



**BROOKLYN  
DEFENDER  
SERVICES**

**TESTIMONY OF:**

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*BROOKLYN DEFENDER SERVICES***

**Presented before**

**The New York State Assembly Standing Committees on Codes, Health, Governmental  
Operations, and Alcoholism and Drug Abuse**

**Public Hearing on Allowing Adult Use of Marijuana**

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My name is Nila Natarajan and I am a Supervising Attorney in the Family Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy in approximately 30,000 cases in Brooklyn every year. This includes thousands of people arrested for marijuana possession or sale, or fighting deportation, eviction, or a loss of custody or parental rights due to marijuana-related allegations or convictions. I thank the New York State Assembly for this opportunity to testify on the legalization of adult marijuana use.

BDS is proud to support the Drug Policy Alliance's (DPA) StartSMART campaign to legalize and sensibly regulate adult marijuana use and sale across New York State. The immense harms of prohibition and discriminatory enforcement practices, balanced against the opportunity for advances in racial justice and economic empowerment envisioned by this campaign, warrant urgent action by state legislators and the Governor. The Marijuana Regulation and Taxation Act (MRTA), S.3040/A.3506, sponsored by Senator Liz Krueger and Assembly Member Crystal Peoples-Stokes, would create a well-regulated and inclusive marijuana industry, improve public safety, and meaningfully repair some of the damage caused by existing drug laws. We hope that Governor Andrew M. Cuomo's support for legalization, following the study conducted by the New York State Department of Health, encompasses all of the many key components of the

MRTA to ensure meaningful progress on racial and economic justice. In short, these components include:

- Allowing adult marijuana use and ending criminalization;
- Automatically vacating as many marijuana convictions as possible;
- Ending punitive responses to marijuana use or possession by child protective services agencies, absent clear and convincing evidence of unreasonable danger to children;
- Ending adverse housing impacts of marijuana use wherever possible;
- Creating an inclusive industry in which people who have been targeted under marijuana prohibition can use their experience and profit from legalization; and
- Reinvesting marijuana tax revenue in the communities that have been most harmed under prohibition.

As a defense attorney, the most frustrating response from policymakers asked whether they support legalization is: “I’m not there yet.” Every day, approximately dozens of New Yorkers, mostly young men of color, are arrested for low-level marijuana possession, potentially upending their lives and the lives of their families and deepening the inequality in our city. In reality, there is no evidence to support the notion that punitive responses actually decrease marijuana use, if that is the goal. In fact, since legalization, marijuana use by teens has decreased in Colorado.<sup>1</sup> Simply put, there is no justification for the status quo – and no justification to delay reform.

## NEW YORKERS NEED AND WANT URGENT REFORM

There is broad popular support for marijuana legalization. Across the country, a large majority (64%) support full legalization of marijuana; this includes a slim majority of Republicans (51%).<sup>2</sup> A recent Emerson College poll showed two to one support for legalization among New York State residents.<sup>3</sup> Yet more than 800,000 people have been arrested for low-level marijuana possession over the past 20 years. The vast majority were people of color, despite government surveys showing equal or greater use by white people.<sup>4</sup> Untold numbers of people are being detained and deported by ICE, losing their children to foster care, or suffering eviction from subsidized housing, in whole or in part, because of marijuana prohibition. Meanwhile, states with legal marijuana markets are benefiting from more than \$1 billion in new—or newly above-ground—economic activity and hundreds of millions of dollars in taxes and fees every year.<sup>5,6</sup>

<sup>1</sup> Christopher Ingraham, *Following Marijuana Legalization, Teen Drug Use Is Down in Colorado*, WASH. POST, Dec. 11, 2017 at [https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm\\_term=.d81e6a662ea0](https://www.washingtonpost.com/news/wonk/wp/2017/12/11/following-marijuana-legalization-teen-drug-use-is-down-in-colorado/?utm_term=.d81e6a662ea0).

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

<sup>3</sup> Marijuana Policy Project of New York & Drug Policy Alliance, *New Poll Shows 2 to 1 Support for Legal Marijuana Use in New York State* (2017), <http://www.drugpolicy.org/press-release/2017/11/new-poll-shows-2-1-support-legal-marijuana-use-new-york-state>.

<sup>4</sup> Melissa Moore, *Lawmakers Must Legalize Marijuana in New York to Support Racial and Economic Justice*, N.Y. DAILY NEWS, Nov. 27, 2017 at <http://www.nydailynews.com/opinion/lawmakers-legalize-marijuana-new-york-support-justice-article-1.3661162>.

<sup>5</sup> Tom Huddleston, Jr., *Colorado Topped \$1 Billion in Legal Marijuana Sales in 2016*, FORTUNE, Dec. 13, 2016 at <http://fortune.com/2016/12/13/colorado-billion-legal-marijuana-sales/>.

The Governor's public support of legalization has helped to expand momentum and we are hopeful that a comprehensive bill can pass this year.

## **SHARP AND PERSISTENT RACIAL DISPARITIES IN MARIJUANA ENFORCEMENT CONTINUE UNDER MAYOR DE BLASIO**

A report commissioned by the Drug Policy Alliance examining the 60,000 low-level marijuana possession arrests in New York City in the first three years of the de Blasio administration found that 86% involved Black or Latinx people—a racial disparity that has remained roughly constant for decades. This follows deliberate policing strategies targeting both neighborhoods in which people of color are a majority of residents and individual people of color within majority-white neighborhoods. In 2016, the New York Police Department (NYPD) arrested 362 people in West Harlem for this offense, yet only 14 in the Upper East Side, which has more than three and a half times as many residents. Of those 14 arrests, 50% involved Black and Latinx people, despite these groups making up only 10% of residents. Throughout Manhattan, Black people are 13% of the population and 45% of the people arrested for this offense, amounting to ten times the arrest rate for white people. In fact, more Black people were arrested for this offense in Manhattan than white people citywide. Across the East River, in the Mayor's home neighborhood of Park Slope, Black and Latinx people comprise 24% of residents and 73% of those arrested for this offense.<sup>7</sup> In reviewing data from 2017, a reporter found that, when white people were arrested, they were significantly more likely to have their cases dismissed by District Attorneys, and cases involving Black and Latino people were approximately twice as likely to end in a conviction compared to those involving white people.<sup>8</sup> (The Brooklyn District Attorney's office is now declining to prosecute most low-level marijuana possession cases, or dismissing those that come in as Desk Appearance Tickets, but in other boroughs and across the state, prosecutions continue.)

Of course, these disparities extend to arrests for allegations of marijuana sales. Of the 80 people arrested for the lowest-level marijuana sale charge (Criminal Sale of Marijuana in the 5<sup>th</sup> degree) in New York City in 2016, only 1 was white. 94% of those arrested for the more common Criminal Sale of Marijuana in the 4<sup>th</sup> Degree were Black and/or Latinx, despite research showing users typically buy drugs from their peers.<sup>9</sup>

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<sup>6</sup> Aaron Smith, *Colorado Passes a Milestone for Pot Revenue*, CNN MONEY, July 19, 2017 at <http://money.cnn.com/2017/07/19/news/colorado-marijuana-tax-revenue/index.html>.

<sup>7</sup> Harry Levine, *60,000 Jim Crow Marijuana Arrests in Mayor De Blasio's New York* (Drug Policy Alliance & Marijuana Arrest Research Project 2017), [https://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017\\_2.pdf](https://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf).

<sup>8</sup> Brendan Cheney, *For Non-white New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO, May 9, 2017 at <https://www.politico.com/states/new-york/city-hall/story/2017/05/04/racial-disparities-in-marijuana-convictions-in-all-five-boroughs-111807>.

<sup>9</sup> Source: NYS Division of Criminal Justice Services

## **CARVE-OUTS AND MISSED OPPORTUNITIES IN NYC’S NEW ENFORCEMENT POLICY**

Under pressure to address these racial disparities in enforcement, and in recognition of the imminent likelihood of legalization, Mayor de Blasio recently developed a new marijuana enforcement policy with the NYPD to issue criminal summonses in lieu of arrests in certain cases. However, this policy, which took effect on September 1, may actually increase racial disparities. That is because the exceptions generally apply to people who have been previously targeted by the criminal legal system and people without an ID – often largely including people experiencing homelessness and young people. People on probation or parole stand the most to lose from a low-level marijuana arrest, because they can be sent to jail or prison, but the Mayor’s plan leaves them behind. Moreover, the policy fails to end the myriad other harms of marijuana prohibition, including punitive actions by the Administration for Children’s Services (ACS) and the New York City Housing Authority (NYCHA) for simple marijuana use or possession.

In the first six months of 2018, even as total arrests for low-level marijuana possession declined, the racial disparity actually increased, with Black and Latinx people making up 89% of those involved (up from 85% in the corresponding period in 2017). We will continue to closely monitor the data following the implementation of the new policy. We expect that fundamental change to end racially biased marijuana enforcement in all of its forms will require targeted action by Governor Cuomo and the Legislature.

## **THE VIEW FROM KINGS COUNTY CRIMINAL COURT**

Our criminal defense attorneys meet their clients on the brink of crisis, generally within 48 hours of an arrest. The most common cases they handle include allegations of turnstile jumping, possession of a crack pipe, driving on a suspended license, stealing essentials like a bar of soap, trespass (often shelter-seeking) or, despite years of pronouncements by policymakers and prosecutors to the contrary, low-level marijuana possession. The Brooklyn District Attorney’s office received a lot of attention for announcing that it would decline to prosecute most low-level marijuana possession cases in 2014; in reality, the office prosecuted 83% of these cases in 2016. Finally, earlier this year, Brooklyn prosecutors began declining to prosecute the majority of low-level marijuana possession cases and dismissing those that come into court via Desk Appearance Tickets. However, we are now seeing an increase in arrests and prosecution for the possession of so-called vape pens, or electronic smoking devices, as Criminal Possession of a Controlled Substance in the Seventh Degree (CPCS7). This charge is typically reserved for possession of non-marijuana drugs, or drug residue, and is often treated more harshly, even though vaping may create less of a public nuisance than smoking. (Under the Penal Law, concentrated marijuana products used in vape pens can be charged as either CPCS7 or Criminal Possession of Marijuana in the Fifth Degree.)

The gulf between the rhetoric of policymakers and the reality we see in court underscores the need for legislative action. Moreover, the statutory criminalization of marijuana, not just its enforcement, drives discriminatory broken windows policing. The oft-claimed “odor” of marijuana and the alleged observation of a flicked marijuana cigarette are two of the most common pretexts officers use to justify unconstitutional stops and frisks, or turn car stops into full blown searches. Much like allegations of failure to signal, odor of marijuana is notoriously difficult to disprove in court, hence the commonality of its use as a pretext. All that said, simply

ending all arrests and summonses for marijuana spare thousands of New Yorkers the trauma and burden of criminal court involvement, fines, and countless so-called collateral consequences.

Once in court, most low-level marijuana possession cases across New York City resolve with no criminal sentence. This is why court watchers often say “the process is the punishment.” After formally charging people, prosecutors generally do not seem to care about marijuana. However, the absence of a criminal sentence does not mean there is no additional punishment. Beyond the harm that can happen between arrest and arraignment, cases that result in an Adjudgment in Contemplation of Dismissal (ACD), remain open and visible to prospective employers and landlords for six months to a year.<sup>10</sup> Cases that result in non-criminal violations trigger costly court surcharges and erect legal barriers to civil lawsuits for police misconduct. Cases that result in misdemeanor convictions result in even steeper surcharges and often permanent criminal records. Children who are removed from their parents during an arrest, even for short periods of time, must deal with the known trauma of removal, and families bear the burden of mending this harm over many months and years.

Importantly, I can only speak to marijuana cases in Brooklyn; in other parts of the state, where jail populations have doubled while that of New York City jails has shrunk by half, people may be much more likely to suffer pre-trial detention on bail or Misdemeanor jail sentences.

### *Client Stories*

*[Note: All client names have been changed, except in the first case, which involves a client who voluntarily shared her story with the media.]*

**Colyssa Stapleton** went downstairs from her apartment to pick up baby formula from her former partner. She was there for less than 30 seconds when an undercover officer approached claiming that he smelled marijuana on her person. When she told the officer that she had not been smoking, and that she needed to get back upstairs to care for her seven month-old child, he arrested her and called ACS. Her child was placed in foster care and she was charged with marijuana possession and endangering the welfare of a child. Even though drug tests came back negative, it took more than a year for Colyssa to regain full custody of her daughter; she missed her baby’s first steps and her first tooth. Colyssa is Black and 25. Her story was featured in *The New York Times*.<sup>11</sup>

**Mr. F’s** car broke down on a roadway. An undercover cop pulled over and helped jump his car. The cop then asked Mr. F if he had any marijuana. Mr. F, feeling gracious for the help, went into his car and pulled out a small amount of marijuana that he had for personal use from his backpack and gave it to the undercover. The cop then arrested him and charged him with sale and possession of marijuana. Mr. F is in the Army Reserves, has no record, and was not the target of any lawful search. He was only trying to thank someone for helping him out. Mr. F is Black and 23 years old.

**Ms. R** was illegally searched and found to have a small amount of marijuana. She also had an

<sup>10</sup> Source: NYS Division of Criminal Justice Services

<sup>11</sup> Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care As Punishment: The New Reality of ‘Jane Crow’*, N.Y. TIMES, July 21, 2017 at <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html>.

open summons warrant for having an open container of alcohol that she had failed to pay. Police arrested her and detained her overnight. Her BDS attorney was able to secure an ACD, but the case was slated to remain open for a year. Recently, Mr. R learned that the company for which she works conducts random background checks and she is at serious risk of losing her job. Now, her attorney is working to get the ACD immediately sealed, but it is unclear whether the court will grant it. Ms R. is South Asian and 22 years old.

**Mr. P** was stopped by police as he left the NYCHA building where he lives as a tenant of record based on an outdated trespass notice issued 11 years earlier. Police found a small amount of marijuana on him and arrested him for trespass and marijuana possession. He was detained overnight. The case resolved with an ACD but Mr. P was forced to do a day of community service. Mr. R is Black and 38 years old.

**Mr. H** was arrested along with his entire family by a notoriously unscrupulous NYPD Detective based on an apparently bogus search warrant. This Detective's prior misconduct had led to 17 settlements totaling more than \$1.2 million, each one involving him entering a private home under the guise of searching for narcotics, and he had been found not credible by a Supreme Court Judge. One settlement involved the choking death of a 49 year-old father of three. After lab results showed that the materials this Detective allegedly obtained from the house were not in fact controlled substances, prosecutors continued to charge Mr. H for the small amount of marijuana that was recovered. After further litigation, Mr. H's BDS attorney was able to resolve the case with an ACD and immediate sealing, but the marijuana charge had allowed the government to continue harassing our client for some time even after we debunked the original charges. It is worth noting that if prosecutors had turned over discovery materials at the outset of the case, this case almost certainly would have been resolved with the same final outcome but immediately. Instead, Mr. H's time and emotional well-being, along with substantial taxpayer dollars and scarce court resources, were wasted in the cover-up of the case's fatal flaws. Mr. H is Black and 23 years old.

**Mr. S** had saved up more than \$10,000 while cutting hair and doing other odd jobs throughout his life with no arrests. In 2015, police executed a search warrant at his apartment and allegedly found marijuana. They arrested one person in the apartment, issued a summons to another, and stole Mr. S' life savings. Mr. S was not charged with a crime. Mr. S had tried to recover the money for approximately six months, regularly contacting the Civilian Complaint Review Board and the NYPD's Property Division, when suddenly the NYPD materialized an I-card warrant for his arrest that supposedly dated back to the time of the search. Finally, the NYPD Legal Bureau provided him with a signed and authorized property release, but when he went to claim his property, he was arrested and charged with numerous counts of marijuana possession. As Mr. S' criminal defense attorneys at BDS fought these charges, he also faced eviction proceedings from NYCHA housing. We were able to get the criminal case dismissed, but he still has not been able to get his money returned. In this case, too, prosecutors' failure to turn over discovery prolonged the case substantially. Mr. S is Black and 33 years old.

## THE VIEW FROM KINGS COUNTY FAMILY COURT

BDS represents the majority of parents in child welfare cases in Brooklyn, one of the busiest family courts in the country. Collateral consequences of marijuana use and arrest often extend to parents and children involved in family court. Although New York State law does not allow marijuana use to be the sole basis for removing a child from a parent or denying that parent visitation with their child, my colleagues and I see these extreme consequences in family court every day.

Contrary to popular perception, most of the drug use allegations against parents we represent involve marijuana. While marijuana use may less often be the cause for the initial filing of a neglect petition, or the removal of a child, it can often be used as a barrier to reunification, to favorable or timely settlement of a case, or as a means to prolong needless state surveillance over families. Marijuana use is often used as a way to impose moral judgment on our clients—a reflection of class and race-based prejudices. Family Court, ACS, and the law make little to no distinction between recreational or thoughtful use of marijuana by a parent, and the use of drugs that has a harmful impact on children. Importantly, the vast majority of the people we represent, who are poor and often people of color, live in shelters, public housing, and/or highly-policed neighborhoods, which renders them extremely vulnerable to government surveillance of marijuana. Similar to the ways in which the odor of marijuana may be used as a pretext to continue to search and arrest our clients in the criminal context, suspected or actual marijuana use can be used as a pretext to continue state surveillance and the removal of children from our Family Defense Practice clients.

Parents in poverty who come into contact with the child welfare system are frequently asked to submit to drug testing even when there is no drug use alleged in the initial phases of the ACS investigation, and even when there has been no court case brought against them. If a parent does not agree to this drug testing, even early on in the investigation process, a negative inference may be drawn against them. If a parent does submit to a drug test despite there being no drug use allegations, and even if that test comes back negative, then that parent's time, resources, dignity, humanity, and right to privacy have been deeply undermined.

The majority of our clients utilize public hospitals for prenatal care, labor, and delivery. It is common for them and their newborns to be drug tested at birth, often without their knowledge or even against their explicit refusal. Our understanding is that the Health + Hospitals' policy generally requires verbal consent to drug testing during or after labor, but many mothers who have been tested at a hospital report that they were not asked permission for testing on themselves or their babies. Racial disparities have been well documented at many points in the health care delivery system, and we know that mothers of color are more likely to be drug tested in child birth than white mothers. Positive drug tests can lead to further invasive investigation, the filing of court cases, and the removal of children. Our office continues to represent clients who face neglect allegations and the removal of their children due to their marijuana use before and even after pregnancy.

Parents involved with ACS who admit to using marijuana recreationally or who have only one positive marijuana test have been required to participate in a full drug treatment program, backed by the threat of child removal. Depending on the treatment center, parents may be expected to go to treatment several times per week, for hours each day, and then to continue to submit to

random testing for an indefinite period of time, even after having consistently tested negative for any substance. The requirement of completing these drug treatment programs limits our clients' ability to seek and maintain employment, to pursue an education, and even to spend needed time with their children. Moreover, these practices misdirect scarce substance use disorder treatment resources and inhibit successful parenting.

Importantly, even when parental marijuana use was not alleged against a parent in initial court filings, or a factor that led to the removal of a child, it is often used as a reason to continue a child's stay in foster care, to justify or advocate for minimal or supervised visitation time with children, and to continue state surveillance of a family. These consequences of simple parental marijuana use occur despite laws requiring proof that drug misuse is directly impacting a parent's ability to provide adequate supervision or meet children's basic needs.

The impacts of marijuana prohibition on mostly women of color in family court must be considered in comparison to the apparent absence of any sanctions against the white male author of an op-ed in *The New York Times* proclaiming the benefits of illegal marijuana use in parenting.<sup>12</sup>

The MRTA would protect parents from being ensnared in the criminal legal system for personal marijuana possession, erase many of the re-entry barriers that inhibit employment, education, and personal growth for people who have already been criminalized, and redirect scarce public funds toward public health and education resources that strengthen families. Furthermore, as DPA has written, the bill would help “[p]revent unnecessary denial of custody, visitation, or parenting time by requiring clear and convincing evidence of unreasonable danger to the safety of a child that is not solely based on the presence – or non-pertinent details – of a parent's marijuana use.” The final legislation negotiated with the Governor must include statutory language to achieve these objectives, as well. Ultimately, we believe a culture shift to end the stigmatization and kneejerk condemnation of parents of color who use marijuana or other drugs is needed, and we hope that change could be engendered, in part, by legalization.

### *Client Story*

**Shakira Kennedy** was the loving mother a young girl who was thriving in a Gifted & Talented school when she became pregnant with twins. Unfortunately, Shakira suffered from extreme morning sickness that prevented her from keeping food or water down. She was losing rather than gaining weight, putting her pregnancy at serious risk. When the medicines prescribed to her by her doctors failed, she turned to cannabis, which was remarkably effective. She disclosed this to her doctors, who then drug tested her without consent. The twins tested negative for marijuana at birth, but she herself tested positive, and the hospital notified ACS. She explained to ACS that she no longer used cannabis, and would submit to regular testing, but instead the agency opened a case against her and mandated that she participate in a substance abuse treatment program three days per week or face the loss of her children. In addition, she may also be blacklisted for alleged child neglect and unable to work in her field—school administration—for 28 years. Read her op-ed in [the Daily News](#).

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<sup>12</sup> Mark Wolfe, *Pot for Parents*, N.Y. TIMES, Sept. 7, 2012 at <http://www.nytimes.com/2012/09/08/opinion/how-pot-helps-parenting.html>.

**Ms. C's** child was removed by ACS and we are currently litigating to have the child returned. Ms. C is compliant with all services, attends visits, and was observed lovingly bonding and interacting with her child. However, because Ms. C tested positive for marijuana, ACS argued that the child should not be released to her. Otherwise, she would almost certainly be reunited with her child, and the case would be on track for closure. This is an example of the way marijuana use among marginalized people is pathologized and penalized, even as its use by the broader public gains mainstream acceptance.

**Ms. G's** children were removed from her care due to an unexplained injury to one of the children. After obtaining medical records, it was clear that Ms. G had a reasonable explanation consistent with the injury. At that point, the children had already been removed from Ms. G's care for several months, and the only barrier to returning the children to her care was her marijuana use. Ms. G's children were only returned to her care, eleven (11) months later, once she completed a drug treatment program and consistently tested negative for marijuana. The conditions of the release included Court ordered supervision, compliance with weekly random drug testing, to test negative for all illicit substances, compliance with intensive preventive services, and compliance with any recommendations from the preventive services provider – among other things.

When **Ms. K** went to the hospital to give birth to her daughter, hospital staff told Ms. K that all women giving birth are tested for drugs, so she should just tell them whether she would test positive for marijuana. Ms. K then admitted to using marijuana a couple of days prior. This admission spurred continued questioning and investigation of Ms. K. Ms. K's newborn daughter was then removed and placed in non-kinship foster care, where she remains. Ms. K was asked to complete a substance abuse program and to test negative for marijuana and alcohol.

**Ms. A's** case began when ACS was contacted after she and her child tested positive for marijuana at her child's birth. At first, ACS did not file a case against Ms. A, but insisted that she engage in drug treatment for her marijuana use. When Ms. A did not, ACS did file neglect charges against her. When Ms. A did not complete drug treatment after the filing, the Court granted ACS' request to remove Ms. A's three-month old from her care. Ms. A immediately entered an inpatient drug treatment program, where she had to consistently test negative for nearly two months before her children were returned to her care.

## **THE VIEW FROM IMMIGRATION COURT**

For many years, New York City and New York State have worked to protect immigrant New Yorkers, but much more is needed. The New York Immigrant Family Unity Project, of which BDS is one of three direct service providers, is a groundbreaking program created by the New York City Council that increased the number of people who win their immigration cases by a factor of twelve. Likewise, the State's Liberty Defense Project provided crucial representation for immigrants facing deportation outside the New York City metropolitan area. Beyond funding representation, the most impactful way for the City and State to reduce the likelihood of Immigration and Customs Enforcement (ICE) arrests, indefinite detention, and deportation is to minimize immigrant New Yorkers' contact with the criminal legal system.

An arrest even for the lowest-level violation can lead to deportation, broken families, and broken communities. Under the Secure Communities program, a federal mass-deportation regime, all fingerprints taken by the NYPD and other local law enforcement agencies are automatically provided to the FBI and ICE. The NYPD's high-arrest policies, including for marijuana and other drug possession, thus effectively provide the federal government with ready-made lists of thousands of immigrant New Yorkers whose humanity, family and community ties, and even lawful residency may be undermined simply because they bear the label of "criminal" for the most paltry alleged offenses. ICE collects information gathered through arrests regardless of whether the District Attorney declines to prosecute a case, a case is still pending so has no final resolution, all the charges are dismissed, or a case results in a non-criminal violation. That is why we say immigrants are doubly punished in our criminal legal system.

To be clear, I am not only talking about undocumented immigrants. New Yorkers with lawful status such as green cards, asylum, or student visas can lose their status and be deported if they are convicted of most drug offenses, including many marijuana offenses. Others who currently lack lawful status may be able to obtain it, except this possibility may evaporate upon conviction of any drug offense.

It must be noted that the aforementioned racial bias in marijuana enforcement is particularly harmful to immigrants of color. BDS believes the surest way to end these disparities, and to protect New Yorkers from being deported for marijuana offenses, is to end marijuana prohibition altogether.

#### *Client Story*

**Mr. L** was born in Jamaica but is a longtime green card-holder who has worked the same job in Queens for more than a decade. He has a US citizen son. He is now facing deportation and is ineligible for discretionary relief only because of a few misdemeanor marijuana possession convictions from more than 15 years ago. Barring a pardon from Governor Cuomo, which we will be requesting, he and his family will likely be torn apart. He is Black and in his mid-40's.

## **EVICTION, HOUSING INSTABILITY, AND MARIJUANA PROHIBITION**

BDS' Civil Justice Practice assists clients with a wide range of so-called collateral consequences stemming from justice system involvement. Many of these individuals and families, disproportionately people of color, suffer diminished housing stability and future housing options by low-level marijuana arrests or convictions.

The most common marijuana-related housing consequences we see are those having to do with NYCHA, HPD, and HUD apartments and other federally subsidized housing programs. Our clients routinely have their applications for subsidized housing denied based on past marijuana convictions or currently pending cases; face termination of tenancy proceedings based on marijuana arrests or convictions; or are forced to exclude loved ones from their households based on these arrests. Under current NYCHA policy, for example, an applicant for public housing with a misdemeanor marijuana conviction would be ineligible for public housing for three or four years from the completion of their sentence. For residents, any drug arrest of a household member, or the arrest of anyone visiting the home, may result in termination of tenancy proceedings being brought against the head of household. While these subsidized housing

policies are based upon federal regulations that would not change with the MRTA, legalization would end the arrests and prosecutions that currently lead to these disastrous consequences.

Marijuana enforcement also affects private housing options. In housing court, it is not uncommon to see clients facing eviction due to lease violations or violations of prior probationary stipulations based solely on marijuana arrests. In fact, we believe landlords of rent-stabilized buildings seeking to evict their tenants, perhaps to legally or illegally deregulate the apartment, sometimes call the police for interventions in instances of low-level offenses like marijuana use.

Marijuana criminalization also has an indirect but important impact on housing stability, as any criminal, family, or immigration court involvement can prevent our clients from making it to work, school, or job interviews—and thus adversely impacts their ability to pay rent. Lastly, such court involvement may reduce families’ household size, directly affecting eligibility for public assistance and housing subsidies.

## **PROPERTY SEIZURE, ASSET FORFEITURE AND MARIJUANA PROHIBITION**

Given the widespread use of marijuana, the current state of prohibition offers police ample opportunity to engage in property seizures and even civil asset forfeiture. There is a common misconception that all property seized and forfeited by law enforcement belongs to people convicted of crimes and that it has been 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 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 continues. Even clients who can prove that their property was not used for illegal activity often settle—that is, they pay the police to get their own stuff back—due to the coercive dynamics and burdensome procedures described in detail below. 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 in court. 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, stable housing and more. The reality is that only clients who cannot afford to settle end up pursuing their right to due process and pushing back against the City’s fundamentally unfair policies.

### *Client Stories*

#### Example #1 – Property with no nexus to alleged offense

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, John, 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 John was charged with sale and possession of marijuana. That car was seized during the arrest, but the property collection did not stop there.

At the time of arrest, the NYPD asked if our client owned a car. They took John's keys and wallet. They drove nearly four miles from the site of arrest to John'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, John 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.

Due process gave 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 John 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. Yet despite the absence of a criminal case related to the car, the NYPD continued its civil forfeiture case. The NYPD was 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. John could have requested a new *Krimstock* hearing, waited up to 20 days for it to be scheduled, and even if it were successful, he would still be facing a civil forfeiture case in state court that could take months to resolve. In the end, he paid a \$500 settlement to get his car back.

### Example #2 – Cash Forfeiture

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

For example, Maria was arrested with a co-defendant for possession of marijuana. At the time of arrest Maria 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 Maria 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 had yet to respond to requests to release her phone. As for the cash, because it was no longer in her name she faced an uphill battle to get it returned. An NYPD Sergeant explained that our client had 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 were successful in all this the NYPD would begin an investigation to determine if the cash could be released to her. More than three months later, Maria finally was able to get her cash back, but not her phone.

This example illustrates what can happen outside of formal civil forfeiture proceedings. If Maria had been unsuccessful in jumping through all these hoops and could not make a claim for the property within 120 days of the termination of her criminal proceeding, it would have been

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.

Of course, if the police were unable to arrest either person for the personal possession of marijuana, both of these unjust seizures would never have happened.

## **DRUG PROHIBITION AND THE OVERDOSE EPIDEMIC**

As we discuss marijuana policy, we must also consider its place in the broader landscape of drug prohibition. Most urgently, we must address the connections between marijuana and non-marijuana drug laws and the epidemic of drug overdose, which is now the leading cause of death for people in the United States under 50.<sup>13</sup>

The opioid and other drug overdose epidemic is among the most deadly forces impacting the people we represent. BDS appreciates that State and City policymakers, heeding the calls of drug users and other experts, have worked to expand the use of life-saving naloxone kits and medication-assisted treatment, as well as other important initiatives to reduce the stigma of addiction and mental illness. However, we are concerned this important work could be undermined by regressive law enforcement strategies that further marginalize, stigmatize, and ultimately criminalize the very people these same policymakers seek to support. For example, as Crain's reported last year, "nearly half of the \$143.7 million budgeted for [NYC's new overdose prevention initiative] HealingNYC through fiscal year 2021 will go to the NYPD, mostly to step up arrests of drug dealers." Much of the funding provided to the police will reportedly be used to investigate overdoses with the goal of bringing high-level criminal charges against people alleged to have supplied the drugs.<sup>14</sup> This strategy aligns with an alarming national trend toward expanded use of drug-induced homicide prosecutions identified by the Drug Policy Alliance in a recent report, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane*.<sup>15</sup>

There is a growing recognition among policymakers of all parties, many of whom may struggle with addiction themselves or have friends or family members who struggle with addiction, that criminalization is an ineffective and, in fact, often very dangerous approach to drug use. These dangers are only heightened as police and prosecutors here and across the country pursue homicide-like charges or other very serious charges against alleged suppliers when overdoses do occur. Among many other serious risks, experts have noted that increased enforcement can discourage people who witness overdoses from calling 911 because suppliers are often close acquaintances and may even be the witnesses, themselves.

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<sup>13</sup> Sheila Kaplan, *C.D.C. Reports a Record Jump in Drug Overdose Deaths Last Year*, N.Y. TIMES, Nov. 3, 2017 at <https://www.nytimes.com/2017/11/03/health/deaths-drug-overdose-cdc.html>.

<sup>14</sup> Caroline Lewis & Rosa Goldensohn, *Will stepping up drug-dealer arrests help alleviate the opioid crisis?* CRAIN'S N.Y. BUSINESS (2017), [http://www.craainsnewyork.com/article/20170522/HEALTH\\_CARE/170529996/nypd-gets-biggest-share-of-new-city-funding-to-fight-opioid-overdose-deaths](http://www.craainsnewyork.com/article/20170522/HEALTH_CARE/170529996/nypd-gets-biggest-share-of-new-city-funding-to-fight-opioid-overdose-deaths) (last visited May 30, 2017).

<sup>15</sup> Lindsay LaSalle, *An Overdose Death Is Not Murder: Why Drug-Induced Homicide Laws Are Counterproductive and Inhumane* (Drug Policy Alliance 2017), [http://www.drugpolicy.org/sites/default/files/dpa\\_drug\\_induced\\_homicide\\_report\\_0.pdf](http://www.drugpolicy.org/sites/default/files/dpa_drug_induced_homicide_report_0.pdf).

At an April 22, 2017 New York City Council Committee on Public Safety hearing, NYPD Chief of Detectives Robert Boyce said of the Department's response to the epidemic: "Our focus is not on the individual addict. Our focus is on the street level as well as interdictions coming into the country." Arrest data provided by the New York State Division of Criminal Justice Services does not support this statement. The most common drug arrest charge in 2016 was low-level marijuana possession, with 18,136 arrests. The next most common NYPD drug arrest charge, or fifth most common arrest overall, in 2016 was low-level non-marijuana drug possession, or Criminal Possession of a Controlled Substance in the 7<sup>th</sup> Degree, with 16,630 arrests. The most common drug *sale* arrest charge was Criminal Sale of a Controlled Substance in the 3<sup>rd</sup> Degree, with 5,628 arrests, or approximately one-sixth of the number of low-level drug possession arrests. (More recently, marijuana arrests have declined, but they remain the NYPD's top drug arrest.)

Research funded by the National Institute on Drug Abuse found that legally protected marijuana dispensaries were associated with reductions of 16 to 31 percent in opioid overdose deaths.<sup>16</sup> Other experts have argued that the criminalization of marijuana helped lead to the over-prescription and over-use of opioids and eventually the epidemic that we are struggling to address today. Simply put, marijuana seems to be a safer alternative to opioids in pain management, but criminalization undercuts that benefit. Furthermore, Portugal's model for drug policy suggests that we may be able to dramatically reduce overdose deaths and other serious harms related to addiction through a careful and deliberate decriminalization of the use and possession of *all* drugs coupled with an aggressive public health strategy. In that country, heroin use has been cut by an estimated 75% and, more importantly, overdose deaths have plummeted. Portugal has the lowest rate of drug-induced death in Western Europe – *less than 2% of the rate in the United States*.<sup>17</sup> In light of the growing overdose epidemic, lawmakers must work to end the drug war altogether, in addition to legalizing marijuana.

## MARIJUANA PROHIBITION AND RESOURCE ALLOCATION

As a public defense organization, Brooklyn Defender Services is principally concerned with the direct impacts of drug laws and enforcement on the people we represent and their families and communities. That said, we recognize that the fiscal and economic impacts of drug policy also play a major role in their daily lives. For example, most of our clients or their children attend or attended public schools with inadequate funding. According to the New York State Board of Regents, schools are owed billions of dollars in funding under the Campaign for Fiscal Equity ruling, with the majority owed to schools with high populations of Black, Latino and immigrant students.<sup>18</sup> Without the resources for a State Constitutionally-mandated "sound basic education," many of our public schools have infamously become pipelines to prisons and jails. If funds

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<sup>16</sup> National Institute on Drug Abuse, *Study Links Medical Marijuana Dispensaries to Reduced Mortality From Opioid Overdose* NIDA (2016), <https://www.drugabuse.gov/news-events/nida-notes/2016/05/study-links-medical-marijuana-dispensaries-to-reduced-mortality-opioid-overdose> (last visited May 30, 2017).

<sup>17</sup> Nicholas, Kristoff, *How to Win a War on Drugs*, N.Y. Times, Sept. 22, 2017 at <https://www.nytimes.com/2017/09/22/opinion/sunday/portugal-drug-decriminalization.html>

<sup>18</sup> *Brennan Ctr. for Justice, Campaign for Fiscal Equity V. State of New York* (2006), <https://www.brennancenter.org/legal-work/campaign-fiscal-equity-v-state-new-york>.

currently spent on drug enforcement were instead reinvested in school-based mental health clinics and restorative justice programs, school environments would improve and administrators and teachers would be better able to address any behavioral problems without calling 911 or issuing suspensions and expulsions. If funds currently spent on overtime for police officers who make low-level marijuana possession arrests near the end of their shifts were instead reinvested in making addiction treatment more widely available and accessible, perhaps overdoses would decline rather than increase or plateau at record-high levels.

The fact that marijuana and other drug prohibition is the status quo should not exempt it from close scrutiny. This hearing is a critical example of such scrutiny and the upcoming State budget negotiations provide ample additional opportunities for reconsideration of existing funding choices. While the City and State have together spent tens of millions of dollars every year criminalizing mostly people of color for low-level marijuana possession, the State has provided more than \$15 million dollars in *subsidies* to mostly or all white-owned craft wineries, breweries, distilleries and cideries in recent years.<sup>19,20</sup> These resource allocations expand the disparities in health, economic success, and liberty in our society. In addition to simply legalizing and regulating adult marijuana use, the MRTA would foster significant economic growth and meaningfully shift the balance toward justice and equality.

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Thank you for your time and consideration of our comments. We look forward to further discussing these and other issues that impact our clients. If you have any questions, please feel free to reach out to Jared Chausow, our Senior Policy Specialist, at 718-254-0700 ext. 382 or [jchausow@bds.org](mailto:jchausow@bds.org). Kaela Economos (Community Office Social Work Director), Catherine Gonzalez (Staff Attorney – Criminal Defense Practice), and Bill Bryan (Supervising Attorney – Civil Justice Practice) also contributed to this testimony.

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<sup>19</sup> Robert Harding, *Regulatory Reforms, Tax Credits Help NY Craft Beverage Producers Save \$15M*, AUBURN CITIZEN, May 9, 2017 at [http://auburnpub.com/blogs/eye\\_on\\_ny/regulatory-reforms-tax-credits-help-ny-craft-beverage-producers-save/article\\_a593fbb4-0433-11e7-b486-5b9c7090db7a.html](http://auburnpub.com/blogs/eye_on_ny/regulatory-reforms-tax-credits-help-ny-craft-beverage-producers-save/article_a593fbb4-0433-11e7-b486-5b9c7090db7a.html).

<sup>20</sup> Marijuana Arrest Research Project, Loren Siegel & Harry G. Levine, *\$75 Million a Year: The Cost of New York City's Marijuana Possession Arrests* (Drug Policy Alliance 2011), <http://marijuana-arrests.com/docs/75-Million-A-Year.pdf>.