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Testimony of The Legal Aid Society

**at a public hearing
on**

OVERSIGHT: ANALYSIS OF NYPD STOP-AND-FRISK ENCOUNTERS

Presented before:

**The New York City Council
Committee on
Public Safety and Civil Rights**

Presented by:

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The Legal Aid Society welcomes the opportunity to testify before the City Council's Committee on Public Safety and Civil Rights and to share the views of its experienced staff of criminal defense practitioners.

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Annually, through our criminal, civil, and juvenile offices in all five boroughs, our staff handles more than 295,000 cases for low-income families and individuals. The legal services we provide reflect the entire gamut of the needs of our clients, from immigration representation for the newest arrivals, to health care benefits for the oldest New Yorkers.

By contract with New York City, The Legal Aid Society serves as the primary trial-level defender of persons accused of crimes and other offenses. It also serves as the largest appellate defender for persons in need of post-conviction services. This year the Society projects that it will represent clients in some 236,000 trial level, post-conviction, and parole revocation proceedings.

THE SCOPE OF THE PROBLEM

The Center for Constitutional Rights (CCR) has performed valuable work in its analysis of "Stop-and-Frisk" reports prepared by the Police Department, entitled Racial Disparity in NYPD Stops-and-Frisks. We are disturbed by the continuing racial disparity in stops and frisks revealed by their 2009 study, which covers 2005

to mid-2008. Not only are Blacks and Latinos stopped much more frequently by the police than whites, they are also much more likely to be subjected to a frisk than whites who are stopped.

Our concern as a criminal defense organization is with the rampant violation of the Fourth Amendment that the unchecked stop-and-frisk policy of the Police Department inflicts on so many of those affected. The CCR study, consistent with prior studies, shows that only 4 to 6 percent of NYPD stops result in arrests. Similarly, since 2005, only 2.6 percent resulted in discovery of a weapon or contraband.

That 19 out of 20 stops, roughly speaking, result in no evidence of criminal activity on the part of the person seized by the police says a great deal about the constitutional legitimacy, or illegitimacy, of many of those intrusions on the individual's right to be free of an unreasonable search and seizure, which is the essence of the Fourth Amendment.

The Fourth Amendment is very much an individual right. A police agency that operates in fidelity to our Bill of Rights is not permitted to cast its net widely by seizing a large number of individuals in order to uncover unlawful activity by a relative few. Under the well-known rule of Terry v. Ohio, 392 U.S. 1 (1968), a police officer may lawfully detain a person only on the basis of a reasonable suspicion that the person is engaged in criminal activity. And the right to frisk that

person is not automatic. A frisk is permissible only for weapons. As Section 140.50(3) of the Criminal Procedure Law requires, the officer must "reasonably suspect []" that the person stopped is carrying a weapon before performing a frisk.

When the number of stops and frisks so greatly outnumbers the incidents in which any criminal activity is actually uncovered, it means that the limitations of constitutional and statutory law are being disregarded by the police on a massive scale. In 2007, for example, of the 472,096 stops that were made, just 27,632 arrests (6%) resulted. Plainly, the NYPD stop-and-frisk policy is not restricting its officers to stopping people only upon a reasonable suspicion of criminality.

Whatever predicate for seizing individuals NYPD officers are acting upon, it cannot be "reasonable" if it proves to be wrong 94% of the time.

THE LIMITATIONS OF THE CRIMINAL JUSTICE SYSTEM

As criminal defense lawyers, we at The Legal Aid Society seek to defend the constitutional rights of those for whom we are appointed to represent. But our experience with the criminal justice system leaves us with the unfortunate knowledge that there is very little meaningful opportunity for legal redress in our current system for the vast majority of those subjected to unlawful searches and seizures by the NYPD's stop-and-frisk policy.

The first reason is inherent in the nature of an intrusive practice that does not end in arrest for some 19 out of 20 people. Where there is no arrest, there is no

criminal case, no appointment of counsel, and no judicial forum in which to challenge the legitimacy of the police conduct. Nevertheless, "No Harm, No Foul" would be a very mistaken view of what has happened to those thousands of individuals who were stopped and often frisked, but not arrested. The physical violation and humiliation that such an encounter may inflict on an innocent person is not made tolerable simply because the further ordeal of the criminal process is not also inflicted. Yet the fact remains that there is no appointment of counsel to aid a person to redress such a grievance in the absence of a criminal prosecution.

Our experience at Legal Aid with the NYPD policy is drawn from the approximately 5-6% of the stop-and-frisk population who are arrested and subjected to criminal prosecution. As noted, it is very likely that the stop and frisk that led to the arrest of the individual and the seizure of evidence was not legal: if so few are arrested, then many stops in the stop-and-frisk program cannot be based on the required reasonable suspicion that the person stopped has committed a crime. The criminal process that follows that arrest, however, will likely not provide a meaningful chance for redress or vindication.

The suppression hearing -- the legal forum in which to adjudicate the legality of a search or seizure -- is an increasingly infrequent event, especially in Criminal Court, where most "quality of life" arrests end up. One reason is that the hearing is not for the asking, but may be granted or denied, depending upon a

motion to suppress that must satisfy technical pleading requirements and may require factual admissions that put an accused person in a difficult position. Consequently, the request for a hearing is often denied. Judicial review of the stop and frisk then does not take place.

As one authority has commented: "One would think that the publicized recognition about the disproportionate impact of present policing policies on people of color, and the increasing acknowledgement that many are wrongly convicted, would compel the courts to examine the basis for search and seizure in every case. Yet, in actuality, the trend seems to be toward narrow and overly strict interpretations of case law as a means to deny defendants suppression hearings." Steven Zeidman, "Policing the Police: The Role of the Courts and the Prosecution," 32 *Fordham Urb. L.J.* 315, 333 (2005).

The greatest barrier to redress is the onerous nature of the criminal process itself. However improper and unfair the police conduct that put the person into that system, the overwhelming desire of persons caught up inside it is to find a way out of it. Judicial review of police behavior comes at a high price, one that few persons facing a criminal sanction are in a position to pay.

In the Criminal Court, for example, some 358,000 cases were initiated by an arraignment in 2007. Out of that enormous number, approximately 400 cases (excluding the Bronx) went to a trial, a small fraction of one percent. In

misdemeanor cases, any suppression hearing is generally held in conjunction with the trial. So only in a minuscule number of cases is the legitimacy of the stop and frisk ever evaluated by a judge, and the guilt or innocence of the accused determined by a jury.

One reason for the absence of trials is the obstacle course the system places in the way of a proceeding on the merits. An accused who wants his or her "day in court" must endure repeated court appearances, a process often prolonged over a year by delays and postponements, very often caused by a prosecutor declaring "Not Ready" on the date set for trial.

Even when a case is ultimately terminated on so-called "speedy-trial" grounds, the result must be seen as a Pyrrhic victory for someone who had been unlawfully stopped, searched, arrested, forced to show up for numerous court appearances at which nothing happened, and then denied an opportunity to have a judge or jury pass on the legitimacy of the police conduct that set the process in motion.

In addition to dismissals, cases often end in guilty pleas. But rather than acknowledging the lawfulness of the police conduct, the guilty plea usually represents the most rational choice for an accused who has been put in the position of having to decide between a number of bad options. For some who are confined in jail during a pre-trial period that may cover several months, a guilty plea with a

"time served" sentence is often an offer that can't be refused. No matter how unwarranted the stop and frisk that started the case, it takes an exceptionally determined and fearless individual to weather further imprisonment in order to receive the due process of law guaranteed by the Constitution.

Those released during the criminal case are in a similar, though less stark, predicament when faced with the opportunity to terminate the case by a guilty plea. A plea to a violation, instead of a misdemeanor, for example, might avert some of the serious collateral consequences that follow a conviction, such as deportation, eviction from public housing, license suspension, and ineligibility for student loans. Again, it is often too much to expect a person, however victimized by improper police conduct, to continue the Criminal Court ordeal and risk its many sanctions, in order to vindicate the rights guaranteed by the Constitution's Fourth Amendment.

The result of all these difficult choices, unfortunately, is that the widespread police activity in unlawfully stopping and searching hundreds of thousands of individuals every year is unchecked and unmonitored by the criminal justice process.

THE NEED FOR CONTINUAL MONITORING

This reality underscores the indispensability of the Committee's oversight process. Our Court of Appeals has emphatically stated that "[t]he privacy interest

of our citizens is far too cherished a right to be entrusted to the discretion of the officer in the field." People v. Howard, 50 NY2d 583, 588 (1980). Nevertheless, for the reasons outlined above, the court system is limited in its ability to protect the constitutional rights of those unfairly targeted for intrusive stops and frisks.

Because of this practical limitation, the responsibility to closely monitor the NYPD's stop-and-frisk program falls upon this body. We urge the Council to insist on full transparency in the effectuation of that policy. Moreover, the Department must promulgate and enforce specific guidelines to ensure that its officers undertake a stop and frisk only in the presence of facts that would support a reasonable suspicion that the person subjected to that personal invasion is connected to criminal behavior.

Thank you again for this opportunity to testify. We welcome any questions that you may have.