

MEMO IN LIEU OF TESTIMONY OF

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HEARINGS OF THE NEW YORK CITY COUNCIL COMMITTEE ON PUBLIC SAFETY, Regarding

Int. No. 799 - In relation to requiring law enforcement officers to provide notice and obtain proof of consent to search individuals.

Int. No. 800 - To prohibit bias-based profiling by law enforcement officers.

Int. No. 801 - In relation to requiring law enforcement officers to identify themselves to the public.

Int. No. 881 - In relation to establishing an office of the inspector general for the New York city police department.

October 10, 2012, New York, New York

POLICE STOPS, ILLEGAL SEARCHES, AND MARIJUANA POSSESSION ARRESTS

I am a professor of sociology at Queens College and the Graduate Center of the City University of New York. For many years I have been researching and writing about the history and sociology of alcohol and drug policies and problems. With a few colleagues, I have been researching racial disparities in arrests for marijuana possession in New York City and throughout the United States. In the last year we have developed the web site www.marijuana-arrests.com as an online library of information about marijuana possession arrests, the NYPD's stop and frisks, and other policing issues. Thank you for inviting me to testify today. I am very sorry that I am unable to present my testimony in person. I am submitting this memo in lieu of my oral testimony.

I would like to briefly present information relevant to the legislation under consideration from our research on police stops and marijuana arrests. New York City's large number of marijuana possession arrests (500,000 since 1997) have received considerable public, media and political attention; I know the Council is well aware of what has been happening.

Central to the question of these arrests is how police officers find the marijuana. As the Governor, the Police Commissioner, the city's District Attorneys, former Mayor Koch and others have pointed out, often the bit of marijuana is retrieved from the pockets of the young people stopped by the police. As the Governor has explained, police will direct or order people to empty their pockets. On other occasions police will ask people to do so. And sometimes, in the course of a pat down for weapons, police officers will reach into a person's pockets to retrieve what is there. As public defenders, people who have been arrested themselves, and people who have interviewed such people learn, this happens far more often than most New Yorkers expect or believe. In this testimony I wish to present some of the public evidence showing that this has been going on.

In the last two years, news coverage about New York City's marijuana arrests has increased dramatically. Experienced, reputable journalists have quoted citizens, mostly young

people of color, describing encounters in which police had put their hands inside of someone's pockets. For example, on February 1, 2012, Jennifer Peltz of Associated Press reported on the case of Stephen Glover. He was standing outside a Bronx job-training center,

"sharing a box of mints with friends, when police came up to him, asked him whether he had anything in his pockets that could hurt them, and searched them [his pockets] without asking his permission. They found the remains of two marijuana cigarettes in his pockets, he said. 'They just take it upon themselves to search,' the 30-year-old Glover said." ¹

In December of 2011, Steve Wishnia of Alternet quoted Sydney Peck, a Brooklyn public defender: "A police officer pulls marijuana out of someone's pocket, and all of a sudden, it's marijuana in public view" Wishnia also quoted Joshua Saunders, a staff attorney at the Brooklyn Defenders, who said he has "seen a lot of 'dropsy' cases, in which police say they saw the defendant drop the marijuana on the ground" Saunders cited the police report of a man in front of a bodega, "in possession of a quantity of marihuana, which was open to public view" which the officer reported he "recovered from defendant's pants pocket" The attorney, perplexed by how marijuana in a pocket could be open to public view, wondered if his client had worn "transparent pants." ²

Most thorough of all was the DuPont Award-winning, two-part series by Ailsa Chang, the police and criminal justice reporter for WNYC, about illegal searches for marijuana by the NYPD. In April 2011 she reported a number of cases of police putting their hands inside people's pockets and searching their clothing.

WNYC tracked down more than a dozen men arrested after a stop-and-frisk for allegedly displaying marijuana in public view. Each person said the marijuana was hidden – in a pocket, in a sock, a shoe, or in underwear. There's no videotape to confirm their accounts, but they each said the police pulled the drugs out of his clothes before arresting him for having marijuana in public view. None of them had been buying their drugs outside. And none of them were carrying a weapon when they were stopped....

Antonio Rivera, 25, said he gets stopped by police up to five times a month. In January, he said he was stopped and frisked near the corner of E. 183rd Street and Creston Avenue in the Bronx. He was arrested for misdemeanor marijuana possession. Critics of the police say his case is an example of how officers may be conducting illegal searches when making marijuana arrests. Rivera said his marijuana was in his pants and that police pulled it out of his clothes after searching him without his consent. "So they checked my pockets, my coat pockets, and they patted my jean pockets," Rivera said, "and then once he felt the package I had in my crotch area, he went into my pants and he pulled it out."

Rivera had lodged a soft Ziploc bag of marijuana between his legs inside his pants while still in the room where he bought it. He said he never took the drugs out when he

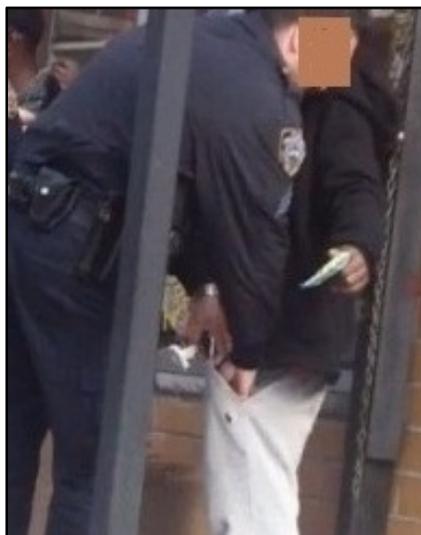
went outside, but the police officer who arrested him told prosecutors Rivera was openly displaying his drugs.

In the criminal complaint against Rivera, the arresting officer stated that he "observed the defendant to have on his person, in his right hand 1 ziplock bag containing a dried-green leafy substance with the distinctive odor alleged to be marijuana in public view"....

Leo Henning, an African-American, said he was walking with a Ziploc bag of marijuana in his sock – under his foot – when two officers stopped him in March on a street corner in East Harlem. He had just bought the marijuana inside a warehouse several blocks away and had tucked the bag in his sock before he stepped outside, he said. Henning said one of the officers who stopped him placed his hands on him almost immediately.... "He went into my front right pocket. Then he went into my front left pocket," Henning said. "Then he went into my right back pocket. Then he went into my left pocket" Finding nothing, Henning said the officer stuck his fingers down Henning's left sock. "And then he switched over to my right sock," Henning said. "He stuck his hands in. His fingers was going under my foot inside my sock. That's when he felt it, I gather." At that point, the officer allegedly pulled out the bag of marijuana and arrested Henning for displaying marijuana "open to public view." Henning spent the night in jail.³

Below are three photographs of New York police officers reaching into people's pockets during a frisk. One we received from an extremely trustworthy source who witnessed the frisk in his Bedford Stuyvesant neighborhood and filmed it on his iPhone. The other two photos are from videos taken by Jazz Hayden, a long-time civil rights activist who posts photographs, videos and news stories about the police stops, frisks, and searches on his web site www.allthingsharlem.com.

Police with with a hand in a suspect's pocket. No arrests were made in these cases.



1. Brooklyn - Bedford Styvesant, April 2011



2. Harlem on Broadway, April 2009



3. Harlem on Broadway, April 2009

Full video for #2 and #3 at:

<http://www.allthingsharlem.com/copwatch/2009/4/26/nypd-harassment-in-harlem-stop-and-frisk-kids-on-bench.html>

It is illegal and unconstitutional for police to reach inside of someone's pockets without prior "probable cause" to believe the person has contraband – meaning evidence sufficient to justify an arrest. As Ira Glasser, a constitutional expert and the former executive director of the American Civil Liberties Union, has explained:

"A full search, in which the person stopped is required to empty his pockets, or where an officer puts his hands in an individual's pockets or otherwise goes beyond the pat-down of outer clothing for the purposes of determining whether there is a weapon, requires probable cause – that is, enough evidence to justify an arrest."

As the U.S. Supreme Court established in *Terry v. Ohio* (1968), police officers may formally, officially stop and detain someone only when they have "reasonable suspicion" that something illegal or dangerous is going on that warrants further investigation. However, in order to conduct a frisk – what the Supreme Court called "a limited search of the outer clothing for weapons," especially a gun – the officer must have "reasonable suspicion" to believe that the person is armed and dangerous, posing a threat to the officer or others. But even this frisk, this pat down, this "limited search," is to be of only the "outer clothing," and there is no legal justification for reaching into someone's pockets or possessions unless the officer feels a weapon – and guns are relatively easy to feel.

"What Terry means, therefore, is that in the absence of probable cause – that is, in the absence of enough evidence to justify an arrest or a search warrant issued by a court – a police officer may frisk someone, once he has been legally and forcibly stopped, *only* if the officer has good and specific reasons to suspect a concealed weapon. What the officer may not legally do is frisk someone because he "suspects" a crime other than the possession of a concealed weapon. And he certainly may not legally frisk someone,

much less search their pockets, for a small amount of marijuana, which could not possibly be mistaken for a weapon, and which in any case is not a crime in New York if it remains concealed and weighs 25 grams or less." ⁴

The second common way that police retrieve marijuana is that some individuals take out their marijuana and hand it over to the police. Few people do this without being asked or ordered. When we began our research on the marijuana arrests five years ago we had many reports from public defender and legal aid attorneys, and from people who had been stopped and searched, that police, in effect tricked people to empty their pockets or take out their marijuana.

Since Police Commissioner Kelly's order of September 11, 2011, it has become far more common to acknowledge that police officers, in Kelly's words, "*recover marihuana pursuant to a search of the subject's person or upon direction of the subject to surrender the contents of his/her pockets or other closed container.*"⁵ Commissioner Kelly also referred to individuals who are "*requested or compelled*" by police officers to empty their pockets and reveal their marijuana. As Kelly's order acknowledged, police officers sometimes ask people to empty their pockets, but police also "*direct*" or "*compel*" people to do so.

In his press conference of June 4, 2012, Governor Cuomo also addressed this situation of police ordering people to turn out their pockets. The Governor said:

"I understand the intent of the law in 1977, and what Governor Carey was intending to do, and the legislature was intending to do. That is not [the] current effect of the law. There is a blatant inconsistency. If you possess marijuana privately, it's a violation; if you show it in public, it's a crime. It's incongruous; it's inconsistent the way it has been enforced. There have been additional complications in relation to the stop and frisk policy where there are claims that young people can have [a] small amount of marijuana in their pocket. During the stop and frisk the police officer says "turn out your pockets" and marijuana is now in public view. [The offense] Just went from [a] violation to a crime, to a possible misdemeanor."

Numerous newspaper and other media stories have also reported cases where people were told (or directed, ordered, commanded, instructed) to empty their pockets, to turn their pockets inside out.

Given that so much of the marijuana for the hundreds of thousands lowest-level possession arrests has been retrieved from people's pockets, it seems me and many of my colleagues that it is appropriate and necessary for the New York City Council to do everything it possibly can to reduce and even eliminate these unconstitutional searches on the streets and public spaces of New York City.⁶

The legislation proposed and under consideration, especially Int. No. 799, Int. No. 801, and Int. No. 881 would make a significant contribution to reducing these frankly disgraceful practices.

NOTES

¹ "Pot arrests Top 50K in 2011 Despite NYPD Order" by Jennifer Peltz, *Associated Press*, Feb 1, 2012 (over a hundred papers across the US carried this AP story)
<http://news.yahoo.com/pot-arrests-top-50k-2011-despite-nypd-order-182052393.html>

² "Hypocritical NYPD Continues Racist Pot Arrest Crusade," By Steven Wishnia, *Alternet*, Dec 30, 2011
<http://www.alternet.org/module/printversion/153617>

³ "Alleged Illegal Searches by NYPD May Be Increasing Marijuana Arrests." by Ailsa Chang, *WNYC*. April 26, 2011 (excellent 10 minute radio show plus text)
<http://www.wnyc.org/articles/wnyc-news/2011/apr/26/marijuana-arrests/>
Also: "Alleged Illegal Searches By NYPD Rarely Challenged in Marijuana Cases." Ailsa Chang, *WNYC*, April 27, 2011 (excellent 8 minutes radio show plus text)
<http://www.wnyc.org/articles/wnyc-news/2011/apr/27/alleged-illegal-searches/>

⁴ Ira Glasser is the author of numerous works on the constitution including *Visions of Liberty: The Bill of Rights for All Americans* (New York:1991). The quotes are from a pamphlet written in direct response to the NYPD stop and frisks and marijuana arrests: *Stop, Question and Frisk: What the Law Says About Your Rights* (Drug Policy Alliance, 2011). At: <http://www.drugpolicy.org/resource/stop-question-and-frisk-what-law-says-about-your-rights>

⁵ New York Police Department Operations Order: "Charging Standards For Possession Of Marihuana In A Public Place Open To Public View" By Direction Of The Police Commissioner, September 19, 2011
On line here: <http://marijuana-arrests.com/docs/NYPD-ORDER-RE-MARIJUANA-ARRESTS-SEPT-19-2011.pdf>

⁶ For a critical but neglected source of rich description about how NYPD narcotics police routinely made illegal searches and arrests in the 1980s and early 1990s, see Chapter 4, "Perjury and Falsifying Documents" (pages 36- 43 of: *The City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department, Commission Report*, July 1994. This is the report of the "Mollen Commission," appointed by Mayor Dinkins to investigate police corruption. Although much of the report focused on gangs of police who robbed drug dealers, one chapter focused on the most common and routine form of corruption which the Commission termed "Perjury and Falsifying" We have excerpted parts of that chapter describing the routine illegality that occurs when narcotics police seek to make drug arrests on the street. For those unfamiliar with its findings, or who wish to understand what narcotics policing has historically meant in New York City, it is an eye-opening work, available here: <http://marijuana-arrests.com/docs/Mollen-Excerpts-Falsification.pdf>