

The New York Times

In Misdemeanor Cases, Long Waits for Elusive Trials



Michael Appleton for The New York Times

When Danilo Melendez, a father of three, decided to contest the charge against him of marijuana possession, his court date was postponed eight times before the prosecutors dropped the case.

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Published: April 30, 2013

Francisco Zapata keeps a copy of the Constitution on his cellphone. So when the police stopped, frisked and charged him with misdemeanor marijuana possession, he wanted what that cellphone document promised.

“I was under the assumption,” he said, “that if I kept going back to court, eventually I would get my day in court.”

But this was the Bronx.

Court delays of as long as five years in felony cases have pushed the Bronx criminal courts into the bottom ranks of courts nationally, reaching what even the judges call crisis levels.

But that backlog has a less-noted companion. The courts are so dysfunctional that those accused of minor offenses — misdemeanors like trespassing or driving with a suspended license — have all but lost the fundamental guarantee of the American legal system: the right to a trial.

The case of Mr. Zapata would usually be overlooked in the flood of 50,000 Bronx misdemeanor filings a year. But he was part of a special legal-defense effort led by the Bronx Defenders, which provides legal representation to poor Bronx residents charged with crimes. That effort tested the borough's courts by trying to bring 54 misdemeanor marijuana possession cases to trial for clients who had been arrested as part of New York City's controversial [stop-and-frisk](#) program and wanted to fight the charges.

Instead, these defendants got a through-the-looking glass criminal justice system where charges that were punishable by a maximum sentence of three months in jail could take many times that just winding toward an always elusive trial. And when the increasingly elastic speedy-trial rules of the Bronx were finally stretched too far by delay after delay, prosecutors would sometimes drop the cases as if they were never quite worth their time anyway.

How 60 Days Turn Into 600 in a Misdemeanor Case

New York law calls for many misdemeanors to be tried within 60 days of arraignment. But Anthony Fearon, who was arrested and charged with criminal possession of marijuana in 2011, has been waiting more than 600 days for a trial because the court only counts certain types of delays toward the 60 days. His case is one of 54 cases in the Bronx Defenders project, an effort to bring clients who wanted to fight their arrests to trial. (See visual here: <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html?ref=opinion>)

Eventually, the effort by the Bronx Defenders, done in partnership with the Wall Street law firm Cleary Gottlieb Steen & Hamilton, was scrapped. The grim conclusion was that the borough's courts were incapable of giving defendants the hearings that people expect. Of the 54 cases, not one ended in a trial.

“The normal rules about being ready and having your day in court just don't apply,” said Lev L. Dassin, a former acting United States attorney in Manhattan who was the Cleary Gottlieb partner in charge of the firm's work on the project. “It's appalling.”

The rights of the accused were not the only ideals compromised. The inability to get a judge to provide a complete hearing or a full decision in a single case meant the Bronx courts ignored pressing constitutional questions about the city's controversial stop-and-frisk program. There were no hearings that allowed Bronx judges to wrestle with the

fraught issues of public safety versus civil liberties, and no rulings that provided the police with firm guidelines about what the Constitution allowed when someone was searched in the street.

The Criminal Court's absence from the debate is particularly glaring in the Bronx, where nearly 1 in 10 residents were stopped and frisked by the police in 2010 and 2011, according to new data compiled by Columbia University.

For years, trials have been vanishing in the lower criminal courts around the country, transforming them into plea-bargaining mills. That trend can upend basic legal concepts, creating such profound disincentives to fighting a case that the accused are effectively treated as if they are presumed guilty rather than innocent. In New York, critics have long said the city's Criminal Courts have so abdicated their function that it is a stretch to call them courts at all.

Efrain Alvarado, the former top criminal judge in the Bronx, disputed that characterization even as the Bronx Defenders were finding it impossible to get the courts to rule on the marijuana cases. He noted proudly that there had been 300 Bronx misdemeanor trials in 2012. At the time, there were more than 11,000 misdemeanor cases pending.

Bronx judges do sometimes express frustration with the pace of low-level cases. This March, a judge dismissed a marijuana case that was not part of the Bronx Defenders project, saying prosecutors had failed to explain why they were not ready for trial for more than a year. But more often, the whole court system seems to push people to give up on the idea of fighting the charges.

Last year, a judge told a 17-year-old defendant in a marijuana case in the Bronx Defenders project that if he did not take a plea deal, which involved no jail time, he would be "coming back and forth to court over the next 18 to 24 months." The 17-year-old took the deal.

A Punishing Process

A 40-year-old Iraq War veteran named Michailon Rue sat in a buzzing basement courtroom in the Bronx, where his marijuana case was scheduled for its seventh court date.

The whole system had made it clear, he said, that if he pleaded guilty, he would not have to keep coming to court. But he had turned down a string of ever-sweeter plea offers over 15 months after his arrest in August 2011. “I said: ‘No. Why would I do that? I am not guilty.’”



Michael Appleton for The New York Times

Scott D. Levy, of the Bronx Defenders, with a client who had just been to court for his case dealing with an arrest for marijuana possession at the Bronx County Hall of Justice.

Mr. Rue’s lawyer, Scott D. Levy, of the Bronx Defenders, coordinated the [marijuana arrest project](#). “The way the courts operate in a million, subtle, unspoken ways,” Mr. Levy said, “is to communicate it’s just not worth their time to fight.”

In January 2012, the prosecutors said they were still not ready for Mr. Rue’s trial. Shortly thereafter, in March, they said they were not ready because the police officer who had arrested Mr. Rue had not come to court that day. In June, they said the prosecutor handling the case was on vacation.

The court delays are difficult to explain to clients, said Robin Steinberg, the executive director of the Bronx Defenders, which represents some 30,000 people a year.

In lower-level cases, Ms. Steinberg said, defendants who have been found guilty of nothing miss jobs and school to return repeatedly to court until they give up and plead guilty to something. The ordeal of going to court has become the new price of being

arrested — even more so than the minor sanctions that usually come with low-level charges.

“The process is the punishment,” she said.

Of the 54 cases in the marijuana project, the average case lasted 240 days, though the state’s speedy trial law sets a target length of 60 days for lower-level misdemeanors.

The prosecutors’ average request for a delay was eight days. But the average postponement granted by judges was 57 days.

In the fuzzy math of the courts, the eight days that a prosecutor might ask for would count toward the 60-day limit, but the other 49 days of delay scheduled by a judge would not. That is how misdemeanor cases can balloon to a year or more while only counting as 45 days. For the defendants, a year still seems like a year.

Still, prosecutors sometimes cannot meet even that deadline. The day of his seventh appearance in court, Mr. Rue said it had been a costly choice to try to fight the charges. He had lost a \$17-an-hour maintenance job because of the drug charges pending against him month after month.

In the courtroom, he strained to hear. There was some mumbling at the bench. The prosecutor said the case had aged beyond that 60-day limit for a marijuana misdemeanor.

“Dismissed and sealed,” was all a harried Judge Miriam R. Best said as she turned to the other 117 cases on her calendar. Mr. Rue had won, but not in the way he had hoped.

Outside in the busy courthouse hallway, Mr. Rue said he wished the judge had talked to him. “I would tell her: ‘Don’t you see? There’s something wrong with the system,’ ” he said. “ ‘And why isn’t somebody doing something about it?’ ”

Stop-and-Frisk Project

In spring 2011, the Bronx Defenders and volunteers from the Cleary Gottlieb law firm decided to team up to try to press the Bronx courts to confront the stop-and-frisk issues for clients like Mr. Rue.

Under New York law, possession of a small amount of marijuana is a misdemeanor only if it is in public view. But across the city, black and Latino men were claiming that when the police found marijuana in their pockets during stop-and-frisk searches, they often manufactured cases by claiming the marijuana had been in plain view.

Despite the growing controversy, the courts have been slow to confront the stop-and-frisk issues. The two [most widely noted rulings](#) from state appeals courts raising questions about stop-and-frisk arrests came in more serious gun cases, not in the far more numerous marijuana arrests. In federal court, there is [a trial under way](#) in a class-action civil rights lawsuit challenging the constitutionality of the tactic.

A law professor, Steven Zeidman, argued in a law review article published in April that the city's Criminal Courts had displayed "invisibility and willful irrelevance" in the stop-and-frisk debate.

The 54 defendants who took part in the project turned down plea offers, rejecting deals that were often extremely favorable, like having a case sealed if they stayed out of trouble for six months. They asked for trials, hearings, testimony and rulings.

"I imagined actually going to court so I could tell my side and they could tell their side," said Shaniel G. Whyte, a 34-year-old shipping manager who said he had been falsely charged with holding marijuana in public view.

After nine months of trips to court, Mr. Whyte took a deal that would leave him with no record if he was not arrested again. He had regrets, he said, because he had given up his chance to make a point in a trial one day.

Sheepishly, he said the system had worn him down. "I didn't know how much more I would have to come back," he said.

An Illusory Expectation



Michael Appleton for The New York Times

Matthew J. Vanek, Kristen M. Santillo and Jennifer L. Kroman, from the Wall Street law firm Cleary Gottlieb Steen & Hamilton, in partnership with the Bronx Defenders, brought marijuana cases stemming from police frisks in front of judges in the Bronx, but rarely got very far.

At times, the public defenders and the corporate lawyers seemed to have come from two different legal planets. The Cleary Gottlieb lawyers saw the Bronx courts with fresh eyes.

Matthew J. Vanek, a Cleary Gottlieb associate, prepared his case the way he did for the firm's corporate clients: He filled his binder with legal points and trial questions. But he never got to use it.

It was not like his usual work for big banks and big business, Mr. Vanek said. "The expectation is you get your day in court," he said one day in the firm's plush Lower Manhattan office. "My experience and the experience of a lot of associates here was that was illusory in the Bronx."

Kristen M. Santillo was on the Cleary Gottlieb team that worked on representing Danilo Melendez, a father of three. Mr. Melendez said the police had stopped him when he took a break from his job at a Bronx meat market to buy a soda. They frisked him, he said, and found a stub of a marijuana cigarette in his pocket. They said he had been holding the stub in his left hand.

"He was really ready to tell his story," Ms. Santillo said.

Mr. Melendez said the marijuana case weighed on him as one court date led to two, and finally to eight. “That thing’s not letting me sleep,” he said in an interview. “I’m thinking about the court.”

Ms. Santillo said Mr. Melendez geared up to take the stand each time, with growing frustration at each court postponement.

But the courts kept avoiding the issue. Finally, after a year, a prosecutor announced that the arresting police officer “cannot make it today.” The judge was irate and refused to give them more time. The prosecutors dropped the charges.

“I was definitely surprised,” Ms. Santillo said.

But Mr. Melendez seemed less mystified by the way the system misfired than his lawyers, thanks to his life experience in the Bronx. Mr. Levy, the lawyer from the Bronx Defenders, said: “There was always an expectation in the back of his head: ‘Yeah, this is how things go.’”

A New Cause

In spring 2012, having had the chance to conduct no trials and complete no hearings, Cleary Gottlieb and the Bronx Defenders decided to phase out the marijuana arrest project.

Now they are working together on ways to challenge court delays, like trying to get defendants excused from some of the endless court dates that some of them say are a major factor in turning the process into the punishment.

Of the 54, Francisco Zapata, the man with the Constitution on his cellphone, was the one who came closest to getting a judge to grapple with his case. The case lasted 523 days.

There were 11 court dates. When Mr. Zapata missed one because he had to work, he was threatened with arrest. There were no such rebukes when prosecutors and police officers repeatedly missed hearings.

But Mr. Zapata did have the rare experience of seeing the officer who arrested him take the stand in a pretrial hearing. His own lawyer from the Bronx Defenders, Martha

Kashickey, even got to ask some questions about the night the officer claimed he had seen Mr. Zapata from a distance holding a plastic bag of marijuana in plain view.

Then, before the cross-examination got too far, the prosecutors suddenly dropped all charges.

Just like that, after 523 days, the case was over.