In no small part due to his prolonged isolation, Mr. F decompensated so profoundly that he was eventually found unfit to proceed in his criminal case and had to be hospitalized in order for him to move forward through the system. This case begs the question, what is the purpose of pre-trial detention if not to ensure people make it to court? 12 Main was depopulated recently after people isolated there smeared feces on the doors and walls of their cells and others lit cell fires.

³² James Gilligan, M.D. and Bandy Lee, M.D., Report to the New York City Board of Correction (New York City Bd. of Corr. 2013).

In recent years, we have noticed a very significant increase in the use of solitary for infractions that are so minor as to be insignificant. Our Jail Services Coordinator regularly brings back stories that shock the conscience. Every client who is placed in solitary suffers from the experience, and the changes in their personalities and behaviors are readily apparent to attorneys, social workers and other staff. These individuals are not afforded due process in the hearings on their alleged infractions. It is clear to us that the use of this extreme punishment constitutes a flagrant deprivation of our clients' civil rights—and their essential humanity.

Historical Perspective

In a way, it is frustrating to have to explain the ills of segregated confinement, given the tremendous amount of research on its cruelty and inefficacy that already exists—dating back several centuries to the birth of the very concept of correctional facilities. As NYCLU's 2012 report on extreme isolation in New York, "Boxed In," notes, Alexis de Tocqueville and Gustave de Beaumont toured Auburn state prison in the early 1820's and found its use of extreme isolation to be ruinous and counterproductive. "[I]n order to reform them," they wrote, "[the prisoners] had been submitted to complete isolation; but this absolute solitude, if nothing interrupt it, is beyond the strength of man...it does not reform, it kills." That prison closed its solitary cells two years after opening them. Of the 26 who were pardoned after serving in solitary, 14 soon returned to prison on new offenses. Perhaps more timely, as New York City tries to heal its rift as a "Tale of Two Cities," is Charles Dickens' reaction to Pennsylvania's Eastern Penitentiary after touring the facility in 1842. He found the extreme isolation system there to be "worse than any torture of the body...[I]t wears the mind into a morbid state, which renders it unfit for the rough contact and busy action of the world."³³

Enacting the legislation in question would expand upon the limited protections set forth in the SHU Exclusion Law and send a message that New York State recognizes the torture of solitary confinement. In the meantime, the City and State should stop placing anybody in solitary confinement until the conditions of this confinement are such that they no longer risk permanent physical and psychological damage to people and until such time as the validity of using solitary confinement to positively impact future behavior in jail is established by concrete evidence. Again, the most impactful reforms refocus our resources on rehabilitation and opportunity over punishment.

Health Care in Police and Correctional Custody

People held in correctional facilities are the only demographic in the U.S. with a constitutionally mandated right to health care. However, the health care currently provided in jails and prisons is deplorable. The fact is that correctional facilities were never intended to function as health care providers, yet they currently house overwhelmingly large populations of individuals with serious mental illness and other complicated health needs. Treating and stabilizing serious mental

³³ Scarlet Kim, Talyor Pendergrass and Helen Zelon, *Boxed In*. (NYCLU 2012).

illness, in particular, is a delicate medical process that is deeply compromised by jail and correctional environments, which frequently trigger and exacerbate many common symptoms. Confinement is not therapeutic. Jails and Prisons are not hospitals, triage or respite centers, or by their very nature, therapeutic environments. Comprehensive and individualized care is not provided to detained BDS clients as it would be in the community at a hospital, mental health clinic, or treatment program, and our clients with serious mental illness or other acute health needs suffer tremendously as a result. Psychotropic medication has become the default treatment method for mental illness in correctional facilities. However, medication management without the supplement of supportive mental health services (i.e. individual or group therapies, case management services, supportive housing) that exist in the community is not medically sufficient care. This is a phenomenon experienced across the country, but it is especially true here in the New York City jails, including Rikers Island. In the absence of adequate care and support, and in extremely harsh environments like prisons and jails, people with mental illness often fall into a devastating cycle decompensation, rules infractions, and punitive segregation.

With intakes of 80,000 each year, City jails could provide an opportunity to connect people, many suffering from poor health, with care. Unfortunately, here in New York City, people often leave City jails in worse shape than when they arrived. This should not be surprising because jails are not equipped, either in staffing or infrastructure, to meet the various health needs of the population. Indeed, incarceration is inherently pathogenic; it confers illness and, with tragic frequency, it kills people.

While many of the fundamental problems in the provision of health care exist throughout the correctional system, I will focus my comments on New York City jails and holding cells, as we predominately work with clients in pre-trial detention.

Prior to Arrest

For our mental health clients, the disruption of treatment and the path to possible decompensation begins at the moment police respond to the scene. This is why we believe that diversion is an essential starting point for reforms. We believe that the greatest good can be achieved by deciding not to arrest individuals with mental illness if there is another safe and viable alternative, particularly in low level offenses. In New York City today, when a 911 call comes in requesting emergency assistance for what is commonly referred to as “Emotionally Disturbed Person,” or EDP, the options of the first responder teams, which are typically comprised entirely of police, are very limited. These first response teams should be expanded to include social workers and/or mental health clinicians trained to conduct critical assessments during moments of crisis. Additionally, the police should be trained to interact with potentially mentally ill people and their families in a manner that de-escalates the situation. Linkages to treatment and hospitals or other service referrals should be the first steps before a consideration of further involvement by the criminal justice system. The recommendations of the Mayor’s Task Force on Behavioral Health are promising, but implementation will be challenging if we continue to rely solely on the police to respond to community needs.

Many police calls come from family members or loved ones seeking crisis mental health services, referrals and assistance, not a criminal justice response. Discretion has been eliminated from the police in many matters, especially those that can be categorized as “domestic violence.” Even if the police believe the mentally ill person should go to the hospital rather than jail, they are not permitted to do anything other than arrest the person. This is discouraging because many families call the police in the hopes of receiving help and feel betrayed by the arrest of their loved one. We believe this dynamic contributes to the dangerous escalation of some situations and adds to the tense relations between the police and the communities served by our office. By giving the police more options and more discretion regarding the response to people with mental health issues, especially on lower-level offenses, the moment of contact can be an opportunity to begin treatment rather than the start of a slide backwards.

Around the country there are various models, including multi-disciplinary “Crisis Intervention Teams,” (CIT) which create better outcomes during the initial contact with the criminal justice system for people with mental illness. This model includes the possibility of going to a hospital rather than being arrested, diverting the person from the criminal justice system entirely. We are encouraged by commitments by the Mayor to fund a CIT pilot program in Manhattan, and hope the program will be implemented broadly in the near future. There is a strong need for such a program in other boroughs, particularly in the communities from which our clients come. If people are identified as having a mental illness, calling in community-based services, not the legal system, is the best first option whenever possible. The impact of incarceration on public health cannot be overstated; being locked up negatively effects family and community ties, employment, housing options, treatment access, and the experience of incarceration often leads to new trauma.

From Arrest to Arraignment

Generally, when our clients are arrested, they spend about 20 hours at the precinct and at central booking before they are arraigned by the court. During this time, most of our clients have not received any of the medication they were taking in the community. Many clients with health needs are treated dismissively by police officers. Only those people with what are deemed critical health care needs typically have a chance to gain access to hospital care. In an attempt to gain more information about this process, our office has filed a Freedom of Information Act request to both the FDNY (which provides Emergency Medical Services screening at bookings) and the NYPD more than seven months ago with no response. In October 2014, a client of ours, Jasmine Lawrence, 22, died in police custody because of a failure to provide medical care.

Our experience is that police officers are generally unwilling to give any of our clients any medication while they are in custody immediately after arrest. There are hundreds of stories about family members at the precinct begging the officers to give their loved one blood pressure or asthma medicine to get them through the next 24 hours with little success. Last year, an elderly female client of ours died right after her arraignment because she was not provided with diabetes medicine during her stay in custody even though her sister came to the precinct with the insulin. In 2013, Kyam Livingston died in Brooklyn Central Bookings after being denied needed medical care by officers who watched her perish rather than call an ambulance. Ms. Livingston

was told by officers at Central Booking that they would intentionally delay her arraignment, and that they would “lose her papers” if she continued to make requests for a doctor.

Like Ms. Livingston, our clients who ask to see a doctor or go to the hospital are discouraged and even threatened by officers, resulting in few seeking treatment during this time. These practices are unacceptable on their face and result in serious harm (and even death) on a shockingly regular basis. For people with a mental illness, this unwillingness to meet the medical needs of arrested people results in significant decompensation. We recommend that the Committees review local police department policies and practices at the time of arrest and until the arresting officer turns over custody of the individual. Certainly, any person who needs medication should be able to receive this medical treatment regardless of whether they have been arrested.

Issues such as homelessness, substance abuse, and serious mental health issues can leave this demographic more likely to have bail set and thus be incarcerated due to poverty. It is very common for clients who have been identified as suffering from serious mental illness at arraignment who are charged with low-level, non-violent offenses to be detained and sent to City jails. The State should analyze and review the information regarding why people are in custody prior to conviction and consider significant changes to the current practices and policies surrounding the application of bail. There are many suggestions we can make about bail for misdemeanor cases, but some that would have the biggest impact on our mental health clients are (1) voluntary supervised release as an alternative to bail; (2) regular review of bail by the court with a presumption that bail should be lowered or eliminated if a person cannot post that bail; (3) presumptive release for a person with a mental illness if they are going to a treatment facility or a valid treatment plan has been proposed to the court.

Inside the Jails

Our social workers and jail services staff are able to advocate for our clients who are not receiving adequate care under the supervision of DOHMH in Rikers, but not every incarcerated person has this kind of support. The result is the now frequent horror stories in the media about health care neglect. Our social work team makes hundreds of referrals to DOHMH personnel each year, after being alerted by clients of serious medical needs. These include people whose methadone treatment is interrupted causing painful withdrawals, interruptions to medication regimens due to facility transfers, failure by medical staff to take seriously suicidal ideations and depression, medical staff at Rikers Island informing clients that they need treatment at a hospital and not providing for that transportation, and long delays or lapses in filling orders for glasses or hearing aids. Most of our female clients are concerned about the poor quality of OB/GYN care. While referrals to DOHMH typically provoke a speedy response, on several occasions in the past year alone we have had to make four or more contacts with DOHMH to secure treatment for a serious condition such as asthma, seizures or diabetes. Pressure by outside advocates to ensure basic healthcare should not be the procedure relied upon by medical staff to meet the needs of their patients, many of whom lack any supportive structure on the outside.

You might have read about the 2013 case of Bradley Ballard, who died after being left alone in punitive segregation for seven days without medicine for his diabetes or mental illness. A review of the death of Bradley Ballard by the New York State Commission of Correction stated:

“The medical and mental health care provided to Ballard by NYC DOC’s contracted medical provider, Corizon, Inc. during Ballard’s course of incarceration, was so incompetent and inadequate as to shock the conscience as was his care, custody and safekeeping by [New York City Department of Correction (DOC)] uniformed staff, lapses that violated NYS Correction Law and were directly implicated in his death.”

During Ballard’s final two days of life, there were at least 46 separate violations of state law that played a role in his death, according to the report. At least ten medical workers were listed in the report as having violated the law, and many correction officers were implicated as well, though any identifiers of this group were redacted. Correction officers that violated state law and contributed to Ballard’s death ranged in rank from officer up through Captain and Assistant Deputy Warden. The Commission implied that DOHMH was less than forthright in its explanation of its patient’s death. Quannell Offley died just weeks after Ballard in the same jail facility.

You might also be familiar with the case of Jerome Murdough, a homeless, mentally ill U.S. Marine Corps Veteran, who died in DOC custody in 2014 after being neglected in a mental observation unit at Rikers Island. He had been arrested for trespassing after attempting to sleep in the stairwell of a public housing building. His bail was set at \$2,500, an amount too high for him to pay. After approximately two weeks in Rikers Island, he died as a result of a toxic combination of medication given him while in DOC custody, cell temperatures that exceeded 103 degrees and a lack of attention from medical and mental health staff during his incarceration. Thousands of such people pass through Rikers Island without any thought to their individual health or safety nor any broader policies or principles that are proportionate to the presumed innocence and the condition of the individual.

Contrary to the reports of DOHMH, many of our clients report that they do not promptly receive a mental health evaluation or medications once committed to City custody. In addition, there is not an appropriate range of mental health care options for people who are noticed to have needs by medical staff. Medication remains the only “treatment” for nearly all of our clients in City jails irrespective of mental health needs that require other interventions. Our clients report that they rarely receive the opportunity for group or individualized therapy, dual-diagnosis therapy, or treatment from specialists in trauma, posttraumatic stress, sexual violence, adolescence, family or other discrete fields, even though such modalities are considered part of, not supplemental to, medically appropriate treatment. **One client summed it up like this recently: “Once a month someone renews my pills and asks me if I want to kill myself.”** There is widespread indifference by mental health professionals working in City jails of the traumatic effects that incarceration itself is having on their patients.

There are inherent problems with the provision of medication, as well. Medication should only be prescribed by a psychiatrist who spends adequate time with a patient. In our experience, this is not the typical procedure at Rikers Island. Not only are there not enough psychiatrists, the quality

of doctors who work there is low. They are limited in what they will prescribe, keeping to low-cost medications that are not necessarily what the client was previously taking on the outside and which may not be medically appropriate. When they do get medication, most clients report disruption from their regimen at some point during their incarceration in city custody. This occurs for a variety of reasons, starting with delay or denial in the first instance. Once on medication, clients report failure by staff to renew medications, difficulty getting medications due to escort restrictions or facility lockdowns, transfer between facilities, and housing restrictions. Many medications must be given consistently to work. Any break can have drastic consequences, such as rapid decompensation, which then results in the cycle of punitive segregation. Pain medication is frequently withheld by medical staff who accuse our clients of drug-seeking rather than having a reasonable health need.

Confidential treatment space is extremely limited in DOC facilities; many mental health visits are performed at cell-front or in dorms within earshot of other patients or DOC staff. In punitive segregation units these interviews are done through a small slot in a closed cell door through which a clinician and patient must actually yell to each other in order to communicate. Information significant to mental health treatment is at times withheld by our clients as a means of self-protection. Something as routine as discussing the side-effects of a particular medication, such as drowsiness, can create a safety risk if overheard, and our clients are determined by his peers or corrections officers to be vulnerable and potentially unable to defend themselves while in jail.

DOC personnel are often part of the failure to deliver quality care. A lack of escorts is frequently given as an excuse for why an incarcerated individual might not get timely care. There is widespread brutality in the jails. Guards frequently assault and otherwise attack our clients, and then threaten them to “hold it down,” which means not seeking medical attention. People have been beaten by correction officers following suicide attempts. In at least one recent case, medical staff did not properly document or treat a person who had had his teeth knocked out, in an apparent attempt to downplay or obfuscate the conditions of brutality.

It is clear that the amount of money being spent to essentially exacerbate the problems of sick, poor New Yorkers should be re-directed into community treatment options to address the health needs of these very same people. While the health care provided in correctional facilities is in dire need of substantial improvement, New York’s prisons and jails will never be appropriate settings for comprehensive care. The current practice of utilizing them as mental health “treatment” facilities, at an astronomical price, is particularly egregious and counterproductive. It has never been morally justifiable. Furthermore, New York’s county and municipal governments must end the incarceration of people who have committed nothing more than nuisance offenses. There is no doubt that this type of charge is disproportionately used against people with mental illness who are unable to cope in our society and are trying to do what they can to survive—hurting no one in the process. Neither severity of charge, nor financial resources has proven to be at all reliable predictors of public safety or return to court rate, yet those are the factors considered in bail hearings. I urge the State Legislature to prioritize the reduction of the number of people in correctional custody at every level and invest in community-based high-quality mental health care, housing, education and targeted preventative, diversion and reentry services.

Curtailed Access to Justice

There are many ways in which pre-trial incarceration damages a defendant's case and impairs her access to justice. According to numerous analyses included in a report by the VERA Institute of Justice, defendants detained before trial were far more likely to accept harsher plea deals and receive prison or jail sentences. Of all those who receive prison and jail sentences, those who were incarcerated pre-trial receive sentences that are, on average, three times longer.³⁴ In discussing issues relating to access to justice in jails, it is critical to remember that the vast majority of those inside are there because bail was set at a level they cannot afford. In other words, they are in jail because they are poor. Comparatively few people are in jail because they are deemed a danger to public safety. The extreme overreliance on pre-trial incarceration is one of the reasons that jails and prisons across the United States, including here in New York, are warehouses for the poor.

Pressure to Plea

The Bureau of Justice Assistance, a division of the U.S. Department of Justice, has found that “[t]hose who are taken into custody are more likely to accept a plea and are less likely to have their charges dropped.”³⁵ Indeed, there is ample research documenting that finding, and our experience at BDS affirms it. It should be obvious that anybody who has experienced even a day in Rikers, and who faces the prospect of weeks, months or years inside, is far more likely to accept a plea that involves an admission of guilt than somebody who is free until their trial, regardless of whether or not they are in fact guilty. District Attorneys consistently exploit this leverage, which amounts to selective prosecution. This appalling practice helps to explain why many of the “repeat customers” in Rikers have shockingly long criminal histories, some with dozens of misdemeanors. They get caught up in the dragnet of aggressive policing, often based on illegal searches, and, because they cannot afford bail, get thrown in jail until they plead guilty to a misdemeanor in exchange for an offer of time served. It is also a factor in the persistence of mass incarceration. One of our clients was in arraignment on charge of possession when the ADA assigned to his case said on the record that if he were out, he would have been offered a plea bargain of time served. Since he was still in, the ADA said, the offer was a six months sentence. In other words, our client's punishment was determined not by his alleged crime, or whether he was guilty, but by his understandable desire to get out of Rikers as soon as possible, regardless of the future consequences. Yet, even as mass incarceration and the collateral consequences of criminal records are regularly decried by policymakers, New York has failed to change bail policies to rectify this well-documented miscarriage of justice.

Lack of Confidential Facility Space for Attorney-Client Conversations

Prison and jails generally lack appropriate facility space for incarcerated defendants to have confidential conversations with their attorneys. Often, this is also true of the lockup spaces in the courthouses in which arraignments take place. Whereas clients who are free can meet with BDS attorneys in our private interview rooms, those who are incarcerated generally must converse

³⁴ Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America* (VERA Inst. of Justice 2015).

³⁵ Lindsey Devers, Ph.D., *Plea and Charge Bargaining* (U.S. Bureau of Justice Assistance 2011).

through recorded telephone calls or video-conferences with corrections officers in earshot. If the attorney has time to make the hour-long journey to Rikers, wait for the client to be produced, have the meeting, and make the hour-long journey back to Downtown Brooklyn, they can meet in the counsel visit room, but the vast majority of conversations take place through video-conferencing or on the phone.

The net effect of the above mentioned and other problems of pre-trial incarceration is to make the defendant unable to participate in her own defense. Every actor in criminal court is aware of the imbalance of power created by this dynamic. The prosecution exploits it, the defense must navigate it, and the client grows hopeless, having been denied a fair trial. The experience is extremely disempowering for our clients, which is the opposite of what the system should do to help those who have transgressed change their lives. The most impactful approach to this problem, beyond arresting fewer people, would be to reform bail proceedings so that people are not incarcerated simply because they are poor.

THE NEXUS BETWEEN MENTAL ILLNESS AND CRIMINAL JUSTICE INVOLVEMENT

Recommendations

- 1.) End the incarceration of people with mental illness.*
- 2.) Create and fund community-based supportive housing networks and other programming to provide them with the best possible treatment and care.*
- 3.) Expand mental health court capacity and remove barriers to due process, such as the requirement that defendants plead guilty to be diverted.*

BDS represents thousands of clients who have a diagnosed mental illness. As such, we have an intimate perspective into the tragic nexus between unmet mental health needs and involvement in the criminal justice system.

Our Mental Health Team has two specialized criminal defense attorneys, as well as a dedicated mental health social worker and other specialized staff to address these clients' unique needs, as well as those of their families. The specialized attorneys represent mentally ill clients at competency evaluations, hearings and other court appearances during the pendency of their case. It is part of our mission to insure that these clients not only receive a fair and just disposition but also the best care and treatment possible. Research has proven that clients with a mental illness who are offered an opportunity to participate in mental health courts are significantly less likely to get re-arrested than similar offenders with mental illness who experience traditional court processing. BDS played an important role in the development and launch of the Brooklyn Mental Health Court more than 10 years ago. This Court serves as the model for treatment courts all over the world.

In addition to our work in the criminal court system, our Family Defense Practice represents about 2000 families at all times, of which half are at risk of losing their children solely because of their mental illness. Our team of licensed social workers and a full time Jail Services Coordinator provide logistical support for our clients during their legal cases and provide supportive counseling as well, which is particularly critical for clients with mental health issues who are spending time incarcerated. These team members communicate with DOHMH staff persons to assist in advocating for, accessing, and coordinating mental health treatment for detained BDS clients with serious mental illness and transitioning clients to the community upon discharge. Similar to the rest of our caseload, our mental health cases arise from a wide range of alleged criminal offenses ranging from trespass and drug possession to felony matters. **We find that people who have a mental illness are unfortunately quite vulnerable to arrest and typically receive significantly worse outcomes at every step of the criminal legal process than other clients.** In one recent case, a judge said on the record that he was setting bail, effectively ensuring pre-trial incarceration, because our client was mentally ill.

The Swift Decompensation of People with Mental Illness in the System

Over the past decade there has been a dramatic increase in the number of people held in City jails who have a mental health diagnosis. Today this demographic represents some 40 percent of the overall population at Rikers Island. Often lacking the community ties to support a successful bail application, mentally ill New Yorkers are disproportionately pulled into pre-trial detention and held in City jails during the processing of their cases. While each of our clients arrives with a unique history and circumstances, different strengths and challenges, most of our incarcerated mental health clients share particular patterns of decompensation while in the custody of the DOC. These clients typically have a hard time adjusting to the distressing conditions of jail and struggle to follow the seemingly arbitrary and inconsistent rules that govern their behavior while they are locked up. Even if they have been receiving good care prior to incarceration, medication is the sole option for treatment once they are in jail. Clients suffer many breaks in their treatment, especially abrupt changes in the medication they were on and many stops and starts with medication while in jail.

It is very common for our clients who are not getting the full breadth of treatment they need to decompensate very quickly. Many of our clients act out, disregard the orders of Correction Officers or commit minor jail infractions like failing to bath or not maintaining a tidy cell. Such clients can be frustrating to other inmates and are likely to be victimized while in jail. Clients who are expressing symptoms of mental illness may appear to be disobeying orders or even be perceived as aggressive by DOC staff. They are disproportionately placed in solitary confinement, which by its nature is guaranteed to exacerbate their mental health symptoms. They decompensate further, sometimes attempting suicide and always losing ground in the lifelong battle they wage with their illness. This lost ground may never be recovered as additional symptoms, diagnoses, physical injuries and mental trauma from the experience leave their indelible mark on these clients. When their case is resolved, they are, for all intents and purposes, cast back out into the community—our neighborhoods—less able to manage their illness on their own, further disconnected from family and friends and without knowledge of how to continue their medication regimen or where to go should they want assistance. Often they were arrested

for a minor crime and the end result is to leave them much worse off than they were before their arrest—at a tremendous financial cost to taxpayers.

Diversion and Alternatives to Incarceration

As an original stakeholder in Brooklyn Mental Health Court, BDS supports the mental health court model, which affords defendants an opportunity to participate in community-based mental health treatment, improves their overall quality of life and seeks to avoid the collateral consequences of felony and criminal convictions. BDS has seen some positive results with the alternatives available through the mental health court and Crisis Intervention Teams. Under the current paradigm, mental health court provides dramatically improved criminal justice outcomes for many of our clients, but in order for our clients to be accepted into the program they must be willing to plead guilty to the charges before them. For clients who are innocent or who do not recall the event, this is not always a fair request. It also forces people to waive their legal rights, such as to contest the legitimacy of the arrest. Another problem is the long wait for services. There is an extreme shortage of treatment beds in most facilities our clients need to go to from jail. This causes longer stays in jail facilities than our other clients face. Many clients give up on treatment solely because they have to wait in jail for a treatment bed. Also, for these clients, the delays often result in their conditions deteriorating. We have lost many opportunities for placement because clients previously accepted into a program subsequently become too symptomatic due to their extended stays in jail.

Jail-based reforms to reduce the census in mental observation dorms, more frequent reevaluation of housing needs for mentally ill people, reducing obstacles to proper and continuous treatment such as escort rules would all bring significant improvements to local jails. Retraining of DOC staff so they can maintain safe, humane living spaces for people in their care and can provide mental health first aid and employ de-escalation techniques rather than brute force during conflicts would also be welcomed. However, again, the primary driver of reform must be restricting the use of correctional facilities to a measure of last resort. Healthcare in City jails often complicate mental health court applications. A typical prerequisite for consideration for a mental health court disposition is compliance with medications while incarcerated. However, due to the widespread failures of Corizon to ensure consistent medical care delivery, many of our clients miss appointments and doses and, although they are not at fault, they are penalized by the court.

The following story comes from a BDS attorney:

Robert, a person living with schizophrenia, was arrested on a non-violent felony. He reported experiencing auditory and visual hallucinations and a competency examination was ordered shortly after his arraignment. He was subsequently found unfit to proceed with his court case. He was ordered committed pursuant to C.P.L. §730.50. The delay for transfer from New York City DOC to the forensic psychiatric center for evaluation took 6 weeks. Robert remained at the forensic psychiatric center for approximately two months. Upon his return to Rikers Island, Robert awaited approval for an alternative to incarceration offer from the prosecutor. By the time his case had been approved for a mental health program offer Robert had decompensated mentally and been the victim of serious assaults while at Rikers Island. His mental health

deteriorated to the point that he had to be hospitalized at Bellevue Hospital Prison Ward. This destabilization prevented Robert’s inclusion in mental health court.

While enhanced mental health programming in correctional facilities could benefit many New Yorkers, the fact is that prison and jails are not therapeutic environments and, by their nature, confer and exacerbate mental illness.

CRIMINAL HISTORIES, ARREST RECORDS, AND SEALING

Recommendations

- 1.) *Enact a robust sealing law that:*
 - i. *Automatically seals all misdemeanor convictions and most felonies, with waiting periods that are commensurate with individual records and circumstances;*
 - ii. *Establishes that the burden of proving the failure of our criminal justice system to rehabilitate a person rests with the government, as represented by the local District Attorney;*
 - iii. *Raises the age of Youthful Offender status to 21, sealing all offenses under this adjudication, except those governed by the Sex Offender Registration Act; and*
 - iv. *Provides that those under 25 at the time of an offense may have it sealed after 30 days for misdemeanors and 2 years for most felonies, beginning at the time of sentencing.*
- 2.) *Enact legislation to “Ban the Box,” ending employment and housing discrimination against those seeking to reintegrate in society.*

Background

Some of the most debilitating collateral consequences of contact with the criminal justice system could be substantively mitigated through a robust sealing statute and effective oversight of its implementation. “Sealing” generally means that a case is removed from the criminal records available to most employers and the general public, though law enforcement and certain employers with vulnerable clients maintain unencumbered access. “Expungement” means a record is completely erased. New York State does not expunge any criminal records. **7.1 million New Yorkers, or 36%, have criminal records.** This figure is significantly higher than the national rate—28.8% of the total U.S. adult population—and exemplifies the reach of the dragnet of our criminal justice system.³⁶ Among the many problems inherent to such a large and deeply consequential system, 2.1 million arrest records in New York contain errors, including hundreds

³⁶Lauren-Brooke Eisen, Nicole Fortier & Inimai Chettiar, Federal Prosecution for the 21st Century (Brennan Ctr. for Justice 2014).

of thousands that do not include case dispositions, according to an analysis by the Legal Action Center.

Existing New York State Law

Under existing New York State law, the vast majority of criminal offenses, no matter how trivial, **cannot** be sealed. With certain exceptions, favorable dispositions, such as dismissals and Adjournments in Contemplation of Dismissal (ACD), and non-criminal violations are sealed. Since 1991, these records are supposed to be sealed automatically, though it is not clear that whether this is always occurring, as online for-profit databases have proliferated without any meaningful oversight. Arrests ending with either Juvenile Delinquent (JD) or Youthful Offender (YO) adjudications can be sealed, with regard to certain felonies. However, cases involving Juvenile Offenders—those age 13 through 15 who are convicted of serious crimes in the adult criminal court system—are not sealed unless they meet the narrow criteria established for adults, as discussed above.

Collateral Consequences

If the purpose of a publicly accessible criminal history and arrest record is to enhance public safety by informing employers, landlords, universities and others about criminal justice-involved applicants, studies prove this policy has the opposite effect. Indeed, there is an abundance of research demonstrating the adverse impacts of criminal records on individuals, families, and communities, including as it relates to public safety. Portions of this research were highlighted in the final report of the Governor's Commission on Youth, Public Safety and Justice. The U.S. Equal Employment Opportunity Commission reports that 92% of employers subject job candidates to criminal background checks. A nationwide survey found that 62% of colleges use criminal justice information in the admissions process. Even if an ex-offender is accepted to a college, she faces exceptional barriers to pay for it, as many public and private loans, scholarships, and grants are not available to persons with criminal convictions.³⁷ Likewise, even if a person with a criminal record obtains a job, she can expect to earn up to 30% less than other employees with comparable skills and experience.³⁸ Even within this hiring bias, stark racial disparities exist, as white Americans with criminal records face a 50 percent reduction in employment opportunities and black Americans with criminal records face a 64 percent reduction in employment opportunities. A person with a criminal record is ineligible for unemployment insurance, worker's comp, veteran's annuities, and other crucial components of our social safety net.³⁹

This loss of opportunities for meaningful, productive involvement in society harms all of us. Ex-offenders who are unemployed are 3 to 5 times more likely to reoffend than those with jobs. Inability to access entitlements likely also increases recidivism. Thus, facilitating the successful

³⁷The Governor's Comm'n on Youth, Pub. Safety & Justice, Recommendations for Juvenile Justice Reform in New York State (2015).

³⁸ Harry Holzer, Steven Raphael & Michael A. Stoll, Employment Barriers Facing Ex-Offenders (Urban Inst. 2003).

³⁹The Governor's Comm'n on Youth, Pub. Safety & Justice, Recommendations for Juvenile Justice Reform in New York State (2015).

re-entry of formerly incarcerated people is a matter of public safety. **An individual may be unemployed and ineligible for food stamps, but she still has to eat.**

Re-entry is also a matter of fiscal responsibility. The annual cost of custody for each person in New York City jails is \$167,731, according to the New York City Independent Budget Office. The annual cost of incarceration in state prisons is \$60,000 per inmate.⁴⁰ These figures exclude the costs of lost productivity, adverse health impacts, shelter stays related to adverse housing impacts, foster care, and, notably, the increased likelihood of reincarceration. Requiring a third of all New Yorkers to disclose past transgressions, including those decades old, without any context destabilizes marginalized communities with chronic unemployment and missed educational opportunities. The effects of ripple throughout New York State's economy.

MANDATORY MINIMUM SENTENCES

Recommendations

1.) Repeal all mandatory minimum sentences.

The New York State Legislature deserves praise for its 2009 reform of the Rockefeller Drug Laws. Among the many provisions of the reform legislation were the elimination of mandatory prison sentences for some drug offenses, and the reduction of minimum sentences for others. The Criminal Procedure Law now explicitly permits judicial discretion to offer drug court alternatives to certain non-violent offenders. As expected, the number of felony drug commitments to prison have fallen dramatically—down 40% since 2008, the year before the reforms were enacted.⁴¹ Crime rates have continued to fall, and nobody is arguing for a return to the old regime. The fact is that longer sentences have never been proven to deter most crimes.

One key way to reduce the prison population in New York State is repealing other mandatory minimum sentences. These statutes, perhaps enacted with good intentions to improve public safety, tie the hands of judges without any evidence of positive impacts on crime rates or recidivism. They represent an intrusion by one branch of government into the jurisdiction of another. Moreover, they demonstrate a failure to learn from the errors of the War on Drugs. Just as with drug use and drug trafficking, the reasons people commit the sorts of offenses for which there are minimum sentencing restrictions cannot—and will not—be resolved with more incarceration.

One of the most interesting—and tragic—examples of this misguided approach is Robbery in the 2nd Degree, which is classified as a C Violent felony. The most common cases with this charge

⁴⁰ The Price of Prisons (VERA Inst. of Justice 2012).

⁴¹ Leslie Kellam & Leigh Bates, 2009 Drug Law Changes - 2014 Update (5th ed. NYS Div. of Criminal Justice Services 2014).

that we see involve adolescents accused of robbing smartphones. Termed “Apple picking,” this crime is so common that, in 2013, New York State Attorney General Eric Schneiderman launched a campaign to “Secure our Smartphones” (SOS).⁴² The SOS campaign gathered national momentum and, heeding the call of the growing coalition, smartphone manufacturers agreed to include a remote kill switch in their new devices to make them far less appealing as items for theft or robbery. **Notably, the AG did not follow the age-old paradigm in politics of pursuing an expansion of criminal penalties such as longer sentences; instead, he went after the multinational corporations to achieve a smart change that has actually reduced crime.** According to the AG, iPhone thefts decreased 25% in New York City, and 40% in San Francisco, after the kill switch was implemented.⁴³ Yet mandatory minimum sentences already exist for this offense, and defendants get saddled with a minimum of 3.5 year prison terms every year without any opportunity to prove extenuating circumstances. At the very least, the minimum is used as leverage by the prosecution. Our criminal defense attorneys watch in horror as a parade of poor adolescents of color are marched from the few neighborhoods in which criminal justice involvement is centered into prison for sentences that will permanently damage their chance at becoming successful adults. They might steal an iPhone to feed their younger siblings and receive a sentence matching that of a crime committed with malice, with no consideration for developmental disabilities, mental illness, and histories of trauma, abuse, and domestic violence.

Anybody with an ounce of faith in the capacity of our criminal justice system to achieve a fair result must afford judges and juries discretion in sentencing those whose crimes are rooted in challenging circumstances. New York must repeal all mandatory minimum sentences and allow the judicial branch to function independently.

CIVIL FORFEITURE

Recommendations

I.) Enact legislation that:

- i. *Ends the perverse profit incentive by requiring that all proceeds from civil forfeiture be deposited in the state or local general fund;*
- ii. *Prohibits civil forfeiture actions prior to the disposition of a criminal case;*
- iii. *Raises the standard of proof in any such action to that of criminal culpability;*
- iv. *Guarantees property owners’ right to counsel;*
- v. *Directs the Division of Criminal Justice Services to establish concrete guidelines to ensure that innocent defendants are not financing local law*

⁴² Pennsylvania Elected Officials Join International "Secure Our Smartphones" Initiative (Office of NYS Attorney Gen. Eric Schneiderman 2013).

⁴³ A.G. Schneiderman, London Mayor Johnson and D.A. Gascón Welcome Dramatic, Global Drop in Smartphone Thefts Following Introduction of Kill Switch (Office of NYS Attorney Gen. Eric Schneiderman 2015).

- enforcement agencies, with strict timelines to ensure that law enforcement agencies do not sit on property indefinitely to coerce a settlement; and*
- vi. *Establishes an affirmative obligation for the ADA to provide the written release necessary for the return of a defendant's property when a criminal matter ends in either a dismissal or an Adjournment in Contemplation of Dismissal (ACD).*

Background

In 2014, the City of New York reported \$5.6 million dollars in revenue from asset forfeiture, or “civil forfeiture,” initiated by the New York Police Department (NYPD).⁴⁴ This is doubtlessly a very lucrative source of income for the NYPD and New York City. However, this procedure not only encourages “policing-for-profit” and degrades the public’s trust in the Police, but more importantly it disproportionately harms impoverished communities. Indeed, while there have been a few high-profile civil forfeiture cases involving big banks in recent years, the practice mostly ensnares those who come into the most frequent contact with law enforcement, i.e. poor people of color.

The forfeiture action process is regulated under New York State’s Civil Practice Law and Rules §1311.⁴⁵ It was allegedly designed to “take the profit out of crime”⁴⁶ and cripple large-scale criminal enterprises by allowing the city to recover property which constitutes the “proceeds of a crime” or that is an “instrumentality of a crime.” Regardless of the underlying purpose, the statute explicitly provides authority for civil forfeiture actions to be commenced against criminal defendants as well as those not charged with a crime. As a result, the NYPD often seeks forfeiture even where the District Attorney has declined to bring charges. The language in the statute does not require that a criminal court determine that a crime has occurred; it instead permits the city to use the much lower preponderance of the evidence standard to acquire property.

Items that are most commonly seized by the NYPD include: cash, motor vehicles, computers, and smartphones.

Seizure and Forfeiture in Practice

In practice, as soon as property has been seized, the NYPD civil forfeiture unit will inform the property owner that they have filed or soon will file a forfeiture action in state supreme court. They typically do not wait until a criminal conviction has resulted from the underlying charges. One repercussion of this practice is that criminal defendants are often unable to testify in the related civil forfeiture proceeding, as any testimony can be used against them in a criminal proceeding. A refusal to testify can lead to a negative inference against the defendant property owner. This puts a defendant in the dangerous position of either exercising their right to remain

⁴⁴ NOVEMBER 2014 FINANCIAL PLAN - Revenue 2015 -2018 (Office of Mgmt. & Budget 2014).

⁴⁵ N.Y. Civil Practice Law and Rules §1311 (McKinney 2010)

⁴⁶ Kelly, James F. (2012) "CPLR 13-A: A District Attorney May Attach the Personal Assets of a Defendant, Prior to Conviction, Without Establishing that the Attached Assets Are the Proceeds of a Crime," St. John's Law Review: Vol. 61: Iss. 1, Article 11.

silent and potentially losing their property or testifying in the civil case and allowing the District Attorney to use their statements against them in the criminal case.

It is important to note that innocence is no guarantee that property will be returned to its owner. An organization that relies on forfeiture proceeds has little incentive to return property for free. We often see cases that result in dismissal of all criminal charges or in a mere non-criminal violation where the NYPD still pursues forfeiture unless the client will pay a settlement fee of anywhere between \$500 and \$2500. In addition, many clients fail to respond to a civil forfeiture summons or do not understand that they must affirmatively demand release of the property. In such scenarios, the property will be marked abandoned and, if it is not cash, liquidated.

Where forfeiture is not related to an ongoing criminal matter, it can be extremely difficult for the property owner to obtain information about why their property is being held or what accusations are being made due to the lack of discovery from the criminal case. Instead, they are forced to pay and settle the case or wait until the civil forfeiture lawsuit has been commenced to be informed of why the NYPD has been retaining their property. Even where they are offering settlement, the NYPD is under no obligation to release information about the underlying allegations, their evidence, or the reasons for seeking forfeiture. This can make it challenging for an attorney to advise clients in these situations and extremely difficult for an innocent owner to decide what to do. In practice, most defendants, even those claiming innocence, will agree to pay whatever they can afford if a settlement is offered.

Experiences of BDS Clients

Example #1 – Property had no Nexus to Alleged Charges

The first example involves the seizure of a car that was not in use, and not even in our client's possession, at the time of arrest. Our client was a passenger in a friend's car when it was stopped because an officer alleged the driver had two earpieces in his ears while driving. The stop resulted in a search and our client was charged with sale and possession of marijuana. That car was seized during the arrest, but the property collection didn't stop there.

At the time of arrest, the NYPD asked if our client owned a car. They took our client's keys and wallet. They drove nearly four miles from the site of arrest to our client's house, knocked on the door, told his younger brother that they had received a phone call that the car was blocking the driveway and seized and held that car, as well. At the station, our client was told that if he did not cooperate with their investigation of the drugs found in the first car, he would not get his own car back.

The criminal case is ongoing and our client has been released on bail, but the car has been retained by the NYPD and the City filed for civil forfeiture even though our client was not charged with anything related to his car. Due process gives our client the right to a "prompt" hearing, called a Krimstock hearing, for the car's return during the pendency of the criminal case and any civil case. Indeed, shortly after his arrest, the NYPD informed our client of this right to a Krimstock hearing and explained they would settle the case for \$1,000 and a release from

liability. Urgently needing his car to commute to and from his job on Long Island but unable to afford the steep settlement fee, our client requested the hearing. However, his hearing was postponed indefinitely when the Assistant District Attorney (ADA) in the criminal case secured an ex parte retention order for the vehicle, effectively ensuring our client could not take advantage of his due process rights to a prompt post-deprivation hearing.

Six weeks after the arrest, the ADA released the car, demonstrating that, in fact, they did not need the car for evidence, and our client was once again permitted to pursue its retrieval with the NYPD. Despite the absence of a criminal case related to the car, the NYPD is continuing its civil forfeiture case unless our client pays to settle and have his car returned. The NYPD has been unwilling to provide any basis for their retention of his car or explain how this car was connected to an arrest that occurred in another car miles away. Our client can now request a new Krimstock hearing, wait up to 20 days for it to be scheduled, and even if successful *still* be facing a civil forfeiture case in state court that may take months to resolve, or he can pay to have his own car returned immediately.

It is not surprising that this client and many others have chosen settlement even when they can't afford it and may be putting themselves in debt to make the required payment.

Example #2 – The Non-Criminal Property Owner

Even when the NYPD and prosecutors agree that no criminal activity occurred and the property should be returned, our client's face the daunting challenge of navigating a system designed to retain property, not to return it.

If criminal charges are dismissed and the DA does not need the property, the owner must still request and receive a written release from the DA before the NYPD will release it. The process of requesting and obtaining this release can take weeks and requires property owners to present themselves in person at criminal court, request the release, and wait to be notified. The assigned DA does not prioritize a case that has ended and has no motivation to assist in the matter. Once the release is acquired, the property owner then has to navigate the NYPD's own procedures.

We were able to help one of our clients get his car back without paying a settlement fee, but even with an acknowledgment from the DA and NYPD that he should get his car it took more than two weeks to physically acquire the car.

This client was extremely anxious to get his car back and relied on to drive a sick relative to regular doctor's appointments, and because of this obligation he had been paying to rent a car while fighting to get back his own. In the end, the client had spent nearly as much on rental cars as it cost him to buy his car in the first place (\$1,000). Despite his frustration with the process, the immense gratitude he had for our office was heartbreaking knowing that he was thanking us for the return of his own property that was taken without justification and returned without compensation.

Example #3 – Cash Forfeiture

These difficulties and delays are not unique to vehicle forfeiture. We see similar problems with cash forfeiture as well.

For example, recently a client was arrested with a co-defendant for possession of marijuana. At the time of arrest our client had her phone and about \$500 cash on her; the co-defendant had no money. When our client was first brought to the precinct, she saw that the phone and cash were vouchered under her name. After our client was offered and accepted an Adjournment in Contemplation of Dismissal (ACD), she began the process of retrieving her phone and cash, only to find that the cash was suddenly vouchered under her co-defendant's name, whose case was still open. Two months later, the ADA on her case has yet to respond to requests to release her phone. As for the cash, because it is no longer in her name she faces an uphill battle to get it returned. An NYPD Sergeant explained that our client has to secure another ADA release in her co-defendant's name, get a notarized letter from the co-defendant relinquishing any claim to the cash, and then make a demand for the cash at the NYPD property clerk window. If she is successful in all this the NYPD will *begin* an investigation to determine if the cash can be released to her.

This example illustrates what can happen outside of formal civil forfeiture proceedings. If our client is unsuccessful in jumping through all these hoops and cannot make a claim for the property within 120 days of the termination of her criminal proceeding, it will be forfeited automatically without the city needing to file for forfeiture. **A very real and perverse incentive thus exists to delay the return of property in such cases.**

Civil Forfeiture as Extortion of the Poor

There is a common misconception that all property seized and forfeited belongs to convicted criminals and that it was used in, or gained through, commission of a crime. The reality is that this process begins at arrest, at a time when the owner is presumed innocent, and that these funds and assets are most often retained without court oversight and without due process.

BDS' Civil Justice Practice works case by case to advocate for justice, but the policing-for-profit industry warrants systemic reform. Even clients who can prove that their property was not used for illegal activity are tempted to settle due to the coercive dynamics and burdensome procedures described in the above examples. It is very difficult to advise a client, even one with a good case, not to pay for an expeditious and guaranteed return of their property. Because settlements are only approved if the client signs a "hold harmless" agreement, preventing any civil lawsuit against the City for abuse of civil forfeiture, there are no realistic avenues to challenge the underlying practices. For our clients, the cost is simply too high. Fighting to protect their rights means suffering the unrecoverable loss of time, wages, missed medical appointments, and lost time with their loved ones. The reality is that only clients that can't afford to settle end up pursuing their right to due process and pushing back against the city's fundamentally unfair policies.

Finally, although the civil forfeiture process begins with initial contact with the criminal justice system, there is no right to counsel in any related civil proceeding. The public defenders that assist in protecting a client's due process rights and ensuring they are innocent until proven

guilty do not have the same mandate with respect to a client's property. BDS is one of only a few comprehensive indigent legal service providers in the State.

It is without question that civil forfeiture is a relied upon source of income for the city and therein lies the danger. There is every incentive for the NYPD to retain property wherever possible. Even where property is returned, the hurdles property owners face in physically retrieving it are daunting, time consuming and often expensive.

The forfeiture statute is being used as just another threat the NYPD can hold over the heads of impoverished communities and the standard practice of extorting money from even innocent owners is clearly outside of the scope of what the original drafters intended.

DISCOVERY REFORM

Recommendations

- 1.) Amend the Criminal Procedure Law (CPL) to require early, complete and automatic discovery in all criminal cases.*
 - i. Repeal CPL §240 and replace it with a new discovery law through passage of S.3877 (Perkins)/A. 663 (Lentol) or similar legislation.*
 - ii. The discovery available to defendants should include additional types of material and information, including: police reports; complete disclosure of evidence and information favorable to the defense; intended exhibits; full disclosure of expert opinion evidence; witnesses' criminal history information; timely notice of potentially suppressible property; search warrant information; and all material and information relevant to a trial or plea.*
 - iii. Information available at arraignment should be turned over immediately, at arraignment.*
 - iv. Ongoing discovery should be turned over to defendants as it becomes available.*
 - v. All evidence and information favorable to the defense—not only that which is deemed “material” by the prosecution—should be disclosed.*

BDS thanks Assembly Codes Committee Chair Joe Lentol for continuing to recognize the need for discovery reform to prevent wrongful convictions and trial by ambush, and realize efficiencies in the criminal justice system. S.3877 (Perkins)/A. 663 (Lentol) would correct a longstanding injustice that has wide-ranging consequences throughout New York State, and I urge the Legislature to pass it immediately.

As you may know, discovery is the compulsory disclosure, by a party to a legal action, of relevant documents and information to other party. Discovery is one of the most critical components of reaching the truth and ensuring justice. Early, complete, automatic disclosure of the evidence collected by the State is vital to both fairness and efficiency in criminal justice.

Delays and discretionary restrictions on disclosure are unacceptable, and serve no truth-seeking function. In Brooklyn, the District Attorney has long been a champion of an “open file” discovery procedure that can serve as a model for a new statewide discovery law and a counterargument to the talking points of opponents of reform. However, across the river in Manhattan, the discovery practice is among the most regressive in the nation.

The need for reform is clear. The importance of broad discovery to those whose freedom and rights may be removed by the government cannot be overstated. People accused of crimes in this state, and the attorneys who represent them, are regularly denied access to such basic materials as arrest reports. This practice cripples their ability to make informed decisions in their cases and dramatically increases the likelihood of sending innocent people to prison. Defense attorneys often meet their indigent clients immediately before arraignment, and do not have access to any of the information that prosecutors have picked through to build their case. This imbalance continues through plea bargain negotiations or trials. It is inexcusable, outdated, and ripe for reform.

Brooklyn: A Case Study

The prosecution’s failure to turn over their file has led to countless wrongful convictions in Kings County, including for many of our clients. These convictions were obtained during a time in which the outdated, inefficient, and unfair discovery regime in place across New York State was used in Brooklyn, as well. Years ago, our counterparts at the Kings County District Attorney’s Office adopted a policy of discovery by stipulation, whereby important case information is exchanged by the parties early and automatically. This practice has significantly reduced wasteful, pro forma motion practice by our attorneys—who are no longer forced to identify, demand, and litigate access to basic case information—and has resulted in much quicker, fairer dispositions for our clients without any negative impact on witness safety.

State-by-State Comparison

According to a report by the New York State Bar Association Task Force on Criminal Discovery, there are robust open discovery rules “in large and small States, States with large rural areas, States with huge urban concentrations, and States, like New York, with a combination of both. Broad discovery is provided to defendants in major cities such as Los Angeles, Chicago, Philadelphia, Miami, Detroit, Boston, Phoenix, Charlotte, Denver, Seattle, San Diego and Newark. New Jersey enacted expedited and liberalized criminal discovery in 1973; Florida did so in 1968. No State that has enacted more open discovery rules has later gone back to impose restrictive ones. Most recently, Texas (2014) and North Carolina (2004) enacted open discovery statutes, and Ohio (2010) made its fairly broad discovery rules even more broad.”⁴⁷ New York State is lagging far behind in this crucial safeguard of justice. New York State’s discovery statute, CPL §240, has not been significantly revised since 1979.

⁴⁷ Final Report of the New York State Bar Association's Task Force on Criminal Discovery (2014).

The Need for Action

There have been many iterations of discovery reform legislation in recent years. BDS is amenable to different approaches, as long as they reach the right end result—early, complete, and automatic discovery—and pass this session. Reform measures must encompass mandatory, immediate, and comprehensive disclosure of discovery materials to enable fully informed and constitutionally effective plea bargaining and trials. Acceptable legislation cannot permit delay or unchecked discretionary restrictions and must acknowledge the defense as a critical, primary component in the process, not an obstacle to be marginalized in seeking convictions at the expense of justice.

CONCLUSION

The hard truths that indigent legal service providers confront do not fade away when we clock out at the end of the day. We wake up every day and go to bed every night thinking about the injustice and the cruelty that our clients endure. We think about their life stories, the tragic circumstances in which they find themselves when we meet them, and what we can do within a highly imperfect system to get the best possible outcomes for them. We think about our clients who suffer from mental illness while trapped in a fluorescent-lit box in the Restrictive Housing Unit, alone with their thoughts and a thin mat on which to sleep away the monotony of 23 hours of daily lock-in, for weeks or months. We think about our adolescent clients who are trapped in a cycle of infractions and solitary confinement, and how our Brooklyn Adolescent Representation Team can work with them to resolve their cases and, if at all possible, reintegrate them into the public education system. We think about the clients who have been raped by Corrections Officers. We think about how all of these clients will do anything, and say anything, to get out of jail—even plead guilty to a crime they did not commit. We think about the devastation wrought by these experiences, and what we can do to support and empower our clients. Ultimately, however, we know the assembly line of arraignments—mostly young men of color followed by young men of color—keeps churning.

It is clear that there is momentum in New York to reform the criminal justice system, and BDS looks forward to continuing to work with policymakers toward that end. I deeply appreciate the commitment from the committees holding this hearing to the well-being of our clients. Every legislator has the ability to turn away from the impulsive criminalization that has characterized politics in this state for decades, and toward improving opportunities for success and civic engagement. I understand this hearing is being held in a time of heightened attention to the tragic fatalities that can occur during interactions between law enforcement and members of the public. We must not let this moment pass without making real and lasting changes to our criminal justice system.

Thank you for your consideration of my comments.