



**TESTIMONY OF:**

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***BROOKLYN DEFENDER SERVICES***

**Presented before**

**The New York State Assembly**

**Committees on Codes and Judiciary**

**Public Hearing on Civil Forfeiture and Deferred Prosecution Agreements**

**December 9, 2014**

Brooklyn Defender Services welcomes this opportunity to submit testimony on the process and effect of civil forfeiture in the borough of Kings in New York City.

**About Brooklyn Defender Services:**

Brooklyn Defender Services (“BDS”) provides innovative, multi-disciplinary, and client-centered criminal defense, family defense, immigration, civil legal services, social work support and advocacy to indigent Brooklyn residents. BDS is the largest Brooklyn-based legal services provider offering comprehensive legal representation to more than 40,000 low-income Brooklyn residents each year.

**Civil Forfeiture Generally**

In the last year, the City of New York reported \$5.6 million dollars in revenue from asset forfeiture initiated by the NYPD. It is without a doubt that this is 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.

CPLR §1311 oversees the forfeiture action process.<sup>1</sup> It was allegedly designed to “take the profit out of crime”<sup>2</sup> by allowing the city to recover property which constitutes the “proceeds

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<sup>1</sup> N.Y. Civil Practice Law and Rules §1311 (McKinney 2010)

of a crime” or that is an “instrumentality of a crime.” Despite 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 will seek 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.

### **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 silent and potentially losing their property or testifying in the civil case and allowing the District Attorney to use 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 violation where the NYPD still pursues forfeiture unless the client will pay a settlement fee of anywhere between \$500 and \$2500. In addition, there is always the possibility that a client will fail to respond to a civil forfeiture summons or understand that they must affirmatively demand release of the property and it will be marked abandoned and disposed of.

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 to advise clients in these situations and extremely difficult for an innocent owner to decide what to do; either pay a settlement fee they may not be able to afford or allow the case to be filed and

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<sup>2</sup> 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. Available at: <http://scholarship.law.stjohns.edu/lawreview/vol61/iss1/11>

hope for the best. In practice, most defendants, even those claiming innocence, will agree to pay whatever they can afford if a settlement is offered.

The following examples speak to some of these issues.

### **Example #1 – Property had no Nexus to Alleged Charges**

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

At the time of arrest, the NYPD asked if our client owned a car. They took our client's keys and his 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 didn't cooperate with their investigation of the drugs found in the first car that he would not get his own car back.

The criminal case is ongoing and our client has been released on bail but the car was retained by the NYPD and the city filed for civil forfeiture 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. 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 due to employment on long island but unable to afford the steep settlement fee, our client requested the hearing. His hearing was postponed indefinitely, however, when the 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 - meaning they do 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 with their 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 explanation for 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 car returned immediately.

It is not surprising that this client and many others choose 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.

For one of our clients we were able to help him 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 from the day prosecutors and the NYPD forfeiture unit agreed not to pursue forfeiture to the day he was able 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 this, and despite his frustration with the process the immense gratitude he had to 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 ACD (Adjournment in contemplation of dismissal) 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 is 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-defendants 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.

### **Summary**

It is unlikely that the above examples are what politicians and the public envision when they think of civil forfeiture. The common misconception is 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 innocent until proven guilty, and more often than not these funds and assets are retained without court oversight and without due process.

Case by case advocacy will not change these systemic unfair practices. Even clients who vehemently deny their property was used for illegal activity will be tempted to settle due to the coercive dynamics and burdensome procedures described in these examples. It is very difficult to advise a client (even one with a good case) that it is not worth it to pay for an expeditious and guaranteed return of their property. Because settlements are only approved if the client signs a “hold harmless” agreement 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 result 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 council 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.

### **Recommendations:**

Mirroring efforts being made on the federal level, raising the standard of proof from preponderance of the evidence to something closer to the standard required for criminal culpability would be a good start. Putting forth a policy of not seeking forfeiture until after the disposition of the criminal matter would also be a positive step.

As discussed many of the problems cited above occur regardless of whether a formal civil forfeiture proceeding is filed. There need to be more concrete guidelines in place to ensure that innocent defendants are not financing the NYPD through a process that was clearly intended to seek out proceeds of crime.

Strict timelines could be placed that require the NYPD to pursue civil forfeiture immediately and provide their reason for doing so. This would allow property owners to make an educated choice in settlement negotiations and end the practice of settlements being the only means of the property's expeditious return.

There needs to be an affirmative obligation for the ADA to provide the written release necessary for the return of a defendant's property when the criminal matter is resolved.

**Conclusion:**

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.