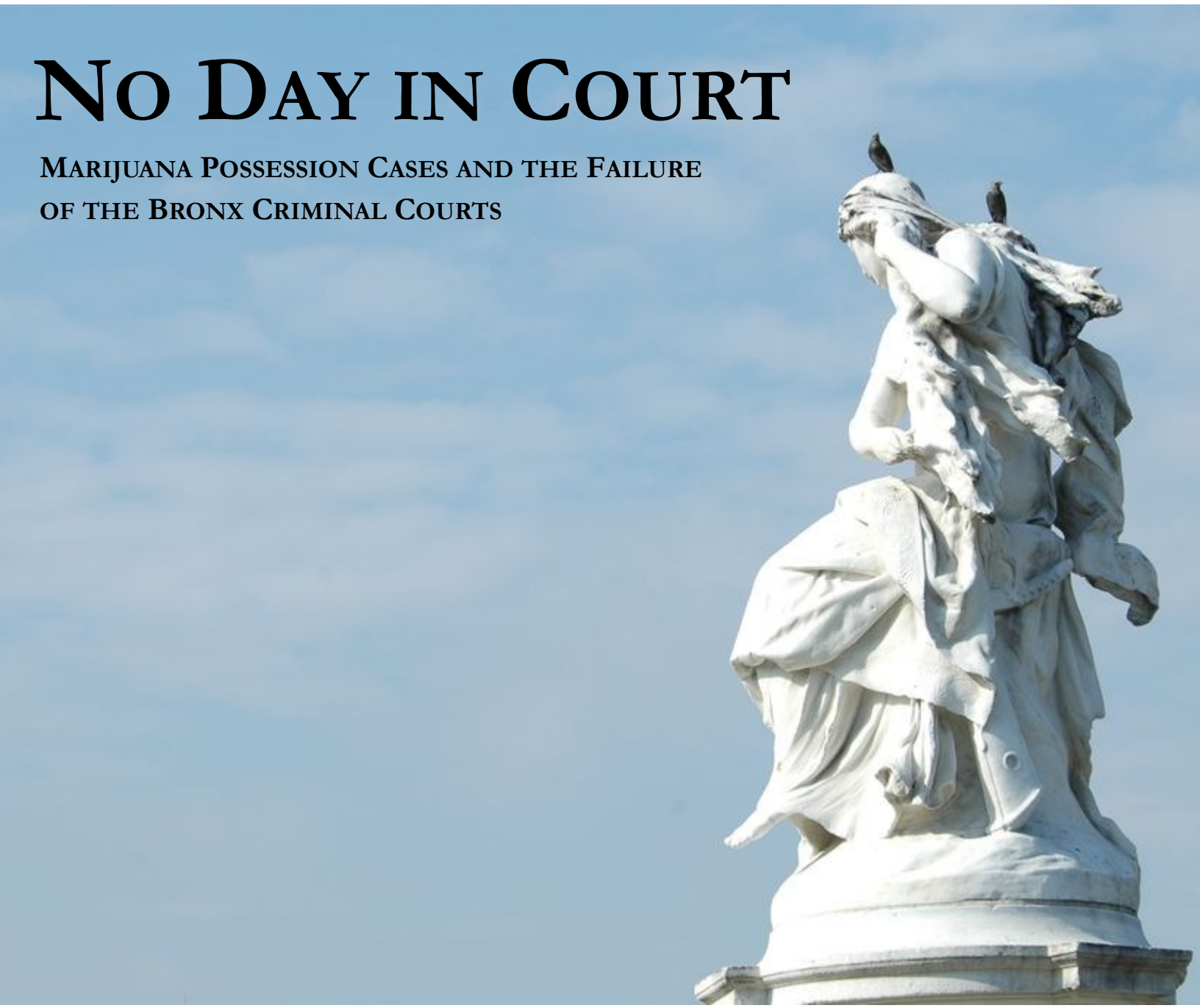
The Bronx Defenders

Redefining public defense.

May 2013

No Day in Court

Marijuana Possession Cases and the Failure of the Bronx Criminal Courts



NO DAY IN COURT

MARIJUANA POSSESSION CASES AND THE FAILURE OF THE BRONX CRIMINAL COURTS

A REPORT BY THE BRONX DEFENDERS
FUNDAMENTAL FAIRNESS PROJECT

The Bronx Defenders

Redefining public defense.

The Bronx Defenders provides innovative, holistic, and client-centered criminal defense, family defense, civil legal services, social work support and advocacy to indigent people in the Bronx. Our staff of nearly 200 represents over 30,000 individuals each year and reaches hundreds more through outreach programs and community legal education. In the Bronx and beyond, The Bronx Defenders promotes justice in low-income communities by keeping people united with their families.

The Bronx Defenders launched The Fundamental Fairness Project in fall 2012 as an extension of the work done by the Marijuana Arrest Project. The Project addresses the ways in which the process has become the punishment for huge numbers of people caught in the web of the criminal justice system and aims to make interactions with the courts less onerous, more efficient, and ultimately more meaningful for our clients.

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Contents

Introduction

In the waning days of summer 2011, just a few weeks before the beginning of the school year, Angel Cardona,[1] a 17 year old high school student from the Soundview neighborhood of the Bronx, chatted with three friends—two female and one male—while waiting for a bus that would take him home for the night. Before the bus arrived, however, a marked police car pulled up to the bus stop. The officer in the passenger seat beckoned the teenagers over to the car and began to question the two young men in the group. A moment later the officers were standing on the sidewalk and Angel and his friends were lined up along a nearby railing and forced to assume the search position. One of the officers frisked Angel and then went through his pockets. The officer found a partially smoked marijuana cigarette in a small plastic box in Angel's right front pants pocket. Angel was arrested and spent approximately 8 hours in police custody before being issued a desk appearance ticket.

Three months later, Angel and his mother, a home health aide who had taken the day off to accompany her son to court, arrived in Bronx Criminal Court for Angel's arraignment. There they discovered that the police officer who had arrested Angel claimed, falsely, that he had seen Angel smoking marijuana on the sidewalk, resulting in a misdemeanor charge (simply carrying marijuana in one's pocket is a non-criminal violation).

As a young man in Soundview, Angel had been stopped and frisked many times—each stop a jarring and humiliating event—but he was particularly upset about how he had been treated during his arrest. That the police had fabricated allegations in order to support a trumped-up misdemeanor charge only cemented Angel's commitment to fighting his case and challenging the constitutionality of the police search. Angel's mother respected and supported his stand. Angel wanted his day in court.

[1] The client's name has been changed.

Almost 10 months later, however, Angel and his mother sat on a bench in the lower level of the Bronx Hall of Justice dejected, frustrated, and resigned to the realities of the criminal justice system. The prosecutor had not been ready for hearings or trial on either of the past two trial dates and had indicated that she would state "not ready" for a third consecutive time. At Angel's first post-arraignment court appearance, the presiding judge had openly questioned Angel's decision to request a trial and pressured him to accept the prosecutor's offer. Angel stood his ground, and he and his mother made 3 more court appearances, missing school and work, respectively, on every court date. Each time, they waited for an opportunity to confront the officer who had unconstitutionally stopped, frisked, and searched Angel. But their patience (and Angel's mother's vacation days) had run out. Rather than endure another 2-month adjournment on the potentially empty promise of a hearing, Angel accepted the prosecutor's offer and pled guilty to disorderly conduct—392 days after his initial arrest. He promptly paid the $120 mandatory court surcharge and moved on with his life, but not before confessing a newfound disillusionment with the criminal justice system. Angel had spent many days in court, but he had not had *his* day in court.

Angel Cardona's experience is in no way unique. Every day, in ways large and small, the Bronx courts fail to provide clients charged with low-level misdemeanor offenses with meaningful access to justice. This report sets out to determine exactly *how* the courts fail Bronx residents, using data gleaned from 54 marijuana possession cases—the "Fighter" cases—in which Fighters like Angel chose to challenge the "manufactured" misdemeanor charges lodged against them.[2]

Plea negotiations do not take place in the shadow of the law, but in the shadow of court inefficiency and delay.

Many of the Fighters were represented by lawyers from both The Bronx Defenders and the law firm of Cleary Gottlieb Steen & Hamilton LLP, and each of the Fighters expressed a sincere desire to see his or her case through to the end. Their primary aim in these cases was to challenge the underlying stops and searches through suppression hearings, whereby courts scrutinize the police conduct leading to an arrest and, if the conduct is found to be constitutionally wanting, suppress any evidence recovered.[3] But, as Angel's experience illustrates, court

[2] The Fighter cohort represents cases arraigned in the 12 months from mid-March 2011 through the beginning of March 2012 in which 1) clients expressed a desire to challenge the police conduct leading to their arrests; 2) there were at least three court dates, including arraignment; 3) there were no parallel felony charges; 4) clients were not on probation or parole; and 5) The Bronx Defenders maintained representation throughout the case.
[3] *See* Mapp v. Ohio, 367 U.S. 643 (1961).

congestion, manipulation of the speedy trial statute by prosecutors, and the requirement that clients must be physically present in court on each and every court date made it virtually impossible for the Fighters to effectively litigate the constitutionality of street-level police behavior.

The findings of the case study are disquieting:

- **Not a single suppression hearing was ever completed**, despite the fact that, on average, clients came to court 5 times over the course of 8 months before their cases were resolved.

- When prosecutors were actually required to present evidence, **the cases against the Fighters ultimately fell apart** and the cases were dismissed.

- In all, **30% of the Fighter cases that were resolved were dismissed outright**, but only after an average of 270 days.

- **Prosecutorial delay accounted for over 80% of postponements** of hearing and trial dates.

- **Less than 10% of the time** the cases were pending in Bronx Criminal Court was actually charged against the District Attorney for speedy trial purposes.

- Many Fighters reluctantly accepted negotiated plea deals because the costs of fighting a case were too great. **Most judges would not excuse clients from appearing in court even when prosecutors indicated in advance that they were not ready for trial.**

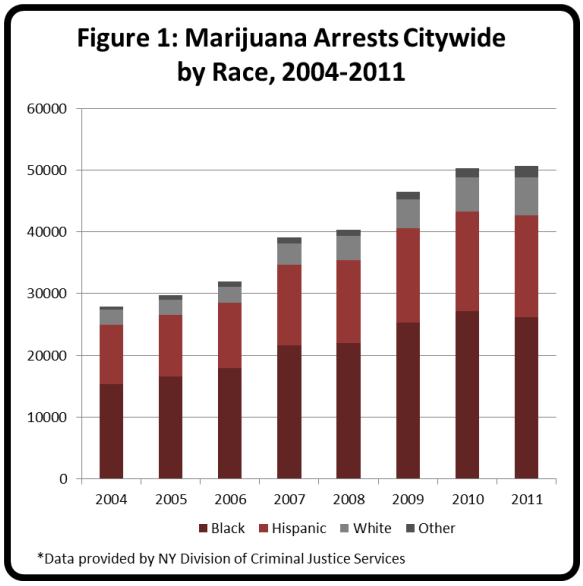
- When clients were excused from court, however, **they achieved better results.**

Viewed as a whole, the data reveal a criminal justice system ill equipped to deliver on the basic promise that all criminal defendants are entitled to their day in court. Indeed, despite the prevalence of unconstitutional searches and manufactured misdemeanors in the Bronx—and the serious and far-reaching consequences facing thousands of clients as a result—not a single suppression hearing has been completed in a Fighter case.

Background: Manufactured Marijuana Misdemeanors in NYC

The largely unchecked expansion of stop-and-frisk practices under the Bloomberg administration has engendered a widespread casual disregard for the basic civil rights of all New Yorkers by the NYPD—and of young men of color in particular. As Federal District Court Judge Shira Scheindlin recently wrote, "[The NYPD's] cavalier attitude towards the prospect of a 'widespread practice of suspicionless stops' displays a deeply troubling apathy towards New Yorkers' most fundamental constitutional rights."[4] Nowhere is this casual disregard for core constitutional principles more evident than in the flood of arrests for marijuana possession that has accompanied the NYPD's unprecedented embrace of stop-and-frisk tactics.

Marijuana arrests are the most common type of arrest made by the NYPD and now account for 15% of all arrests in New York City.[5] Even as the violent crime rate in New York City declined sharply over the past two decades, the number of arrests for low-level marijuana possession skyrocketed. In late January 2012, the Division of Criminal Justice Services (DCJS) released data showing that over 50,000 people were arrested for low-level marijuana possession in New York City in 2011, bringing the total number of marijuana arrests over the five-year period from 2007 through 2011 to an astonishing 227,000.[6] These arrests have needlessly disrupted the lives of hundreds of thousands of New Yorkers, the vast majority of them Black and Latino young men.



The manufacturing of misdemeanors in marijuana possession cases such as Angel Cardona's has emerged as one of the most glaring examples of the NYPD's disregard for New Yorkers' basic rights. More than 30 years ago, the New York State legislature decriminalized concealed possession of a small amount of marijuana, making it a violation, not a crime. Numerous reports have suggested, however, that NYPD officers manufacture thousands of misdemeanor arrests every year by

[4] Floyd v. City of New York, 283 F.R.D. 153, 178 (S.D.N.Y. 2012).

[5] Drug Policy Alliance, *Marijuana Arrests in NYC: Fiscally Irresponsible, Racially Biased and Unconstitutional*, 1 (April 18, 2012), www.drugpolicy.org/resource/marijuana-arrests-nyc.

[6] Data provided by the New York State Division of Criminal Justice Services. On file with author.

charging clients with possessing marijuana that is "open to public view," even when it only comes into public view as a result of a police request or unlawful search.[7] These practices occur almost exclusively in communities of color.

A study conducted by The Bronx Defenders Marijuana Arrest Project showed that at least 40% of marijuana arrests were constitutionally deficient.

In late June 2011, The Bronx Defenders launched the Marijuana Arrest Project (MAP) to focus attention on the NYPD's practice of manufacturing misdemeanors. With pro bono assistance from Cleary Gottlieb Steen & Hamilton LLP,[8] from September 2011 to February 2012, MAP interviewed and represented over 500 clients who were arrested and charged with marijuana possession in the Bronx. In late March 2012, MAP released data showing that the police had no legal cause for the initial detention and/or manufactured misdemeanors in over 40% of all the cases evaluated.[9] While police officers manufacture misdemeanors in over a third of all marijuana cases, the vast majority of clients nonetheless plead to a lesser charge at arraignment or on the first post-arraignment court appearance rather than endure a prolonged, often futile court process as Angel Cardona did.

Having conclusively diagnosed the scope of the problem, MAP then turned its attention to the representation of the Fighters, those clients with manufactured misdemeanors who, against daunting odds, wished to challenge the police conduct leading to their arrests. As this report shows, however, the procedural and practical obstacles facing the Fighters were often overwhelming. In the fall of 2012, The Bronx Defenders created the Fundamental Fairness Project (FFP) in order to better understand exactly how the criminal justice system prevents people charged with constitutionally suspect quality-of-life crimes from accessing

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[7] *See* Ailsa Chang, *Alleged Illegal Searches by NYPD May Be Increasing Marijuana Arrests*, WNYC News (April 26, 2011), www.wnyc.org/articles/wnyc-news/2011/apr/26/marijuana-arrests/; Ailsa Chang, *Alleged Illegal Searches By NYPD Rarely Challenged in Marijuana Cases*, WNYC News (April 27, 2011), www.wnyc.org/articles/wnyc-news/2011/apr/27/alleged-illegal-searches/; Ailsa Chang, *Marijuana Arrests Dip After NYPD Order, But Allegations of Improper Arrests Continue*, WNYC News (December 8, 2011), www.wnyc.org/blogs/wnyc-news-blog/2011/dec/08/marijuana-numbers/; Ailsa Chang, *Data Shows Percentage of Wrongful Marijuana Arrests Rose After Kelly's Order: Bronx Public Defenders*, WNYC News (March 29, 2012), www.wnyc.org/blogs/wnyc-news-blog/2012/mar/29/bronx-public-defenders-say-data-shows-wrongful-marijuana-arrests-rose-after-kellys-order/.

[8] MAP is extremely grateful for the invaluable pro bono support provided by Cleary Gottlieb Steen & Hamilton LLP throughout this process.

[9] *Fact Sheet*, The Bronx Defenders Marijuana Arrest Project (March 29, 2012), www.bronxdefenders.org/press/. While Police Commissioner Raymond Kelly took the unusual step of issuing a department-wide order specifically instructing all NYPD officers to discontinue this practice—Operations Order #49—in September 2011, the order appears to have had little effect on the actual behavior of front-line police officers. *Id.*

meaningful justice through the courts. FFP is dedicated to looking at the ways in which the process has become the punishment for huge numbers of clients—not just those charged with marijuana possession—caught in the web of the criminal justice system.

Identifying the Sources of Delay

At the time of this writing, 50 cases in the Fighter cohort have been resolved; 4 cases remain open. Despite all of the clients' expressed desire to challenge the police conduct leading to their arrests, to date, not a single suppression hearing has been completed. This, however, has not been for lack of trying: on average, clients in the Fighter cohort made 5 court appearances over almost 8 months, with approximately 2 months between each court date. Clients had to wait an average of 4 months for their first trial date. This does not include the additional 3-month delay between arrest and initial arraignment in Criminal Court for the 42 clients who received desk appearance tickets (DAT's).[10]

Table 1: Fighter Case Summary

Total number of Fighter cases	**54**
Cases resolved	**50**
Cases still open	**4**
Total number of court dates (incl. arraignment)	**278**
Average number of court dates per case	**5**
Average number of days from arraignment to disposition or next future court date (if still open)	**240**
Clients issued DAT's	**42**
Average number of days from arrest to arraignment in DAT part	**95**
Average number of days from arraignment to first trial date	**120**
Average length of adjournments in days	**57**
Total hearings and/or trials completed	**0**

[10] New York's Criminal Procedure Law allows police officers to issue a DAT in lieu of a fully processed arrest for certain minor offenses. *See* C.P.L § 150.10. While a DAT allows an arrestee to avoid spending the night in Central Booking, the delay between arrest and arraignment significantly extends the life of a case, which can have serious negative consequences, particularly in the employment context. In his State of the City address, Mayor Bloomberg recently announced that police officers would issue DAT's in all marijuana arrests beginning in March. *See* Michael Grynbaum and Michael Barbaro, *From Bloomberg, a Warning of Life After Bloomberg*, N.Y. Times, Feb. 14, 2013.

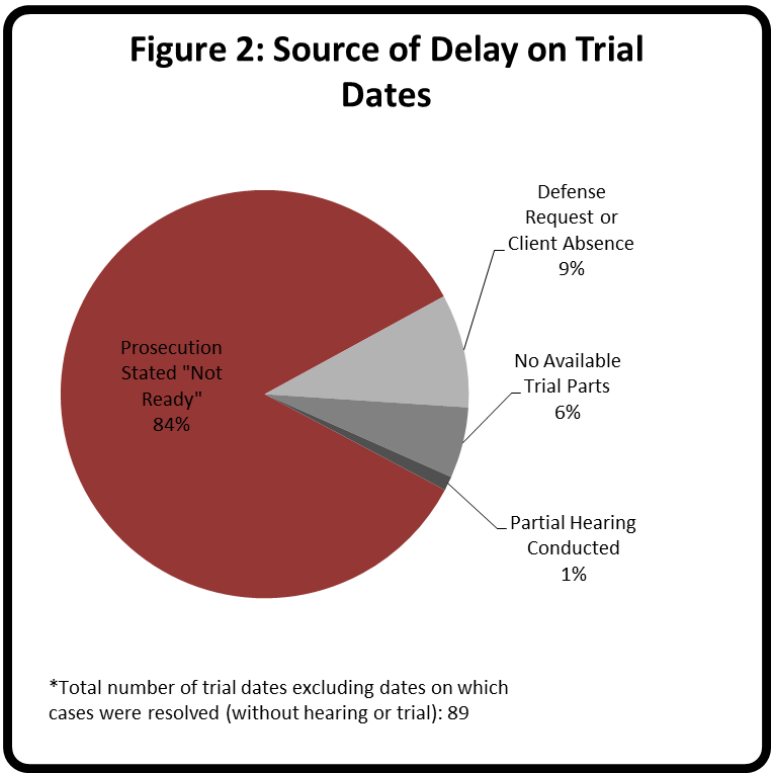
The Process: A Brief Overview

A cursory understanding of criminal procedure is required to understand the mechanics of delay in Bronx courts—the devil is in the details. Generally, following a client's initial arraignment in court, the judge will adjourn the case for motion practice. On the first post-arraignment court date, a judge will determine which hearings, if any, are to be conducted prior to the client's trial. In marijuana possession cases, this almost always consists of a suppression hearing, known as a *Mapp* hearing, where the admissibility of physical evidence at trial is determined. For the Fighters, *Mapp* hearings would be largely dispositive, as a successful challenge of the constitutionality of the police search would prevent prosecutors from introducing the central piece of evidence during trial—whatever marijuana was recovered from the client.

After deciding which hearings will be held, the judge will then set a date for hearings and trial to commence. For a hearing to occur 1) the prosecutor must be ready to proceed and have her witnesses (generally police officers) present and available, known colloquially as "stating ready"; 2) the defense team must also state "ready"; and 3) there must be a judge, courtroom, and court staff available to conduct the hearing. The scheduling of a trial date, however, in no way guarantees that hearings will *actually* be conducted on that date. Instead, the scheduling of the first trial date generally marks the beginning of a long and torturous process in which clients' expectations are repeatedly raised and then dashed with each successive postponement and delay.

Sources of Delay

As of the writing of this report, the Fighters have had a total of 89 trial dates—not counting those trial dates on which clients' cases were resolved without a hearing or trial—but not a single completed suppression hearing. Requests for adjournments by the Bronx District Attorney's Office accounted for the lion's share of postponements—more than 80%—on trial dates. Combined, defense delay and court congestion accounted for only 15% of trial postponements.



In the vast majority of cases, the prosecution's trial-readiness (or lack thereof) was the primary threshold obstacle to conducting hearings. Prosecutors stated "not ready" for hearings and trial on 75 of 89 trial dates. As a result, clients wishing to challenge the legality of police searches and seizures were forced repeatedly to turn down plea offers with the knowledge that doing so would likely mean many more courts dates, more absences from school and more missed days of work and lost wages. There was never a promise that the next hearing and trial date would be the final one, and each time a prosecutor stated "not ready," clients became more disillusioned with the court system. The result of this process was entirely predictable: most clients simply (and understandably) lost their resolve after two or three seemingly futile court appearances and opted to resolve their cases through a negotiated disposition.

Dispositions

While possession of a small amount of marijuana is not generally viewed as a serious threat to public safety,[11] a conviction can have dire consequences: misdemeanor marijuana possession in violation of Penal Law § 221.10 is a class B misdemeanor and carries with it a potential jail sentence of up to three months, possible community service, fines up to $500, a mandatory court surcharge of $200, and, of course, a permanent criminal record.[12] Additionally, the potential collateral consequences of a conviction—ineligibility for public housing, loss of financial aid for college, eviction, termination of parental rights, suspension or termination from work, and even deportation—often overshadow the result of the criminal case itself.

The majority of marijuana cases, however, are resolved through dispositions that do not result in a criminal record. In fact, not a single Fighter pled guilty to misdemeanor marijuana possession. Of the 50 cases that have been resolved, over 60% of the cases were either dismissed or adjourned in contemplation of dismissal (ACD). (Pursuant to an ACD, a client's case is adjourned for a year and ultimately dismissed barring any new arrests.) Together, negotiated pleas to the non-criminal violations of unlawful possession of marijuana (Penal Law § 221.05)[13] and disorderly conduct (Penal Law § 240.20)[14] accounted for approximately 30% of all dispositions. Three clients ultimately failed to return to court, resulting in the issuance of bench warrants, but only after an average of 172 days and 4 court dates.

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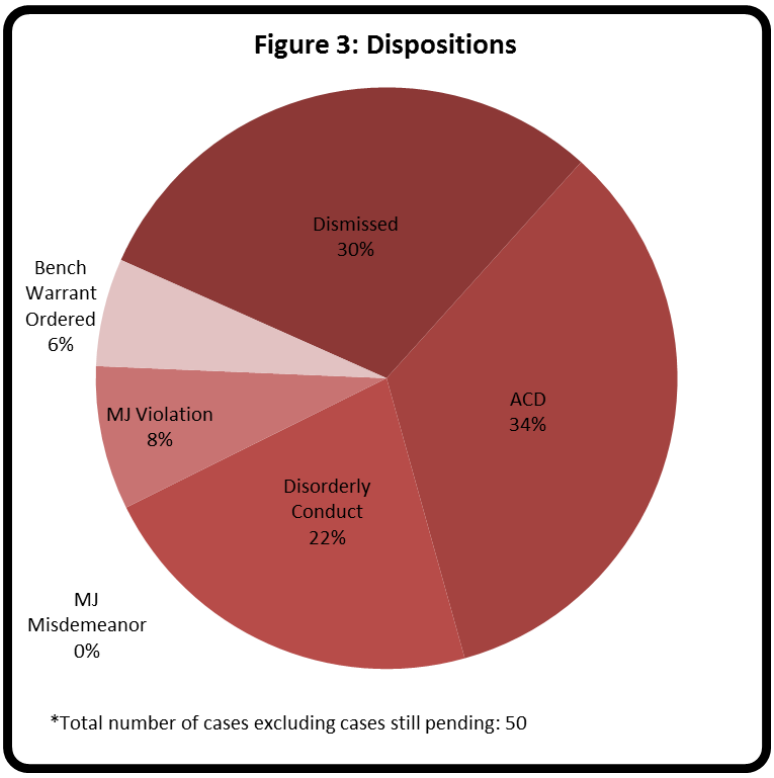
[11] In June 2012, Mayor Bloomberg, Police Commissioner Kelly, and the district attorneys from all five boroughs came out in favor of Governor Cuomo's push to further decriminalize possession of small amounts of marijuana. *See* Glenn Blain, *NYPD Commissioner Raymond Kelly Backs Gov. Cuomo's Plan to Decriminalize Public Possession of Small Amounts of Pot*, N.Y. Daily News, June 4, 2012; *see also* Human Rights Watch, *A Red Herring: Marijuana Arrestees Do Not Become Violent Felons* (Nov. 2012), www.hrw.org/reports/2012/11/23/red-herring-0.

[12] The failure to pay a court-imposed fine may result in the issuance of an arrest warrant and additional time spent in jail. And where a client fails to pay a court surcharge, courts regularly enter civil default judgments, which have lasting negative consequences for clients' credit ratings.

[13] Marijuana violations are punishable by a mandatory fine of up to $100 and a $120 court surcharge. Repeat offenses may be punishable by fines of up to $250 and 15 days in jail.

[14] Disorderly conduct is punishable by a fine of up to $250, possible community service, a $120 court surcharge, and 15 days in jail. Because a conviction for a non-criminal marijuana violation may lead to disproportionate negative collateral consequences—losing federal financial aid, eviction, and even deportation—disorderly conduct is a preferable disposition for many clients.



While MAP was able to obtain relatively favorable outcomes for the Fighters, the ultimate legal dispositions do not fully capture the universe of negative consequences engendered by these cases. Clients were required to return to court multiple times over many months before their cases were ultimately resolved. Clients who accepted negotiated dispositions (ACD's and non-criminal violations) did so after making an average of 4.5 court appearances over 193 days. Clients who ultimately had their cases dismissed—15 in all—made an average of 5.8 court appearances over 270 days.

Suppression Hearings

In the course of the project, 4 Fighter cases *were* actually sent out to trial judges for hearings. None of the hearings, however, were ever completed. While these cases represent aberrations in the Fighter cohort, they illuminate another important underlying reality governing cases in the Bronx Criminal Court: the system is frequently unwilling or unable to actually conduct substantive hearings in the thousands of misdemeanor cases making their way through the courthouse.

Judges typically respond to clients who reject plea bargains and express a principled desire to go to trial in misdemeanor cases—and marijuana cases in particular—with attitudes that range from bemused curiosity, exasperation, and veiled condescension to derision and almost palpable contempt. The decision to go to trial is treated as silly or irrational. At every turn, the court system communicates, in subtle and not-so-subtle ways, that clients are expected to give up the fight and accept a negotiated disposition. In the rare circumstances where prosecutors are actually required to present evidence, however, the cases frequently fall apart.

Of the 4 Fighter cases that were sent out for hearings:

- One was dismissed mid-hearing by the prosecutor following the arresting officer's testimony on direct examination. The client had made 11 court appearances, including 9 trial dates, over 520 days. Only 30 days were chargeable against the speedy trial clock.[15]

- One was dismissed after the arresting officer failed to appear in court to testify at the hearing. The client had made 8 court appearances, including 3 trial dates, over 282 days. Only 7 days were chargeable against the speedy trial clock.

- Two were resolved with negotiated dispositions before hearings commenced but after the judges exerted intense pressure on the clients to resolve the case. In both cases, the prosecutor had refused to offer a non-criminal disposition until the eve of trial. One client pled guilty to disorderly conduct after making 5 court appearances, including 2 trial dates, over 203 days; only 19 days were chargeable against the speedy trial clock. The other client made 3 court appearances, including 1 trial date, over 128 days and accepted an ACD; no time was chargeable against the speedy trial clock.[16]

As the Fighters' experiences illustrate, in many, if not most, of the misdemeanors that make up the majority of the cases making their way through the criminal justice system every year, there is simply no substance behind the right to a trial. More often than not, the handful of clients who are able to withstand all of the pressures to accept a negotiated disposition and see their cases through to the end discover that the right to trial is nothing more than an empty promise.

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[15] The implications of New York's speedy trial law will be discussed in depth below.

[16] Both of these clients' experiences were atypical for the cohort.

The Hidden Costs of Fighting a Case

The decision to fight a case comes at great personal cost. Every court date, clients must wait in a line that often runs around the block in the morning just to enter the Bronx Hall of Justice. After making it into the courthouse, they must wait, sometimes for hours, in crowded courtrooms, where judges frequently hear in excess of 100 cases a day, before having their cases called. And because prosecutors rarely reveal whether they will state "ready" for hearings and trial until the case is called on the record, the wait is colored by anxiety and uncertainty.

Beyond the physical and psychological toll exacted by these delays, each postponement brings with it the potential for another missed day of work, lost wages, school absence, rescheduled medical appointment, financial hardship, or childcare emergency. Clients must pay for transportation to and from court. Repeated absences from work strain relationships with current employers, and potential employers are less likely to hire clients when a background check reveals a pending criminal case. Clients working in the public sector or in jobs requiring state-issued licenses—such as security guards, home health aides, or cab drivers—are especially vulnerable, as an open case may lead to an immediate suspension without pay and, ultimately, termination.

> ***"Every day my client came to court in a suit and tie, prepared for his trial, and each time the officer failed to show up. As the case dragged on, he felt more and more disrespected by the system."***
>
> **-Martha Kashickey, Bronx Defenders Staff Attorney**

For the clients who accepted negotiated dispositions (ACD's and non-criminal violations), the outcomes rarely, if ever, reflected the relative legal merits of the particular case, but, rather, the client's desire to stem any further drain on his time and resources. In essence, clients often just paid the "nuisance value" of the case in order to resolve the matter and avoid future costs.[17] To a person, the

[17] In many cases, negotiated dispositions only aggravate the collateral consequences set in motion by an arrest. The mere fact of an arrest may trigger proceedings in family court and/or housing court. Beyond fines, court surcharges, and community service, convictions for even non-criminal violations can lead to wildly disproportionate negative consequences such as eviction, the loss of federal financial aid for college students, and even deportation for non-citizens, including legal permanent residents (i.e., green card holders). ACD's are not costless, either. While marijuana ACD's are generally regarded as positive dispositions for clients, the cases appear as open misdemeanor cases in court records for the year of the adjournment, causing myriad

Fighters expressed a mix of frustration and astonishment that the court system seemed to have no mechanism to make the promise of "a day in court" a reality.

Excusing Clients from Court

The strain caused by seemingly endless adjournments was exacerbated by judges' insistence that clients be present in court regardless of the prosecutors' "readiness" for trial. MAP attorneys regularly asked judges to excuse clients from personally appearing in court on scheduled trial dates if prosecutors indicated in advance that they would not be stating "ready" for trial. Many judges, however, would not even entertain the requests, and those who did granted them only in exceptional circumstances. The majority of the clients in the Fighter cohort were required to be present in court on each and every adjournment date, regardless of the prosecutor's readiness, often spending hours waiting for their cases to be called and then adjourned in perfunctory fashion.

> ***"It's frustrating coming back to court over and over again, having a case hanging over your head, when you are looking for work and trying to get your life in order."***
>
> **-Fighter**

In all, judges granted MAP attorneys' requests to excuse clients in only 12 of the Fighter cases. The data shows, though, that when clients *were* excused from court they achieved better results in their cases on average. In fact, where judges excused clients from appearing in court, cases were dismissed 56% of the time and resolved with ACD's 44% of the time. Not a single client who was excused from court pled guilty to either a non-criminal violation or a misdemeanor.

Where judges refused to excuse clients, however, clients did not fare as well. Cases were dismissed only 24% of the time and resolved with ACD's 32% of the time. Thirty-seven percent of clients who were required to be in court regardless of the prosecution's trial-readiness ultimately pled to non-criminal violations. Moreover, no bench warrants were ever issued to clients who were excused from court, whereas the 3 clients who failed to return to court—after an average of 172 days and 4 court dates—had all been required to come to court regardless of the prosecution's trial-readiness.

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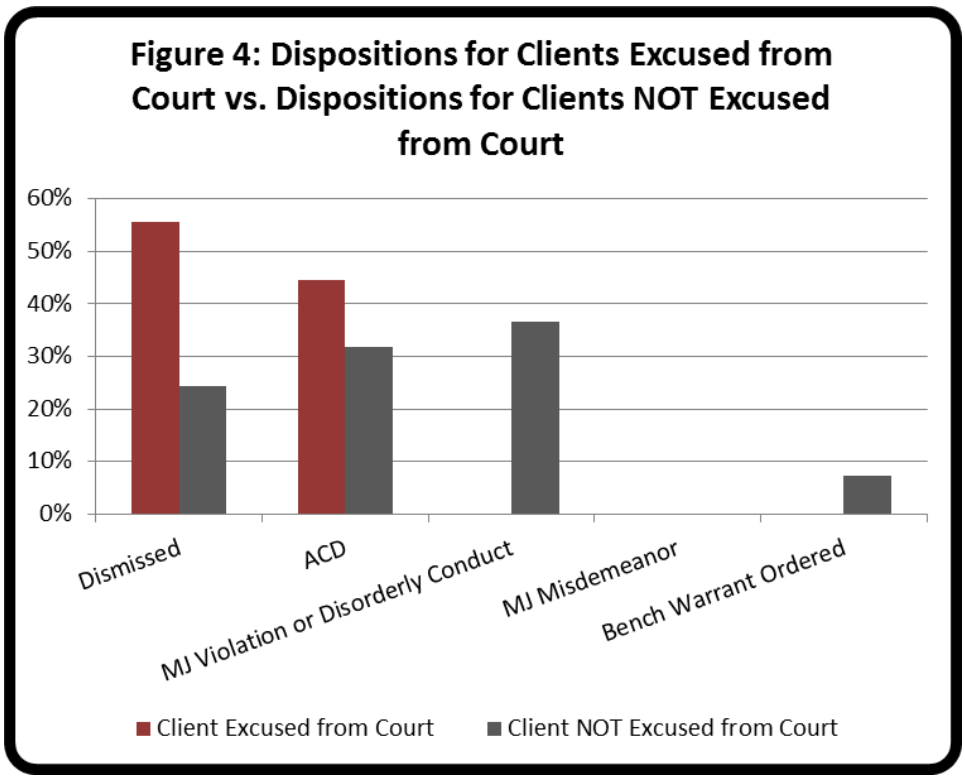
unexpected and often hidden problems associated with having an open case. An ACD will even prevent a client from being able to enlist in the military for the duration of the adjournment.



Tellingly, clients' past criminal histories played almost no part in creating this divide. The longer a case had been open, the less a client's past criminal history factored into the final disposition. Of the 10 cases that remained open for more than 300 days before reaching a disposition, not a single case resulted in a guilty plea.

As seen in the preceding section, there is often little or no institutional will on the part of prosecutors to devote the time and resources necessary to conduct hearings in marijuana possession cases. When prosecutors are forced to present evidence, cases often crumble. Outsized procedural delays, however, insulate prosecutors from the need to scrutinize the relative merits of a case until the very last moment. Most clients, quite understandably, accept a negotiated disposition well before this happens in a process that is almost wholly divorced from the underlying facts of the case and is, instead, determined by the client's relative ability to withstand system-created hardships. Such plea negotiations do not take place in the shadow of the law, but rather in the shadow of court inefficiency and delay.[18]

The clear import of these findings, wholly supported by anecdotal evidence, is that the burden of having to come to court repeatedly for empty and unnecessary court appearances wears clients down and creates pressure to plead guilty simply to bring the case to an end. A client's ability to fight his or her case and ultimately to achieve a favorable and just result is

[18] *See* William Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548 (2004).

directly tied to the burdens placed on the client by the court system itself. Excusing clients from unnecessary court dates significantly mitigates some of the distorting effects of these burdens, in large part by allowing clients to maintain their employment and attend school during the pendency of their cases.

This dynamic is evident in the 4 Fighter cases that remain open at the time of this writing. Of the 4 clients who continue to fight their cases, 3 have been excused from appearing in court on trial dates where the District Attorney does not intend to state "ready," making it possible to litigate their cases without jeopardizing their employment. The remaining client, against all odds, has made 6 court dates, including 4 trial dates; the case will have been pending over 400 days as of the next court date.

Speedy Trial

While New York's speedy trial statute, Criminal Procedure Law § 30.30, provides that the District Attorney must be ready for trial within 60 days of the commencement of an action where a client has been charged with misdemeanor marijuana possession (Penal Law § 221.10, a B misdemeanor), marijuana cases routinely sit inert on court dockets for anywhere from eight months to two years. Under § 30.30, speedy trial time only accrues when the prosecutor is responsible for the delay in the proceedings. A quirk of New York criminal procedure, rooted in the speedy trial statute and developed in case law, combined with the overwhelming volume of cases in the criminal justice system at any given time, gives prosecutors virtually unfettered power to control the calculation of speedy trial time. Trial date after trial date, prosecutors may state "not ready" for hearings and trial and request repeated one-week adjournments. Because of court congestion, however, cases are regularly adjourned for two months at a time. In such circumstances, only one week, rather than the full two months, is charged against the speedy trial clock at each adjournment. This practice results in cases stretching out long past the 60 days contemplated by the statute.

On average, only 8.0% of the time a case is open is actually counted against the speedy trial clock.

In the Bronx, it is standard practice for prosecutors to request short, usually one-week, adjournments, giving a variety of reasons for the delay: the arresting officer was not notified; the arresting officer is not available; the prosecutor is working a night shift; or the prosecutor is out of the office or on trial. Often, prosecutors give no reason at all, and few

judges require them to explain their requests. On some occasions, judges require prosecutors to file a "statement of readiness" (SOR) off-calendar if and when they become ready for trial. The filing of an SOR stops the speedy trial clock, but does not guarantee actual trial-readiness on the next date. On multiple occasions, prosecutors stated "not ready" for trial even after filing an SOR prior to the trial date. There is no procedural mechanism available to clients to expedite the process or challenge prosecutors' claims of readiness. As such, prosecutors are under very little pressure to prepare for trial.

MAP's data bears this out:

Table 2: Calculating Speedy Trial Time

Trial dates on which prosecutor stated "not ready" for trial	**75**
Times prosecutor requested an adjournment in court for a specific length of time	**55 (73.3%)**
Average length of request in days	**8**[19]
Times court required prosecutor to file an SOR	**20 (26.7%)**
Number of times prosecutor failed to file an SOR	**8**
Of remaining times, average number of days before filing of SOR	**15**
Times prosecutor stated "not ready" on next trial date after filing an SOR	**5**
Average length of adjournment in days	**57**
Percentage of time charged against speedy trial clock on average[20]	**8.0%**

Thus, despite the fact that New York's speedy trial statute contemplates a 60-day window in which prosecutors must be ready for trial, only a fraction of the time a case is open—just 8.0%—is actually charged against the speedy trial clock. If the cases that were dismissed on speedy trial grounds—often due to prosecutorial inattention—are excluded from the calculation, that number drops to 2.8%.

Dismissals

Of the 15 cases that were ultimately dismissed, 6 were dismissed by prosecutors on substantive grounds.[21] The remaining 9 cases were dismissed on speedy trial grounds. It is difficult, however, to characterize these dismissals as outright successes in a holistic sense. While the speedy trial time for a B misdemeanor marijuana possession charge is 60 days, it took an average of 272 days for cases to be dismissed on speedy trial grounds. Prosecutorial

[19] The most common request was for an adjournment of a week.

[20] Capping chargeable time at 60 days.

[21] These were cases in which prosecutors ultimately conceded the legal insufficiency of the case or dismissed in the interest of justice.

inattention and neglect, rather than any principled stance, was largely responsible for speedy trial dismissals.

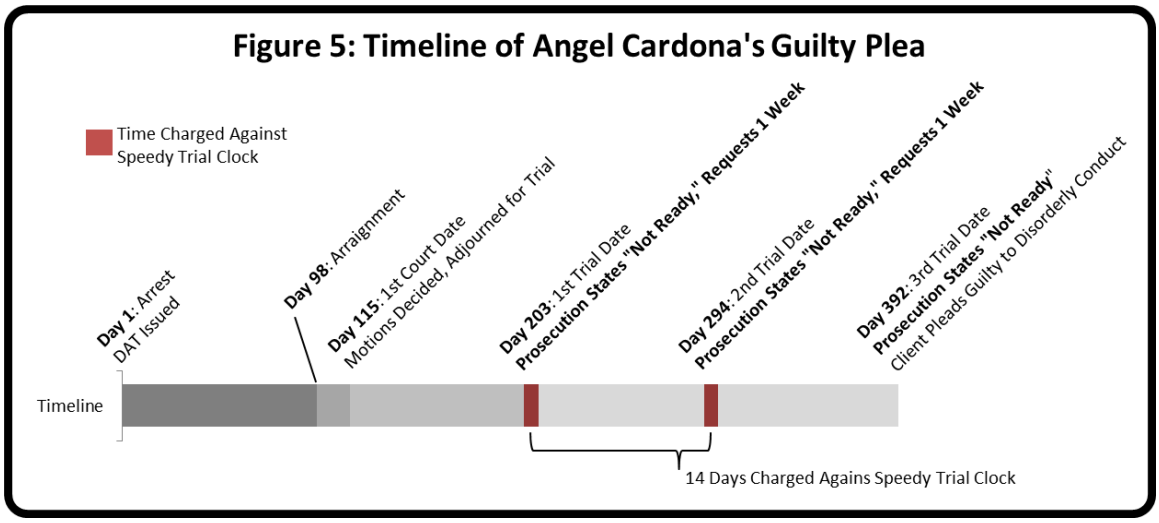
Table 3: Speedy Trial Dismissals

Total number of cases dismissed on speedy trial grounds	**9**
Prosecutor failed to file sufficient charging document	**2**
Prosecutor failed to respond to motions	**1**
Prosecutor failed to file off-calendar SOR	**6**
Average number of court dates	**5**
Average number of days from arraignment to dismissal	**272**

While a dismissal is the most favorable disposition from a purely legal point of view, most clients who received dismissals expressed mixed emotions about the result. The Fighters were motivated by principle, faith in the rule of law, and a belief in the promise of the adversarial process. By and large, the Fighters sought legitimacy: seeing the police officers held to account for their actions and subject to cross-examination and judicial scrutiny was just as much a goal as having the charges dismissed. By the time their cases were actually dismissed, these clients had been "punished" far in excess of the sentences proposed by the prosecutors, and they experienced their pro forma dismissals as something of a disappointment.

Conclusion

Taken as a whole, the data collected from the Fighter cohort paints a strikingly clear picture of inefficiency and unfulfilled promises of basic due process rights. Those who believe that the courts exist to provide a level playing field and an opportunity to challenge the state's evidence are quickly disabused of such notions. Angel Cardona's case provides a textbook example of how the dynamics described above interact to wear clients down and functionally deprive them of meaningful access to real justice.



Angel began the process with an acute sense of the injustice of his case and an abiding faith in the ability of the courts to right the wrong. But more than a year after his arrest, his faith had been tested and replaced by cynicism. Judges had greeted his decision to fight his case with derision and condescension. Prosecutors had blithely shirked their responsibility to present their evidence against him without explanation or excuse, wholly indifferent to the personal sacrifices required of Angel and his mother with each delay. Angel, like thousands of clients before him, confronted this reality with a deep sense of resignation, ultimately accepting the prosecutor's offer more than a year after his initial arrest. On the day he pled guilty, only 14 days had been charged against the speedy trial clock—that is, 3.6% of the days from arrest and 4.8% of the days from arraignment.

Some variation of the pattern seen in Angel Cardona's case was repeated in virtually all of the cases handled by MAP. At the time of this writing, 4 Fighter cases are still pending in Bronx Criminal Court; each has been open for more than a year. As of the next court date, one Fighter's case will have been open 632 days, having already been on for hearings and trial 8 times. The lion's share of delay—over 80%—is attributable to prosecutors failing to be ready for trial.

Table 4: Open Cases

Fighter cases currently open	**4**
Number of cases open for more than a year as of next future court date	**4**
Average number of days cases have been pending as of next future court date	**554**
Average number of court appearances per case	**9**
Average number of trial dates per case	**6**
Average length of adjournments in days	**63**

What makes these cases exceptional is not the length of time they have been pending or the nature of the delays along the way—such delays are the norm in the vast majority of low-level misdemeanor cases—but rather the perseverance of the particular clients in the face of incredible inconvenience and frustration.

Some of the solutions to these problems are obvious and easy to implement. For example, judges should regularly excuse clients from appearing in court on days when their presence is not necessary. Excusing clients would relieve some of the pressure on clients to plead guilty simply to bring a case to an end. Moreover, prosecutors' requests for adjournments, and the reasons underlying those requests, should face greater judicial scrutiny. Judges should use their discretion over matters of scheduling to demand accountability. Other fixes, however, such as reform of New York's speedy trial statute, will require a great deal of political will and a sustained policy advocacy campaign.

Perhaps the greatest challenge to addressing the issues raised in this report, though, is one of court culture. In the past 20 years, New York City has seen an explosion in the number of misdemeanor quality-of-life cases coming through its already under-resourced criminal courts. As a result, individual constitutional rights and questions of justice regularly take a backseat to the practical demands of processing the thousands of cases in the system. Few acknowledge the subtle, but strikingly clear message that is communicated to clients every day: participate in the charade or be prepared to put your life on hold for the next year and a half.

The disjunction between the high rhetoric of Judge Scheindlin's denunciation in federal court of the NYPD's cavalier attitude toward New Yorkers' constitutional rights and the response of the Bronx courts tasked with addressing the police conduct in the first instance puts the problem in stark relief. In the face of overwhelming and convincing evidence that NYPD practices have led to the wholesale denial of basic constitutional rights on an unprecedented scale, Bronx courts have largely abdicated their duty to provide defendants with a meaningful opportunity to challenge the police conduct underlying their arrests.

A shocking percentage of the more than 50,000 marijuana arrests that take place in New York City every year are constitutionally deficient—at least 40% according to the study conducted by The Bronx Defenders Marijuana Arrest Project. Each and every one of these arrests seriously undermines New Yorkers' trust in the NYPD and faith in governmental institutions generally, particularly in communities of color. Yet there is effectively no meaningful judicial oversight of such abusive police practices.

The sheer volume of quality-of-life misdemeanor cases in the system in the Bronx makes it virtually impossible for clients to challenge unconstitutional stops and manufactured misdemeanors through the regular criminal legal process. Widespread police misconduct is

systematically shielded from judicial scrutiny by court congestion and prosecutorial policies that create incentives for clients to plead guilty to lesser charges rather than see litigation through to the end. As a result, the staggering costs engendered by the current system—in the form of criminal records, fines, absences from school, missed days of work, evictions, deportations, and loss of parental rights—overwhelmingly fall on young men of color living in neighborhoods where these arrests are concentrated. With each perfunctory adjournment, clients' confidence in the criminal justice system erodes even further.

In his concurrence in *Barker v. Wingo*, one of the leading cases in the Supreme Court's constitutional speedy trial jurisprudence, Justice White wrote that courts must

> guard against inordinate delay between public charge and trial, which . . . may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."[22]

At the heart of Justice White's concurrence is a fundamental insight: the criminal justice system's legitimacy relies as much on substantive outcomes as it does on clients' experience of the process; whether it treats people fairly and respectfully; and whether it is able to fulfill the promise of "the day in court." As this report shows, the Bronx criminal justice system falls short of this ideal in ways that are as profound as they are routine.

[22] 407 U.S. at 437 (White, J., concurring) (quoting United States v. Marion, 404 U.S. 307, 320 (1971)).

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