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Presented before

The New York City Council

Committees on Public Safety and Small Business

Oversight Hearing on Retail Theft

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My name is Gina Mitchell and I am the Attorney-in-Charge of Law Reform and Policy at Brooklyn Defender Services (BDS). BDS is a public defense office whose mission is to provide outstanding representation and advocacy free of cost to people facing loss of freedom, family separation and other serious legal harms by the government. We want to thank the Committees on Public Safety and Small Business, and Chairs Feliz and Thomas-Henry, for the opportunity to testify today about retail theft.

For 30 years, BDS has worked, in and out of court, to protect and uphold the rights of individuals and to change laws and systems that perpetuate injustice and inequality. After 29 years of serving Brooklyn, we expanded our criminal defense services to Queens. We represent over 40,000 people each year who are accused of a crime, facing the removal of their children, or deportation. Our staff consists of attorneys, social workers, investigators, paralegals and administrative staff who are experts in their individual fields. BDS also provides a wide range of additional services for our clients, including civil legal advocacy, assistance with the educational needs of our clients or their children, housing and benefits advocacy, as well as immigration advice and representation.

Background

In recent months, there has been heightened media attention on retail theft which has sensationalized the rates and magnitude of shoplifting in the city. The city's own data

demonstrates that, while there was a spike in rates of arrest for theft during the COVID-19 pandemic, rates of retail theft have reduced to pre-pandemic estimates.¹ Further, rates of theft at small businesses and bodegas are lower than projected.² At today's hearing, the NYPD repeatedly stated that those most impacted by retail theft are not New York City's small businesses, but rather national and international brands and businesses that already possess vast security tools.

Under the prior administration, the NYPD increasingly prioritized policing poverty and untreated behavioral health needs through its launch of the "quality-of-life" policing teams (Q-Teams) and targeted retail theft intervention. These policies are based on long-discredited theories like "broken windows policing" and serve only to increase arrests for minor transgressions, which in turn worsen the issue that often brought the person into the system, such as mental health, drug or alcohol use, food insecurity, houselessness and lack of opportunity and affordability in New York City. Instead of expanded policing, the city should address waitlists and backlogs to access social services, such as housing or food, improve access to medical and mental health treatment, invest in job training and specialized educational services, including training in skilled trades, to provide historically underserved communities a fighting chance to survive in this city. These policing measures do not address the affordability crisis or social issues that are driving most cases of retail theft. As public defenders, we routinely see the people we represent being arrested for taking basic necessities from stores: food items, deodorant, toothbrushes, or diapers. Most of the people we represent who are arrested for retail theft are living in poverty and navigating complex issues including serious mental health concerns, substance use, and housing instability.

The challenges people face are compounded when there is criminal legal system involvement. In Brooklyn and Queens, we see widespread use of trespass notices following a petit larceny arrest. This means that if a person is arrested for shoplifting, even if it's for food or basic necessities, they are given a notice that says they cannot return to the store. As a result, these trespass notices can be used to increase subsequent shoplifting charges from misdemeanors to felonies. The increased charges can put the person at risk of serving a prison sentence, making it even more difficult for them to access diversion programs and get the help and services they need.

In one instance, a woman we represent was arrested for taking hygiene items from a store. She is chronically unhoused and navigating complex physical and mental health conditions. After being issued a trespass notice, she was arrested a second time for taking basic necessities from the

¹ New York City Council analysis of *NYPD Complaint Data Current (Year To Date)* and *NYPD Complaint Data Historic* from NYC OpenData. See https://data.cityofnewyork.us/Public-Safety/NYPD-Complaint-Data-Current-Year-To-Date-5uac-w243/about_data and https://data.cityofnewyork.us/Public-Safety/NYPD-Complaint-Data-Historic/qgea-i56i/about_data

² See New York City Council *Committee Report*, <https://nyc.legistar.com/View.ashx?M=F&ID=15266490&GUID=413155B3-7DB9-4D3F-804E-314DEF46C2FD&G=2FD004F1-D85B-4588-A648-0A736C77D6E3>

same store. While she was in the process of getting connected to supportive housing and the healthcare and treatment she needs, she is now facing a prison sentence and the collateral consequences of criminal legal system involvement, such as increased housing and job insecurity, and a criminal record. These compounding arrests have destabilized her mental health condition more and have created further barriers to getting the supportive services that may help lift her out of poverty.

Surveillance Does Not Create Safety

BDS is concerned with Int. 533, which would create financial assistance for small businesses to buy surveillance technology, and Int. 623, a bill that would require the Commissioner of Small Business Services and the Police Commissioner, to create a pilot program to install security cameras in areas identified by the NYPD. We respectfully oppose this \$24 million initiative.

New Yorkers are already subject to a vast and sophisticated surveillance network run by the NYPD and other local agencies. Although the city’s surveillance network largely operates in the shadows, our work, community activism, investigative journalism, and public interest litigation have brought pieces of it into public view.³ The city’s invasive and growing surveillance program poses a dangerous threat to the constitutional and civil rights of New Yorkers. While technology and its attendant insights and conveniences are alluring in their seeming objectivity and infallibility, real-world application—divorced from marketing claims—demonstrates that technological solutions to law enforcement’s surveillance agenda merely replicate the biases and failures of our historical *Handschu* and stop-and-frisk past.⁴ However, technological surveillance brings with it a world of expanding harms that far outstrips traditional surveillance.

The involvement of the NYPD in the installation of cameras, including those that monitor people walking within 15 feet of a small business, raises concerns about the vast network of surveillance that will be installed in communities across the city. We are particularly concerned about the use of faulty, racially biased facial recognition software. Facial recognition technology has been found to have higher error rates for people of color. The troubling impact on already-marginalized communities is all the more disturbing when this bias-laden data is placed in the hands of an agency often linked to pervasive racism and bigotry. Indeed, numerous recent studies reveal the ways that facial recognition technology perpetuates bias and leads to inaccurate identifications. For instance, The National Institute of Standards and Technology (“NIST”) found that facial recognition systems revealed higher false positive rates for women, particularly

³ See for example Elizabeth Daniel Vasquez, Opinion: Reining in the NYPD’s Use of Surveillance Technologies, City Limits (Feb. 22, 2022) at <https://citylimits.org/2022/02/22/opinion-reining-in-the-nypds-use-of-surveillance-technologies/>.

⁴ See “*Handschu v. Special Services Division (Challenging NYPD Surveillance Practices Targeting Political Groups)*” at <https://www.nyclu.org/en/cases/handschu-v-special-services-division-challenging-nypd-surveillancepractices-targeting>.

Black women⁵ and that depending on the algorithms used, Black and Asian people were 100 times more likely to be misidentified than white men.⁶ Facial recognition systems have also been found to demonstrate “demographic differentials” based on age, producing higher error rates amongst children and the elderly.⁷ Given the high levels of policing aimed at communities of color and LGBTQ+ individuals, and the reality that the criminal legal system disproportionately impacts these communities, the people we serve are part of the communities most likely to be unjustly targeted by these faulty surveillance systems.

Today’s hearing highlighted a number of our concerns. The NYPD was not able to provide answers to many questions, including:

- Will the NYPD have real time access to cameras or other surveillance technology purchased or installed through these programs?
- Will small businesses be required to store, maintain, or turn over this video to NYPD or district attorneys?
- Will the NYPD be permitted to use facial recognition technology to review this widespread surveillance of people who access—or walk past—small businesses?

We ask the council to seek answers to these questions when evaluating whether or not to move forward with proposed legislation.

Recommendations

To meaningfully address retail theft, the Council can take action to invest directly in communities. The most resourced communities are the safest communities. And when people can meet their basic needs, they are less likely to resort to theft to meet their basic needs.

Expand Access to Low-Cost Mental Health and Substance Use Treatment

Many of the people we represent have tried for years to access mental health and substance use treatment but have faced barriers to appropriate care. For people with co-occurring SMI and substance use treatment needs, there is only one long-term, inpatient treatment facility in New York City that accepts Medicaid. This lack of access means many people spend months waiting for an opening, and for those with pending criminal cases, they may be required to wait while being held in custody on Rikers Island. Due to the shortage of program beds, people who are incarcerated waiting for treatment may choose to take a plea in order to get out of jail, instead of

⁵ Patrick Grother, Mei Ngan, Kayee Hanaoka Face Recognition Vendor Test: Part 3: Demographic Effects. *National Institute of Standards and Technology, US Department of Commerce* (December 2019), Available at <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf>.

⁶ *Id.*

⁷ *Id.*

receiving the treatment they need. The Council should work to encourage dual-diagnosis providers to accept Medicaid or offer low- or no-cost treatment options. The creation of a wide range of mental health treatment options, particularly for people with co-occurring conditions, would go a long way towards addressing the mental health crisis that we see in New York City and likely would be very cost effective as it would reduce arrests and reduce the population of Rikers Island. This includes creating more supportive housing programs with supportive services and mental health treatment which offers people long-term stability and reduces involvement in the criminal legal system. We would also like to see New York City expand access to Assertive Community Treatment (ACT), a team-based mental health service for people living with SMI which aims to support people in their recovery and integration into the community. This will help people living with mental illness and struggling with housing and food insecurity to get the services they need without the use of the criminal legal system.

Expand employment training and paid programming for young people

Many young people first become involved in the criminal legal system due to an arrest for retail theft. Poverty, lack of access to employment and education increase the likelihood of criminal legal system involvement, especially for young people. The city must expand access to after-school programs, job training and mental health support. Programming and resources that help alleviate these conditions are alternatives to incarceration, as they prevent young people at risk of system involvement from encountering the system in the first place. Many people we serve are only able to gain access to community-based programs after their contact with the criminal legal system. The people we serve are often eager to take advantage of any resources that we can connect them with. Being able to do so before participation is mandated by a court is paramount to building a safer New York. It should not take being charged with a crime to get youth connected to resources that they are eager to make the most of and desperately need.

We urge the council to support passage of the Youth Justice Innovation Fund (A.10264-Romero/S.643-Cleare), which would direct \$50 million from the annual state-wide Raise the Age appropriation to community-based organizations to provide a continuum of services from prevention, early intervention, to alternatives to detention, placement and incarceration for youth aged 12 through 25. The Fund would direct dollars to the kinds of services across the state and New York City which are designed for adolescents and young adults and have been shown to reduce rearrest.⁸ Research shows that program models like credible messenger mentoring, family focused multidimensional therapy such as Multisystemic Therapy and Functional Family Therapy, Cognitive Behavioral Therapy, restorative justice and wraparound programs that include education, mentoring, job placement and care coordination produce better results for young people and community safety over more punitive approaches, including jail, placement and prison.

⁸ Richard Mendel, Effective Alternatives to Youth Incarceration, The Sentencing Project. June 2023.

Pass a New York City Council Resolution in Support of the NYS Treatment Court Expansion Act

New York City should commit to creating more off ramps from the criminal legal system. The City Council should call on the state legislature to pass and the Governor to sign the Treatment Court Expansion Act (S.4547-Ramos)/A.4869-Forrest).

In 2009, as part of the Rockefeller Drug Law Reforms, New York passed the Judicial Diversion Program legislation. Under Criminal Procedure Law Article 216 (CPL §216), this legislation created a pathway for a small subset of people with substance use disorders to avoid prison and potentially have their charges reduced or dismissed after engaging in a course of treatment. This treatment is monitored by specialized court parts in every county in New York. Judicial diversion has successfully enabled thousands of individuals to minimize or avoid a criminal record while receiving the benefit of potentially lifesaving substance use treatment.

Judicial diversion has also realized the saving of tax dollars, from both reductions in reoffending and the decreased costs per capita of treatment versus incarceration. Unfortunately, CPL §216 diversion is limited to people with substance use disorders charged with a short list of crimes related to substance use. The current law leaves behind people who do not live with substance use disorders, but experience other mental illnesses, developmental disabilities, or cognitive impairments that can be effectively addressed through treatment.

People living with mental health issues deserve treatment, not jail. Mental health intervention through courts can decrease the jail population and provide people with access to treatment they would not otherwise receive if incarcerated. This has been shown to increase mental health program enrollment and completion of these programs reduces homelessness, psychiatric hospitalizations, and rates of recidivism.⁹ New York can become a leader in diverting people with mental health issues out of the criminal legal system and into treatment by passing the Treatment Court Expansion Act.

Streamline access to benefits and city services

The city has invested in a vast network of social services to meet the needs of New Yorkers. Too often, people do not know about these programs, struggle to complete opaque application processes, or are denied benefits they are entitled to.

⁹ Nazisha Dholakia and Daniela Gilbert, What Happens When We Send Mental Health Providers Instead of Police, *Vera Institute of Justice: Think Justice Blog*, 2021, Available online at <https://www.vera.org/blog/what-happenswhen-we-send-mental-health-providers-instead-of-police>.



CityFHEPS vouchers, for example, can be the path to securing safe, affordable, and permanent housing, but pervasive administrative hurdles make these vouchers difficult to access and use. There are several immediate administrative fixes to the CityFHEPS program that would help New Yorkers access vouchers and expand the pool of apartments available to voucher holders. We encourage this administration to authorize additional social service providers to submit CityFHEPS applications and streamline the approval process by eliminating unnecessary steps and establishing time guidelines.

Conclusion

We appreciate the opportunity to testify before the City Council and engage in the public discourse regarding retail theft and raise our concerns about the criminalization of poverty and the proliferation of surveillance in low-income communities of color. We recognize the need to support small businesses, and we urge the city to invest in services that meet the needs of people in our communities, and discourage any investments that expand policing, surveillance, and criminalization of those living in poverty.

Thank you for the opportunity to testify today. If you have any questions, please feel free to reach out to contact me at gmitchell@bds.org.