June 2, 2017

MEMORANDUM

RE: VSC Requests for Copies of Police Reports Detailing Arrests

Sanctuary for Families' Immigration Intervention Project (IIP) has seen a troubling trend in U-visa and U-adjustment cases in instances where clients have been arrested in the past. Regardless of whether Sanctuary's client was actually convicted of the crime for which she was arrested, USCIS is submitting Requests for Evidence seeking certain items, such as the arresting officer's report and certain criminal court records related to the arrest. USCIS then evaluates these underlying arrest documents to make a determination about whether to use its discretion to grant our client a U or U-adjustment. This is true even if the criminal court has already found the client not guilty, if the problematic arrest charge has been dropped (e.g., if the client pled to a lesser charge), or if the client received a conditional discharge and the duration on the CD has expired. This memorandum contains research on several potential arguments against these requests and against USCIS using its discretion to essentially re-try an arrest case that a New York Criminal Court has already dismissed.

Argument No. 1: It is inappropriate for USCIS to seek police/arrest reports and use them to make their own analysis of the client's arrest, especially if those reports did not result in formal charges or convictions.

It is inappropriate for USCIS to seek police/arrest reports and use them to make their own analysis of the client's arrest. Doing so, especially in the absence of a conviction or other corroborating evidence, runs afoul of BIA and Second Circuit precedent, and may violate the Due Process Clause of the Fifth Amendment.

While "police reports and complaints, even if containing hearsay and not part of the formal record of conviction, are appropriately admitted for the purposes of considering an application for discretionary relief," *Carcamo v. U.S. Department of Justice*, 590 F.3d 94, 98 (2d Cir. 2007), they should be afforded weight *only* when the underlying arrest led to a conviction or they are otherwise corroborated. *Compare Matter of Teixeira*, 21 I&N Dec. 316 (B.I.A. 1996) (convicted of firearms violation) *and Matter of Grijalva*, 19 I&N Dec. 713 (B.I.A. 1988) (convicted of possession of marijuana), *with In Re Arreguin De Rodriguez*, 21 I. & N. Dec. 38, 42 (BIA 1995) ("[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.") *and In Re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 205 (BIA 2001) ("[I]n the absence of a conviction, we find that the outstanding warrant should not be considered an adverse factor in this case."); *cf. Sorcia v. Holder*, 643 F.3d 117, 126 (4th Cir. 2011), *as amended* (July 21, 2011) ("[I]nsofar as the BIA declined to give substantial weight to [appellant's] charge, it was following, rather than contradicting, precedent."); *Henry v. I.N.S.*, 74 F.3d 1, 6-7 (1st Cir. 1996) ("[T]he lesson of *Arreguin* is that . . . [the BIA] will accord virtually no weight to an arrest record . . . unsupported by corroborating evidence.").

In *Matter of Arreguin*, the BIA confirmed that it was "hesitant to give substantial weight to an arrest report, absent a conviction [of the alleged crimes] or corroborating evidence of the allegations contained therein." 21 I&N Dec. 38, 42 (BIA 1995). Further, in considering the Board's holding in *Arreguin*, the Second Circuit confirmed that, although the BIA could admit arrest reports into the record, it could not deny relief for a discretionary benefit, in that case Cancellation of Removal, "upon the assumption that the facts contained in such documents [were] true." *Padmore v. Holder*, 609 F.3d 62, 69 (2d Cir. 2010). Similarly, in *Billeke-Tolosa v. Ashcroft*, the Sixth Circuit relied on *Arreguin* in finding that it was impermissible for the immigration judge to deny discretionary relief based on charges for sexual misconduct when the charges had been pled down to simple assault and disorderly conduct. 385 F.3d 708, 712 (6th Cir. 2004).

Although immigration proceedings are civil, not criminal, the evidence considered must "be probative and its use fundamentally fair, so as not to deprive an alien of due process of law." *Matter of*

Velasquez, 19 I&N Dec. 377, 380 (B.I.A. 1986). Fairness is determined in large part by the "reliability and trustworthiness" of the evidence. *Felzcerek v. I.N.S.*, 75 f.3D 112, 115 (2d Cir. 1996). And courts have consistently found that "[w]hile police reports may be demonstrably reliable evidence of the fact that an arrest was made they are significantly less reliable evidence of whether the allegations of criminal conduct they contain are true." *United States v. Johnson*, 710 F.3d 784, 789 (8th Cir. 2013), *citing United States v. Bell*, 785 F.2d 640, 644 (8th Cir. 1986). The United States Supreme Court has held that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense." *Schware v. Bd. Of Bar Examiners*, 353 U.S. 232, 241 (1957). Further, the Court explained that "[w]hen formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is . . . dissipated." *Id*; *See also Michelson v. U.S.*, 335 U.S. 469, 482 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a person. It happens to the innocent as well as the guilty."). As the Honorable William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated when presenting the final version of the Federal Rules of Evidence: "Police reports, especially in criminal cases, tend to be one-sided and self-serving." H.R. REP. NO. 93-1597 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7111 (Statement by the Hon. William L. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, Upon Presenting the Conference Report on H.R. 5463 to the House for Final Consideration). Academic research underscores the unreliability of police reports. *See, e.g.*, Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 New Eng. L. Rev. 1, 6 (1993) (examining how "[p]olice reports may mislead by misstating facts, omitting facts, or a combination of both"); *see also* Mary Hoper, *Confronting Cops in Immigration Court*, 23 W. & MARY BILL RTS. J. 675, 685-86 (2015) (explaining that because the "inherently adversarial" "nature of the confrontation between the police and a criminal defendant . . . rais[es] concerns about reliability of police reports," Congress "specifically exclude[d] police reports from the public records exception to the hearsay rule"); *cf.* EvidenceProf Blog,

"Why Incriminatory Police Reports Are Unreliable/Inadmissible & Exculpatory Police Reports Are Reliable/(Potentially) Admissible (Sept. 7, 2016), available at http://lawprofessors.typepad.com/evidenceprof/2016/09/in-response-to-mondays-post-ive-been-getting-a-lot-of-questions-about-the-admissibilityreliability-of-police-reports.html#more ("Clearly, the [FRE] rulemakers were hesitant to allow the admission of a document which was the product of an adversarial relationship, both because the circumstances of production lessened the likelihood of reliability, and because the admission of such a document would not be fair to a criminal defendant." (quoting *Solomon v. Shuell*, 457 N.W.2d 669 (Mich. 1990)).

Notwithstanding the BIA and Circuit precedent allowing the consideration of police reports in the discretionary context, a recent, albeit unpublished, BIA decision resolutely recognized the unreliability of police reports. In *In re: Noe Cesar Hernandez-Avila*, the Board sustained a finding that the police report was "'inherently unreliable' because it was not incorporated into the guilty plea, was not substantiated by the respondent's admissions, and was not corroborated by independent witness testimony." A0769 531 484 (BIA Jan. 18 2013). In doing so, the Board affirmed the immigration judge's statement that "arrest reports are one-sided recitations of events aimed at establishing probable cause or reasonable suspicion in criminal proceedings." *Id.* (quoting 05/27/11 I.J. Dec. at 6).

Further, arrest records are improper to use in evaluating candidates in other legal contexts as well. In *Schware*, the U.S. Supreme Court held that a bar association cannot use arrest records as evidence against an applicant if those arrests did not result in formal charges. *Schware*, 353 U.S. at 241. The Court went further, conclusively stating that arrest records do not carry any probative value of wrongdoing if the arrest did not result in formal charges and the defendant is released without a trial. *Id.* Arrest records are also improper as evidence against applicants for employment if the arrest did not result in charges. The EEOC, in its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, explains that a defendant is entitled to the presumption of innocence until he is proven guilty. U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil*

Rights Act of 1964 § VII (B)(2) (2012). The Commission goes further, stating conclusively that "the fact of an arrest does not establish that criminal conduct has occurred. *Id.*

Even if an arrest does result in formal charges, these should not be considered conclusive evidence of wrongdoing. Prosecutors have an essentially exclusive role in bringing charges and negotiating plea deals in criminal cases in the United States. *See* H. Michael Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 Cath. U.L. Rev. 51, 62 (2014). This broad discretion creates a significant risk that prosecutors will abuse this system in order to obtain more guilty pleas and in turn resolve more cases. Setting a goal of plea bargains incentivized prosecutors to give themselves more and better bargaining chips in the plea negotiation process. *Id.* To improve their position in these negotiations, prosecutors frequently "overcharge" defendants so they can negotiate them down to a guilty plea on the actual charge they seek.

Prosecutors typically overcharge defendants in two main ways: "horizontal" overcharging and "vertical overcharging." Kyle Graham, *Overcharging*, 11 Ohio St. J. Crim. L. 701, 704 (2013). Horizontal overcharging occurs when a prosecutor "multipl[ies] 'unreasonably' the number of accusations against a single defendant." *Id.* Vertical overcharging occurs when a prosecutor charges a single offense at a higher level than the circumstances may warrant. *Id.* Generally, this includes a "lesser included offense" for which the prosecutor actually intends to seek a conviction. *Id.* at 705. That prosecutors overcharge defendants with the specific intent of inducing a plea bargain is one of the main criticisms raised by defense counsel pertaining to prosecutorial discretion. *See* ABA Standards for Criminal Justice Prosecution and Defense Function 76 (3d ed. 1993). In a comment to the ABA Standards, the ABA explains that defense counsel frequently voice concerns that prosecutors overcharge in order to "obtain leverage for plea negotiations." *Id.* Going further, the commentary states that "the heart of the criticism is a belief that prosecutors bring charges not in the good-faith belief that they fairly reflect the gravity of the offense, but rather as a harassing and coercive device in the expectation they will induce the defendant to plead guilty." *Id.*

This concern is difficult to conclusively prove, but it can be illustrated by examining the data behind termination of cases and comparing it to the charge data for those cases. The most extensive data on this subject is kept by the Administrative Office of the United States Courts, which compiles charge-specific data for all criminal cases that terminate in United States District Courts in a given fiscal year. *Overcharging*, 11 Ohio St. J. Crim. L. at 715. This data shows that in total, 10.0% of cases resolved wholly or partly by plea involved the dismissal of three or more charges, with some U.S. Attorney's offices, including the Eastern District of New York, dismissing three or more charges in over 20% of cases. *Id.* at 719. These rates of dismissal show that even formal charges can be an inaccurate method of proving a defendant's wrongdoing. Thus, USCIS should be hesitant to use charges as evidence of wrongdoing, and should not use police/arrest records at any point in its analysis.

Argument No. 2: **<u>It is inappropriate for USCIS to ask defendants for court documents that are sealed, even though New York's Criminal Procedure Law allows the defendants to access their own records.</u>**

The argument that it is inappropriate for USCIS to ask New York courts for sealed documents may have merit because the relevant statute requires the party requesting the unsealing to be a law enforcement agency and the justice must require unsealing. USCIS is not primarily a law enforcement agency[1] (when INS was broken up, ICE and CBP were tasked with enforcement) and determining whether to grant a U-visa or U-adjustment is not the type of ongoing criminal or civil proceeding where justice has required unsealing in the past.

New York's main sealing statute, CPL § 160.50, provides for the sealing of records following the termination of criminal action in favor of the accused.[2] Through the language of the statute and the statements of the Governor and the legislators-sponsors, courts have found that the purpose of CPL §

---

[1] when INS was broken up, ICE and CBP were tasked with enforcement

[2] New York also has CPL § 160.55 to cover situations where defendant, having been arrested or charged with a printable offense (CPL § 160.50), ultimately is convicted of a petty offense, except the three specifically excluded (DWI and two unenforceable loitering charges). Under this section court records are not sealed. A defendant who qualifies is entitled only to destruction or return of prints and photographs in the same manner as one who has been acquitted as is provided in CPL § 160.50. Judgments and orders of the court are not sealed because the defendant has been convicted and a record of that fact is needed. Accordingly, sealing under this section covers only the records of arrest and prosecution in the files of the Division of Criminal Justice, police agencies and prosecutor's offices. N.Y. Crim. Proc. Law § 160.55 (McKinney)

160.50 is "to protect the rights of privacy and enhance the fundamental principles of the 'presumption of innocence' of an accused." *People v. Anderson*, 97 Misc. 2d 408, 411–12, 411 N.Y.S.2d 830, 833–34 (Sup. Ct. 1978). "A rational and logical reading **834 of these sections shows it was designed to place a successful defendant in the same position that he occupied prior to his arrest." *Id.*

The sealing statute lists the situations where sealed documents can be accessed with specificity. The relevant sections for U-visa and U-adjustment applicants, CPL § 160.50 (1)(d)(ii),[3] states that " Therefore we must ask two questions: (1) is USCIS a law enforcement agency and if so, (2) does justice require unsealing records which have been sealed pursuant to CPL § 160.50?

Question 1: Is USCIS a law enforcement agency?

Arguably no, as when INS was split into USCIS, CBP, and ICE, the latter two agencies were given enforcement power, while USCIS role is to adjudicate benefits applications. On USCIS' website, the agency states "[w]e were formed to enhance the security and improve the efficiency of national immigration services by exclusively focusing on the administration of benefit applications." USCIS, *Our History*, (Feb. 11, 2016), https://www.uscis.gov/history-and-genealogy/our-history/our-history. And that "Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), components within DHS, handle immigration enforcement and border security functions." *Id.*

But courts have ruled that in certain contexts, USCIS is a mixed-function agency. In *Am. Civil Liberties Union of S. California v. United States Citizenship & Immigration Servs.*, USCIS sought to use the law enforcement exception under FOIA to withhold certain responsive documents the ACLU had requested. 133 F. Supp. 3d 234 (D.D.C. 2015). The ACLU sought "records relating to or concerning 'policies for the identification, vetting and adjudication of immigration benefits applications with national security concerns,' and statistical information related to the processing of benefits applications." *Id.* at 238-39. The court held that "[w]hile USCIS as a whole may primarily engage in civil administration and

[3] The relevant section of CPL § 160.55 is (1)(d)(ii), which applies the same standard, though only to the records of arrest and prosecution in the files of the Division of Criminal Justice, police agencies and prosecutor's offices.

not law enforcement, based on the agency's declarations, it appears that in this particular context national security concerns play an important role in the agency's policies and procedures." *Id.* at 242. Thus, in the FOIA context, the court would treat USCIS as a mixed-function agency and under D.C. Circuit precedent consider the agency's claim that the law enforcement exemption applied with some skepticism.

Furthermore, it is important to consider the purpose of the law enforcement exemption under FOIA. Exemption 7(E)'s purpose is to prevent disclosure when it "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for
law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C § 552(b)(7)(E). Therefore, given that it might make sense to treat USCIS as a mixed-function agency for the purposes of FOIA and the goal of preventing circumvention of the law, it doesn't make sense to treat USCIS as a mixed-function agency in the context of its adjudication of benefit applications, such as U-visas and U-adjustments.

<u>Question 2: If USCIS is a law enforcement agency, does justice require unsealing records for the grant of a U-visa or U-adjustment?</u>

It is unclear if justice requires unsealing in the U-visa context. There are no cases where the unsealing of records pursuant to CPL § 160.50 was related to immigration or the grant of a visa specifically. Generally, "interest of justice" has been interpreted to prevent someone from taking advantage of CPL § 160.50 in a later criminal investigation. Below is a list of situations where a court has found that justice required unsealing the documents and when it did not. Given these cases, an argument can be made that justice does not require unsealing in the U-visa context because the adjudication of a U-visa benefits application does not implicate a new or ongoing criminal matter.[4] Indeed, some courts are

[4] The last refuge of parties seeking to unseal documents when a court has found that the documents do not fall within one of the enumerated sections comes from *Matter of Dondi*, where the court found that outside of the exceptions, courts have inherent authority to by virtue of their authority to oversee attorney discipline to unseal court records if they were necessary to a disciplinary proceeding begun by the grievance committee. 482 N.Y.S.2d 431 (1984). Many cases involve an arugment based on *Dondi*, but courts have not extended *Dondi* beyond the particular context of attorney discipline.

skeptical that unsealing is permissible in anything other than an ongoing criminal matter. *See People v. Canales*, 664 N.Y.S.2d 228 (Sup. Ct. 1997).

Request to Unseal Granted

- Trial court was not required to suppress photo array identification of defendant based upon photograph obtained by police in connection with earlier unrelated incident on which charges were dropped, even though photograph should have been returned to defendant in accordance with NY CPL § 160.50. *People v. Patterson*, 78 N.Y.2d 711 (1991).
- Sealing stayed in the interests of justice because numerous other related proceedings could not otherwise be fairly and effectively resolved. *People v. Abedi,* 607 N.Y.S.2d 862 (Sup Ct. New York Cty.1994).
- Special Prosecutor's audit and investigative reports should not be sealed because they were relevant to other jurisdictions' pending investigations of the defendant's far-flung and interrelated enterprises. *People v. Neuman*, 428 N.Y.S.2d 577 (Sup.Ct. Westchester Cty.1980).
- In a case in which both criminal and civil actions were commenced against a defendant for an alleged scheme to defraud the New York State Medicaid system the interests of justice warranted not sealing the criminal matter because the records are essential to enable the State to meet its burden of proof in the civil case and should not be sealed for that reason. *People v. Roe,* 628 N.Y.S.2d 997 (Sup.Ct. Bronx Cty.1995).
- Defendant who testified in the Grand Jury and had the case dismissed, was going to trial regarding a separate incident that occurred “within hours” of the dismissed matter. Records of Grand Jury minutes in the first incident may be unsealed so the government

may use them to impeach the defendant. *People v. Lester,* 514 N.Y.S.2d 861 (Sup.Ct. Bronx Cty.1987)

Request to Unseal Denied

- None of the exceptions could justify making sealed records available to assist a grievance committee in determining whether to bring professional disciplinary charges against a lawyer. *Hynes v. Karassik*, 47 N.Y.2d 659 (1979).
- Court refused to permit State Liquor Authority to consider dismissed criminal charge against licensee seeking a renewal. *Skyline Inn Corp. v. N.Y. State Liquor Auth.*, 44 N.Y.2d 695 (1978).
- Court refused to permit to board of education to unseal records for use in teacher disciplinary proceeding. *Matter of Joseph M. (N.Y. City Bd. of Educ.)*, 82 N.Y.2d 128 (1993).
- Sealed records were not available to prosecutor for purposes of making sentencing recommendations. *Katherine B. v. Cataldo*, 5 N.Y.3d 196 (2005)
- Unsealing not justified by the mere fact that information in the criminal records is relevant to issues in the civil claim." *Ferreria v. Palladium Realty Partners,* 611 N.Y.S.2d 458 (Sup.Ct. New York Cty.1994).
- Internal Affairs Unit of the Nassau County Police Department is not a law enforcement agency when it investigates claim that a police officer filed false reports and testified falsely. *People v. Anthony R.,* 651 N.Y.S.2d 1009 (County Ct. Nassau Cty.1996)
- Section 8 benefits were improperly terminated and eviction proceedings were initiated through reliance on sealed records contravening the letter and the spirit of the sealing statutes and deprived plaintiff of her right to a fair hearing with all the protections of due

process of law. *Reed v. N.Y. City Dept. of Hous. Preserv. & Dev.,* 2013 N.Y. Slip Op 33142[U], [Sup Ct, N.Y. County 2013)

Argument No. 3: **It is an abuse of discretion for USCIS to apply a higher standard to U adjustments under INA 245(m) than it applies to adjustments generally under INA 245(a).**

The argument that using different standards for adjusting the status of an applicant with a 245(a) U-visa and a 245(m) U-visa is an abuse of discretion is unlikely to be successful because the decision to adjust the status of an immigrant under INA 245 is committed to agency discretion by law and thus not reviewable by a court, even under an abuse of discretion standard. A case brought under this theory will likely be dismissed for lack of subject matter jurisdiction.

While a court can review purely legal questions, such as an applicant's eligibility for an adjustment of status, the actual grant or denial of adjustment is at the sole discretion of the agency and not reviewable. Therefore, even if the agency is using a higher standard for 245(m) applicants, because the statute gives the agency the sole discretion over how to weigh factors in its determination, it is not reviewable by a court. *See Daniel v. Castro*, No. 15-21828-CIV, 2015 WL 5727990, at *3 (S.D. Fla. Sept. 30, 2015), aff'd, 662 F. App'x 645 (11th Cir. 2016). The theory behind this is that if a decision is placed in an agency's absolute discretion, there are no judicially manageable standards by which a court can judge how and when an agency should exercise its discretion, making it impossible to evaluate such agency action for "abuse of discretion" under the APA. See *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985).

Additionally though it is not directly relevant to this question, courts have refused to review the denial of U-visa petitions for the same reason. *Mondragon v. United States*, 839 F. Supp. 2d 827, 829 (W.D.N.C. 2012). This may be relevant as another factor for why a court would be comfortable rejecting this abuse of discretion argument.

Argument No. 4: **A sworn affidavit and/or certificates of disposition are sufficient to establish what happened when a client was arrested and prosecuted.**

A sworn affidavit is sufficient to establish facts in the record. *See, e.g., In the Matter of F*, 4 I. & N. Dec. 475, 479 (BIA 1951) (noting that "[i]n cases in which an affidavit in narrative form has been made by the alien prior to the issuance of a warrant of arrest . . . and such affidavit satisfactorily establishes the facts necessary for determination as to deportability, the hearing officer may enter the affidavit as an exhibit of record and it may be used as the basis for the decision in the case"); *Salta v. INS*, 314 F.3d 1076 (9th Cir. 2002) (sworn affidavit from alien that neither he nor a responsible party residing at his address received the notice was sufficient to rebut the presumption of delivery and entitle alien to an evidentiary hearing to consider the veracity of his allegations); *In Re: Jose Manuel Oliva-Ramirez*, A206 700 849 - DAL, 2015 WL 10090673, at *1 (DCBABR Dec. 22, 2015) (granting respondent's motion to reopen following an in absentia order of removal because his motion included a notarized affidavit, which established, *inter alia*, "his unsuccessful attempts to find transportation to Texas for his hearing" and "his actions to determine the status of his case"); *In the Matter of W*, 6 I. & N. Dec. 210, 210 (BIA 1954) (finding that affidavit of the petitioner established the fact that she and the beneficiary were sisters and "the offspring of parents who apparently were never married"); *c.f.*, *In Matter of Kodwo*, 24 I&N Dec. 479 (BIA 2008) (affidavits executed by the heads of households may be sufficient to establish a divorce for immigration purposes).

Likewise, a record of conviction – which includes certificates of disposition – is sufficient to establish certain facts in the record, at the exclusion of other evidence. *See, e.g., Matter of Short*, 20 I. & N. Dec. 136, 140 (BIA 1989) (looking to respondent's conviction record to determine whether her conviction was for a crime involving moral turpitude, and holding that conviction record of respondent's husband may not be admitted); *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 334 (BIA 1996) (certificate of disposition did not establish respondent's deportability for a firearms violation when it did not refer to the subdivision under which he was convicted or the weapon that he was convicted of possessing).

Argument No. 5: **<u>The amount of time that elapses between an arrest and a dismissal of the charge is irrelevant.</u>**

The amount of time that elapses between an arrest and the dismissal of a charge is irrelevant. Frequently, in cities like New York, defendants are forced to wait years for disposition of their case, often through no fault of their own. Backlogged court dockets and increasing arrest rates combine to make it nearly impossible for courts to dispose of cases in a timely manner.

That defendants generally have is illustrated by the number of cases that are dismissed due to violations of the right to a speedy trial. For example, in January 2013, 73% of all felony cases in the Bronx exceeded New York's 180-day speedy trial limit, which states that 180 days is the threshold for excessive delay in most felony cases, and there were over 800 felonies that had been open for at least two years. Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 Colum. J.L. & Soc. Probs. 223, 253 (2015). Indeed, the average length of bench and jury trials often far exceeds this 180-day limit. As recently as 2012, the average life of bench and jury trials across New York City was 345.1 days and 436.2 days, respectively. Criminal Court of the City of New York, *New York City Criminal Court Annual Report 2012* 52 (Justin Berry ed., 2012).

This delay is not limited to felony cases. A study published in 2013 by the Bronx Defenders found that a typical defendant charged with misdemeanor drug possession in the Bronx would wait for 240 days and make five court appearances before obtaining a disposition on his case. The Bronx Defenders Fundamental Fairness Project, *No Day In Court: Marijuana Possession Cases and the Failure of the Bronx Criminal Courts* 1 (Scott D. Levy Ed., May 2013). Moreover, when the study concluded in 2012, zero of the 54 defendants studied had gone to trial or completed a suppression hearing. *Id.* at 6. In each case that had closed, the defendant either had the charges dismissed or entered into a negotiated disposition, which generally results in no criminal violation. *Id.* at 10.

Often, these delays occur simply because there are too many defendants for courts to see in a timely manner. For example, New York City in the mid-1990s instituted a policy called "Broken Windows" policing, which emphasized strict enforcement of small quality of life crimes. *Broken Clock*, 48 Colum. J.L. & Soc. Probs. at 231. This policy had a dramatic effect on the number of misdemeanor

arrests in New York City, as that number increased every year from 2003–2010, eventually reaching a high of 251,279 arrests. N.Y. State Div. of Criminal Justice Servs., *Adult Arrests: 2004–2012*, (2013). Because trial judges only spend around 2.5 hours each day actually hearing and trying cases, this creates a backlog which can grow to hundreds of thousands of cases. *See The All-Purpose Parts in the Queens Criminal Courts: An Experiment in Trial Docket Administration*, 80 Yale L.J. 1637, 1644 (1971) (noting that by the end of 1968, the backlog of pending cases in New York City Criminal Courts was nearing 520,000 criminal charges).

Because both felony and misdemeanor defendants can face delays that can be months or even years long for reasons completely unrelated to their own actions or wrongdoing, the amount of time between an arrest and dismissal of a charge is irrelevant to a defendant's wrongdoing or lack thereof.