



Four Years in Prison for Four Pairs of Socks

Shoplifting Bump-Ups in
New York County



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OVERVIEW

New York County Defender Services is a public defense office that represents thousands of people every year who are charged with crimes in Manhattan. Since NYCDS opened its doors in 1997, we have represented more than 300,000 people. All of our clients are indigent. The vast majority of our clients are accused of committing misdemeanors or violations for actions that directly stem from homelessness, mental illness, or drug abuse/misuse. In short, our clients fall victim to the criminal legal system because they experience these collateral consequences poverty.

The quintessential example of policing poverty is the prosecution of shoplifting of hygiene or other necessary items. Every year we represent thousands of people charged with Petit Larceny, or shoplifting, where they face misdemeanor charges and a jail sentence of up to one year. In 2018, NYCDS represented people in 1,422 cases where Petit Larceny was the top charge.¹

Unlike other boroughs in New York City, the Manhattan District Attorney's Office frequently charges people with felony burglary in shoplifting cases. They "bump-up" the misdemeanor charges to a felony when the accused person has a prior trespass notice at the same store.

In 2018, we represented 47 people who had shoplifting charges bumped up to felony Burglary in the Third Degree charges. This report analyzes this sub-set of cases and the cost to taxpayers of incarcerating people on these charges.

The numbers only tell a small part of the story. We represent a client who is facing four years in prison for taking four pairs of socks from Bloomingdale's in 2018. He had cycled in and out of homelessness for years as a result of untreated mental illness. It took his trial attorney eight months of advocacy to get him inpatient treatment services before he was transferred off of Rikers Island.

Our criminal punishment system is not equipped to get people who are sick or suffering on the path to stability. Jail and prison are not the answers to ending the cycle of homelessness, drug abuse, mental illness and other struggles that lead them to survival theft. There is no doubt that we need policy solutions to address shoplifting and other problematic behaviors, but the existing remedies are failing to make our communities more secure.

¹ Top charge refers to the most serious charge listed on a criminal complaint, the accusatory instrument filed by the District Attorney's Office. As you will see in this report, many people, including many of our shoplifting bump-up clients, are charged with Petit Larceny in addition to a more serious felony top charge, such as Burglary in the Third Degree. The figure 1,422 only contemplates cases where Petit Larceny was listed as the top charge.

EXECUTIVE SUMMARY

In 2018, NYCDS represented 47 people in shoplifting bump up cases. All of these clients were alleged to have taken without permission goods in the amount of less than \$1,000 from commercial retail establishments. Typically, this would only qualify as a misdemeanor Petit Larceny charge (NY Penal Law § 155.25). However, because each of these individuals had either received a prior written or oral trespass notice from the store or one of the store's employees to not return, the Manhattan District Attorney's Office elected to charge them with Burglary in the Third Degree (NY Penal Law § 140.20), a class D felony, rather than Petit Larceny.²

Findings

- We estimate that taxpayers spent \$1,417,288 on jail or prison sentences for NYCDS clients in bumped up shoplifting cases in 2018.
- The cost of arresting our 47 clients in these cases cost the city \$82,250.
- 74% of NYCDS clients with bumped up shoplifting cases had bail amounts set at \$1,000 or above.
- These clients overwhelmingly pleaded guilty (97%). Only one client received a dismissal of charges. No clients proceeded to trial.
- Out of those who pleaded guilty, the vast majority of cases with available disposition information (67%) were sentenced to jail.
- The median amount of time in jail or prison is 180 days, with half of those sentenced to jail or prison serving more than 180 days.
- Of those receiving jail/prison sentences, 11% were sentenced to state prison with sentences of over a year.
- 36% of clients in eligible cases are homeless.
- A plurality of these cases come from Rite Aid and other drug stores.

² Burglary in the Third Degree is defined as “knowingly entering and remaining unlawfully in a building with intent to commit a crime therein,” (New York State Penal Law § 140.20). Prosecutors in Manhattan charge shoplifting as Burglary in the Third Degree where there is a prior trespass notice by arguing that by returning to the property, or trespassing, the accused person possessed the “intent to commit a crime therein.”

METHODS

Population and Inclusion Criteria

In 2018, NYCDS represented 120 people who had a top charge of Burglary in the Third Degree, a class D felony charge.³ We reviewed the felony complaints of the 120 people to determine if their cases qualified as shoplifting bump-ups.⁴

Criteria to qualify as a shoplifting bump-up charge:

- Top charge of Burglary in the Third Degree.
- The complaint alleged that the accused person took or attempted to take items that did not belong to them without paying.
- The alleged theft took place at a commercial establishment, not a private residence or office building.
- The amount of goods allegedly stolen was less than \$1,000. If more than \$1,000 worth of goods were taken, the accused person would also be charged with Grand Larceny in the Fourth Degree (Penal Law § 155.30(1)). Grand Larceny cases were excluded from this study.
- The accused person had previously received a written trespass notice at the same store (though not necessarily the same location of the store) or had received an oral trespass warning not to return to the store.

Of the 120 NYCDS clients with a top charge of Burglary in the Third Degree in 2018, 47 cases met our shoplifting bump-up criteria.

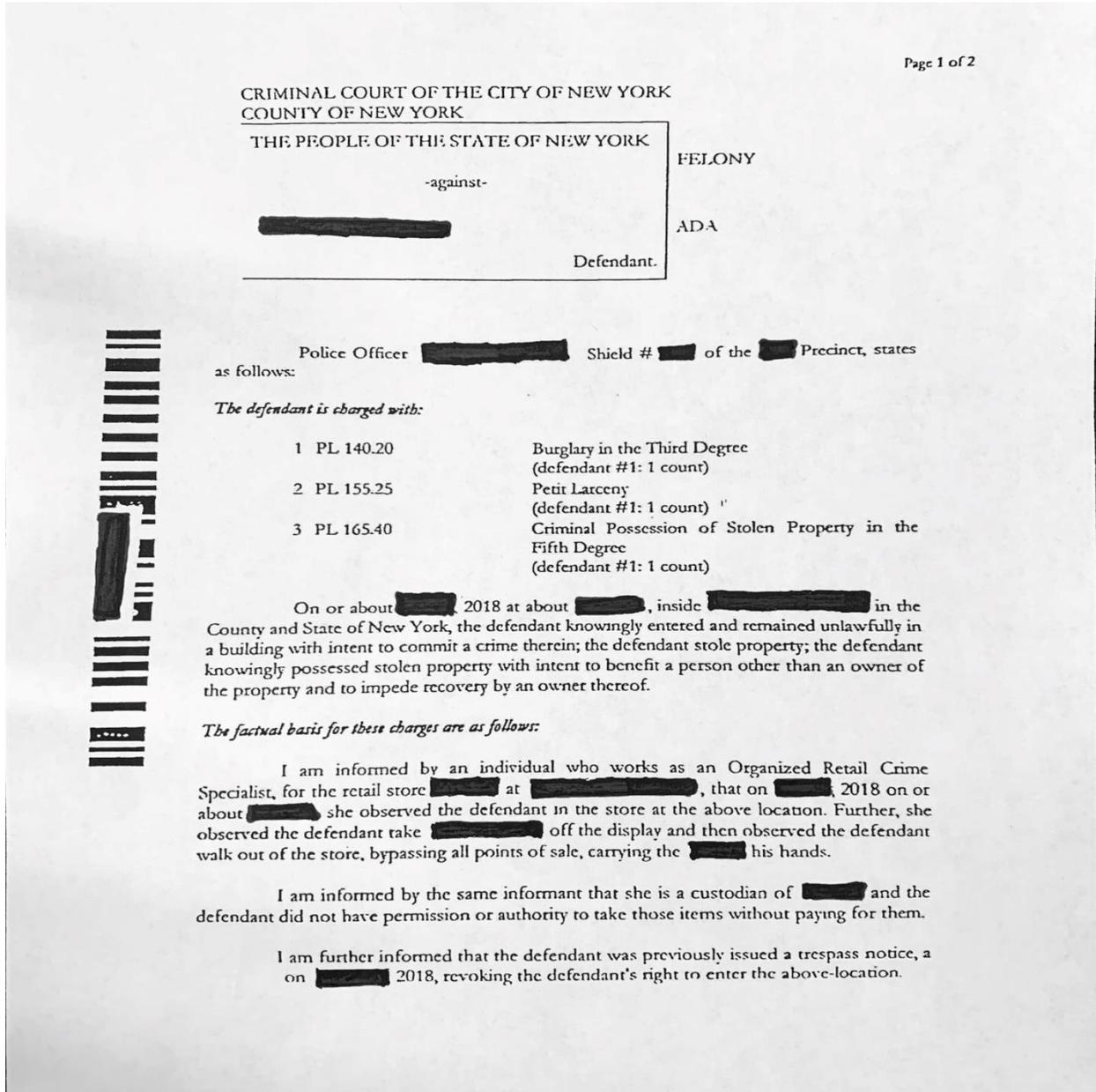
Outcomes

We were interested in assessing the proportion of the population that was homeless, stores where these cases originated, types of items allegedly stolen, bail amounts, and final disposition for cases that were not relieved. Additionally, sentences and sentence length were examined in those who pleaded guilty.

³ We did not review case files or consider including in this study any person charged with more serious crimes in addition to Burglary in the Third Degree, as in our experience they do not qualify as the type of case this study contemplated assessing.

⁴ A felony complaint is an official document created by the District Attorney's Office that is provided to an accused person at their arraignment informing them of the charges against them.

Sample Felony Complaint



Redacted copy of a representative 2018 felony complaint that qualified as a shoplifting bump-up case pursuant to this study's criteria.

Sample Trespass Notice

Bloomingdale's
Warning Not to Trespass (New York)

AP-FRM 041 Reviewed 2/1/16
Supersedes: LP Policy



Based on your criminal, immoral, and/or improper conduct at this store, you are hereby advised that your license, privilege, permission, and authority to enter and/or remain upon these premises or the premises of any other Bloomingdale's store is hereby revoked. Should you remain on the premises or, subsequent to leaving, return to this or any other Bloomingdale's premises, you will be subject to arrest and prosecution for trespass and other related crimes and/or violations.

You are advised never again to enter ANY OTHER BLOOMINGDALE'S STORE FOR ANY REASON WHATSOEVER FROM THE FOLLOWING DATE AND TIME:

Date: [REDACTED] Time: [REDACTED]

Today, [REDACTED], who works for Bloomingdale's, has advised me to stay out of Bloomingdale's. I have been advised that I could be ARRESTED and CRIMINALLY PROSECUTED if I should ever again enter Bloomingdale's at any time for ANY REASON. So that Bloomingdale's can monitor this order and warning.

Date: [REDACTED] Signature: [REDACTED]

Witnessed by: [REDACTED]

On [REDACTED] I ordered [REDACTED] never again to enter ANY BLOOMINGDALE'S STORE.

New York State Law - S 140.05: Trespass

A person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises...A person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises...does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person.

Civil Demand Payment Exception:

A temporary exception to this trespass notice exists for the sole purpose of paying your Civil Demand fee in the store. You should proceed directly to the register and make your payment then exit the store. Or, you may request Asset Protection assistance when you arrive at the store in order to expedite your payment.

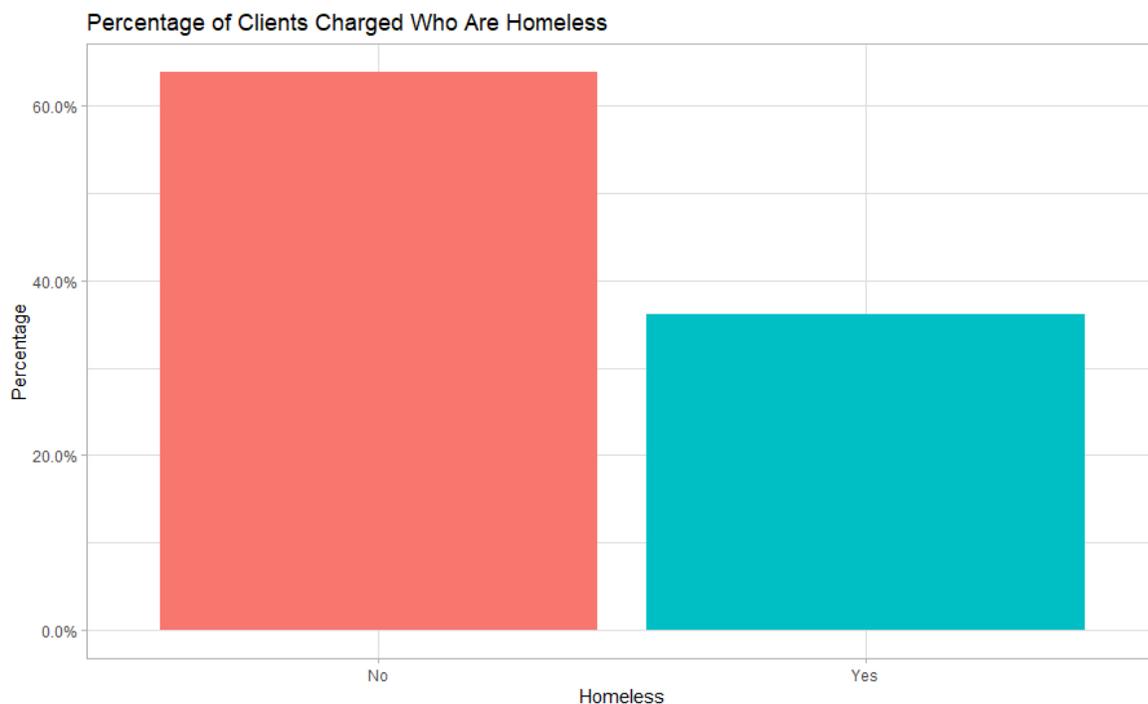
Redacted copy of a representative store trespass notice that was used to bump up a Petit Larceny charge to Burglary in the Third Degree.

RESULTS

Homelessness

More than a third (36%) of our 2018 shoplifting bump-up clients were homeless at the time of arrest.

We defined homeless for the purposes of this study as someone who listed their address upon arrest as “homeless” or provided the address of a New York City homeless shelter.⁵



⁵ This number does not tell the whole story, however. Every one of our clients is poor and must be indigent in order to qualify for free representation by our office. We know anecdotally that a large number of clients charged with Petit Larceny or shoplifting bump-ups are housing insecure, but we were unable to quantify that number. While reviewing the files of the 47 shoplifting bump-up clients, we found that many of them told their attorneys or forensic social workers that they lived with friends or family or had previously lived on the streets or cycled in and out of homelessness. However, because not every client provided information about their housing situation to their defense team we were unable to quantify the number of clients who are housing insecure without follow-up interviews with each.

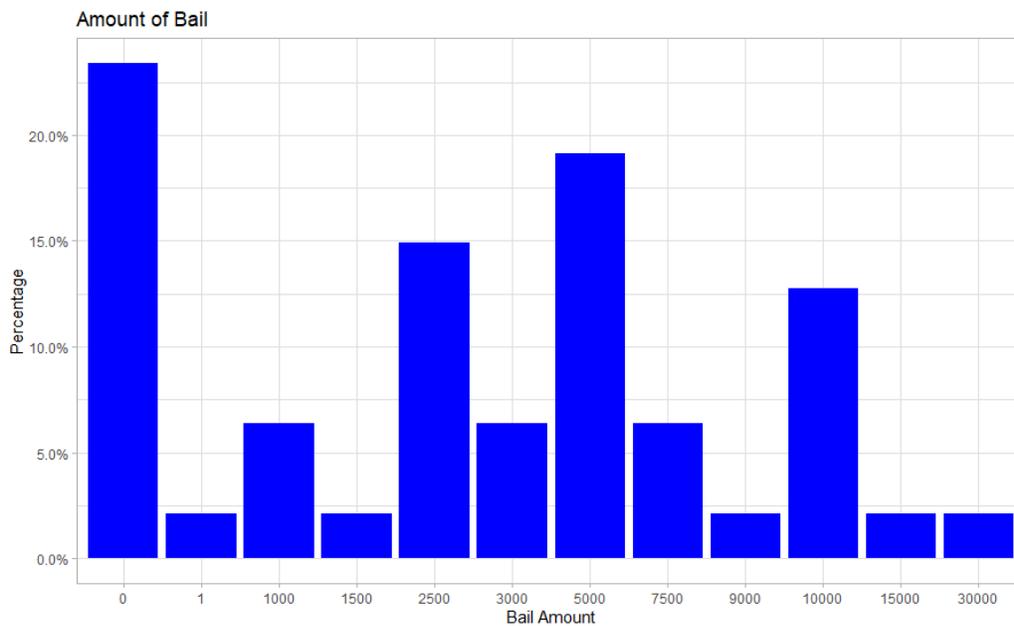
Bail

In approximately three out of four (74%) of our shoplifting bump-up cases, judges set bail at arraignments.

State law currently does not allow community bail funds to pay bail in felony cases. Because Burglary in the Third Degree is a felony, our clients are ineligible for assistance from community bail funds. This means that the vast majority of our clients had bail set and was forced to remain in jail until their case was resolved.

Only 24% of our shoplifting bump-up clients were released on their own recognizance in 2018. One person had \$1 bail set.⁶

Note: In 2019, the New York State legislature changed the bail statute so that people charged with non-violent felonies, including Burglary in the Third Degree, will not be able to have bail set at arraignment in most cases. This means that in 2020, the Manhattan District Attorney's Office will not be able to request that bail be set in these kinds of cases, barring extenuating circumstances.⁷

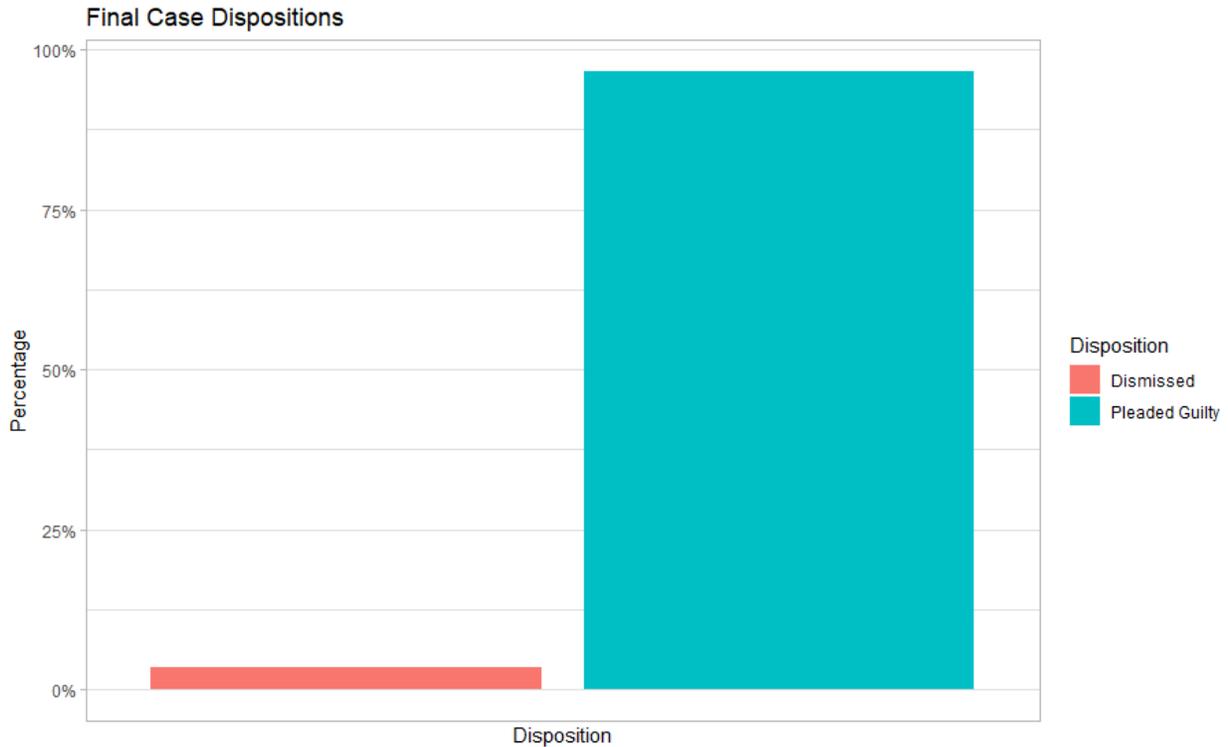


⁶ A \$1 bail amount is typically issued by a judge when the accused person simultaneously has another pending case for which bail has already been set.

⁷ For more details about the 2020 bail reforms, see Michael Rempel & Krystal Rodriguez, *Bail Reform in New York* (Center for Court Innovation, April 2019), available at https://www.courtinnovation.org/sites/default/files/media/document/2019/Bail_Reform_NY_full_o.pdf.

Dispositions

97% of our cases that had disposition information ended in a guilty plea.⁸ Only one client received a dismissal of their shoplifting bump-up charges.⁹

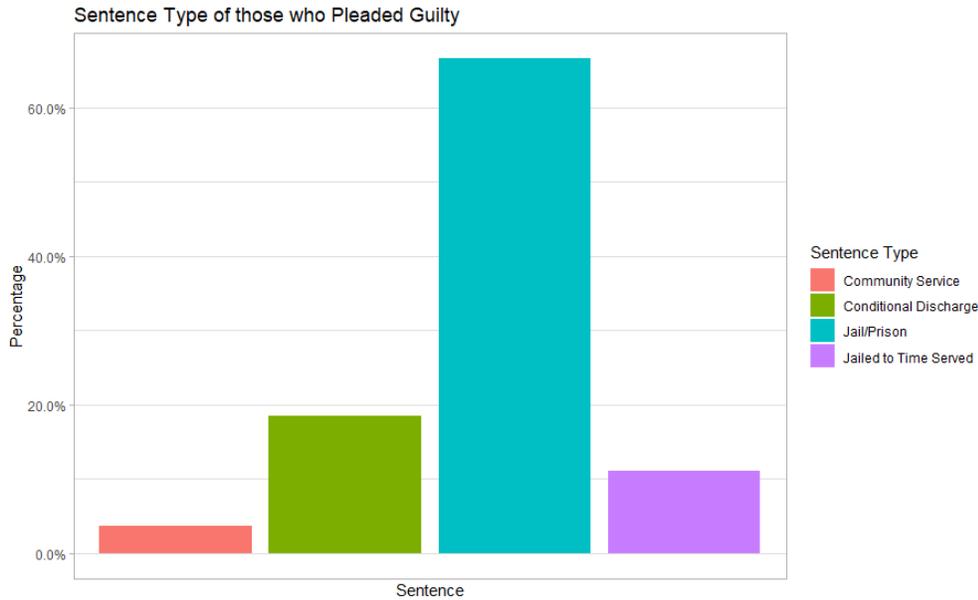


⁸ Because this study looked at cases from 2018, many of the cases are still pending and thus do not yet have disposition information. Some of the cases were transferred to other public defense offices such as the Legal Aid Society or Neighborhood Defender Services if there was conflict in the case or if one of those offices was already representing the accused person in another case. We had disposition information on only 30 of the total 47 shoplifting bump-up cases.

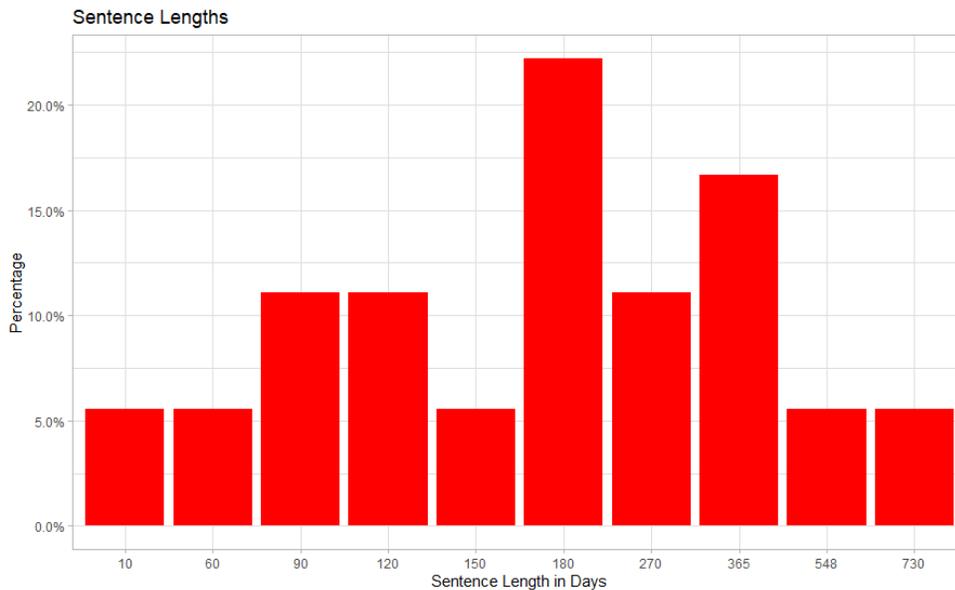
⁹ It is very simple for prosecutors to secure a conviction in shoplifting bump-up cases. They need only a copy of the prior trespass notice and photo or video evidence of the shoplifting. Store loss prevention agents readily provide this information to the police and the District Attorney, making it extremely easy for prosecutors to prove every element of their case and win a conviction at trial. This strengthens the prosecutor's plea bargaining position and makes it difficult for defense attorneys to secure a more lenient plea.

Sentence Types and Length

Based on the 27 eligible cases where we have sentence information, the vast majority of NYCDS clients who pleaded guilty in a shoplifting bump-up case are sentenced to city jail or state prison time (67%).



Eighteen people received a city jail or state prison sentence. 11% (two people) were sent to state prison, with sentences longer than a year. The other 16 people were sentenced to city jail time.



Taxpayer Costs of Arrest & Incarceration

\$82,250

Cost of arresting our 47 clients in bumped up shoplifting cases in 2018

\$1,417,288

Cost of incarcerating our 18 clients who received jail/prison sentences for bumped up shoplifting charges in 2018

The Police Reforming Organizing Project estimates that a single arrest costs New York City \$1,750.¹⁰ We multiplied this cost to each of our 47 shoplifting bump-up cases to obtain the estimated cost to the city for arresting our clients.

We also calculated that New York taxpayers spent \$1,417,288 incarcerating the 18 people who received jail or prison sentences for bumped up shoplifting charges from our office in 2018. This incarceration cost was calculated based on daily costs of imprisonment on Riker's Island¹¹ for those with sentences less than or equal to one-year and daily costs of imprisonment at a New York State Department of Corrections and Community Supervision prison facility¹² for sentences greater than one-year. Daily costs were derived by dividing annual costs by the number of days in a year.

Note: New York County Defender Services represents only 25% of accused people charged in Manhattan Criminal and Supreme Courts. Therefore, our numbers represent only a quarter of the total people who likely faced bumped up shoplifting charges by the Manhattan District Attorney's Office.¹³

¹⁰ Police Reform Organizing Project, *The Human and Economic Cost of Broken Windows Policing in NYC* (November 2014), available at <https://drive.google.com/file/d/oBOQqM3ewBPXmaUIwdkpQQjdfUnc/view>.

¹¹ Yoav Gonen, "City jail costs hit new record despite drop in inmates," *New York Post*, Nov. 14, 2017, available at <https://nypost.com/2017/11/14/nyc-jail-costs-hit-new-record-despite-drop-in-inmates/>.

¹² Ngoc Huynh, "Report: Cost per prisoner in New York tops other states," *New York Upstate*, July 2017, available at https://www.newyorkupstate.com/news/2017/07/data_cost_per_prisoner_in_new_york_tops_other_states.html.

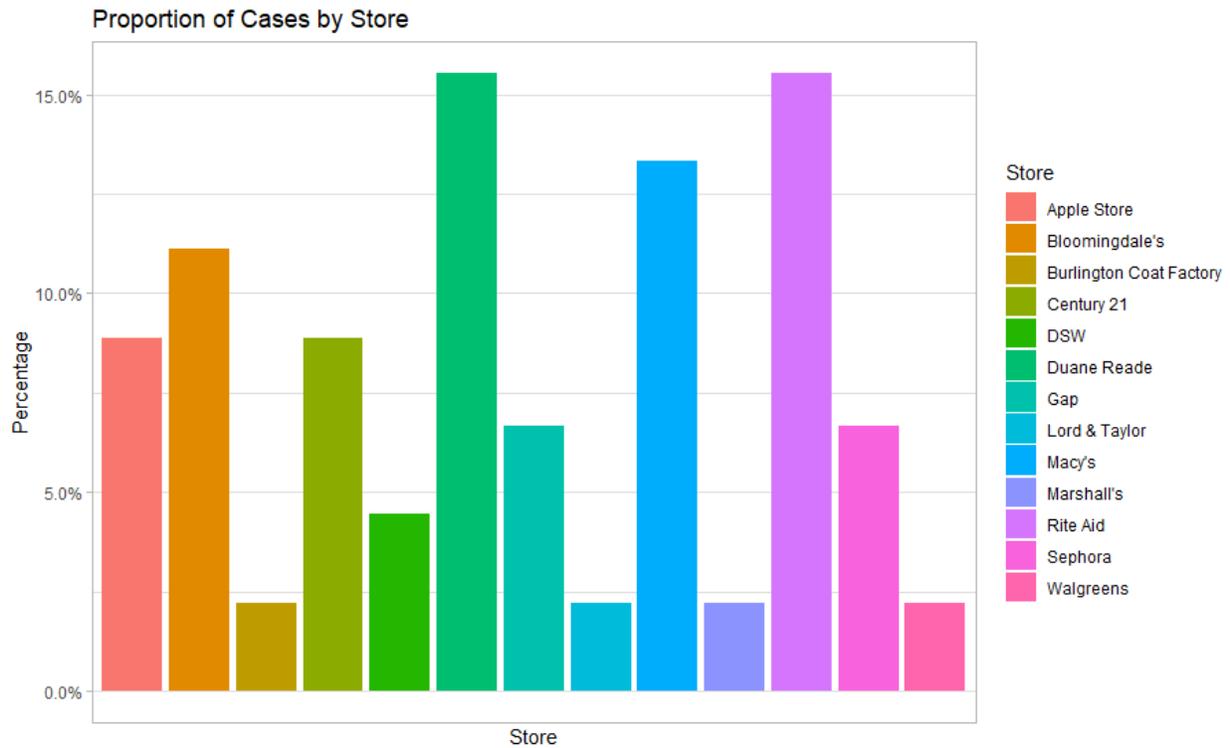
¹³ If our data is consistent with the rest of the 75% of cases, we can extrapolate that New York taxpayers could have paid as much as \$6 million to incarcerate close to 80 people in shoplifting bump-up cases in Manhattan in 2018. We recommend additional study of the entire subset of these cases for the borough of Manhattan to accurately assess the total cost to taxpayers.

Which Stores Are Bumping Up Shoplifting Charges?

There are hundreds of retailers with storefronts in Manhattan,¹⁴ but only a handful work with the Manhattan District Attorney's Office to bump up shoplifting charges to obtain felony convictions.

Our 47 clients involved in shoplifting bump-up cases came from 13 stores: Apple Store, Bloomingdale's, Burlington Coat Factory, Century 21, DSW, Duane Reade, Gap, Lord & Taylor, Macy's, Marshall's, Rite Aid, Sephora, and Walgreens. Stores with multiple locations, such as Rite Aid or Duane Reade, are listed under the store name.

A multitude of cases come from drug stores, such as Duane Reade/Walgreens and Rite Aid.



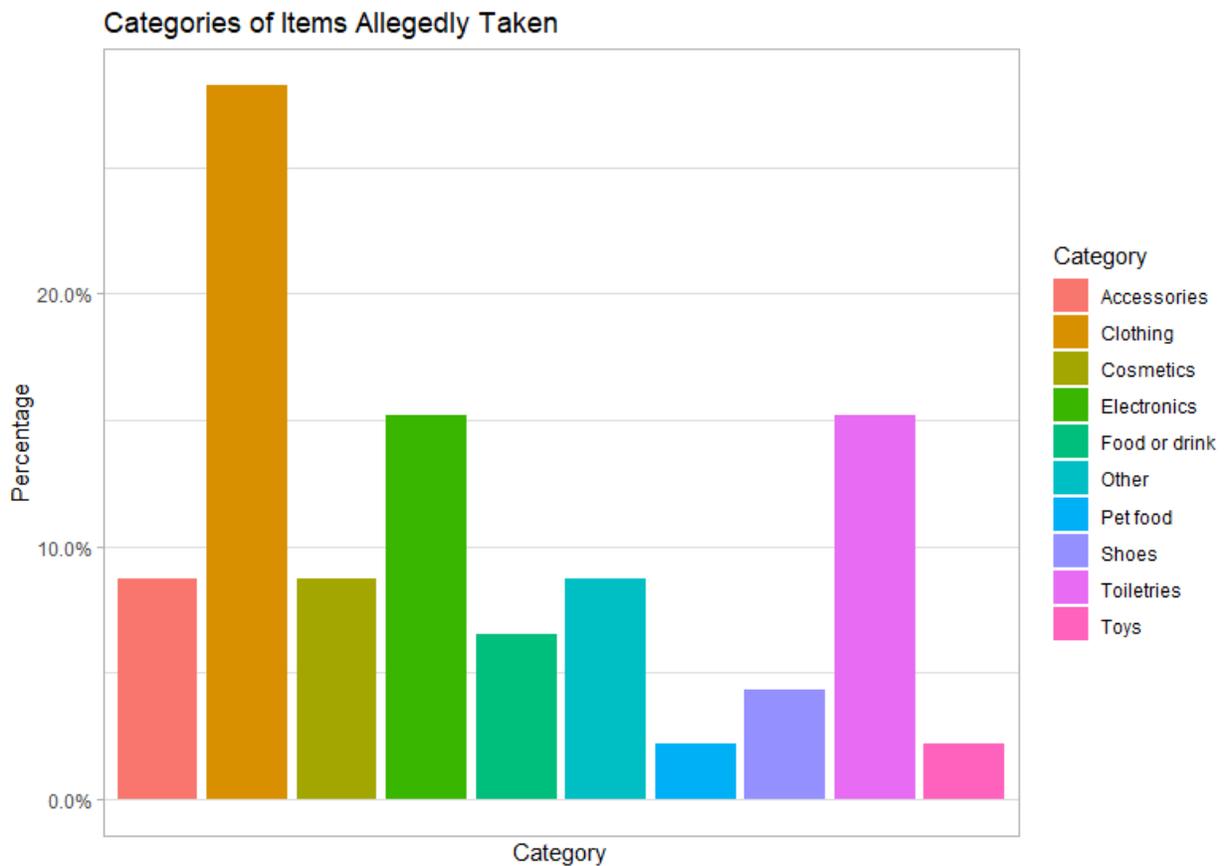
¹⁴ See, e.g., Center for an Urban Future, *State of the Chains 2013*, available at <https://nycfuture.org/research/state-of-the-chains-2013>.

Types of Items Allegedly Taken

The felony complaints for eligible cases listed a wide variety of items alleged to have been taken from stores without permission.

Specific examples include:

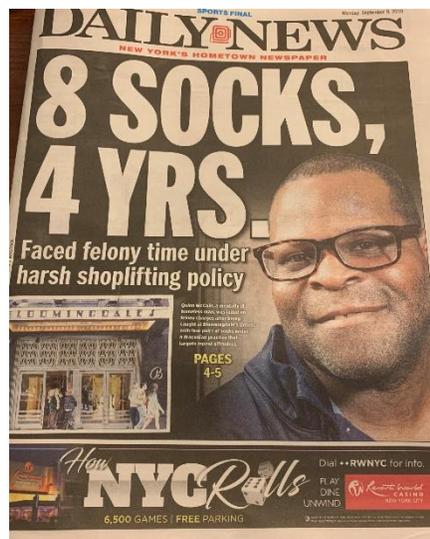
- “Case of water”
- “Several bottles of Aveeno lotion”
- “A pair of sneakers”
- “Cat litter and cat food”
- “2 red velvet cakes”
- “Four pairs of Calvin Klein socks”
- “A coat”



CLIENT STORY

NYCDS represents a New York City man, Qulon McCain, who is facing four years in prison for taking four pairs of socks from Bloomingdale's in late 2018.¹⁵ He received a previous trespass notice from the store in 2017.

His trial attorney, Thalia Karny, fought with prosecutors for eight months to ensure that Mr. McCain could enter the New York County Mental Health Treatment Court and be released from Rikers Island. He is now at an inpatient treatment center where, for the first time in his life, he is receiving treatment for longstanding, chronic mental health issues.



Mr. McCain spent more than a decade cycling in and out of homeless shelters as he struggled with serious mental illness and substance abuse. He had a long history of misdemeanor convictions, stemming from his difficulty with managing his medication while navigating the shelter system. He was never able to access meaningful treatment to allow him the foundation he needed to get support, get treatment, and turn his life around.

Mr. McCain's story is similar to that of thousands of New Yorkers struggling to access mental health treatment across the state. A 2018 study by the Manhattan Institute found that only a small fraction of total seriously mentally ill adults in the state and city are able to access care and support from public mental health care providers.¹⁶ There are simply not enough free services for all who need them.

¹⁵ Chelsia Rose Marcus, "Homeless, mentally ill man almost spent years in jail taking 4 pairs of socks from NYC department store," *Daily News*, Sept. 9, 2019, available at <https://www.nydailynews.com/new-york/ny-man-shoplifted-bloomingdale-s-felony-charge-20190909-txmctcpf2zfnxhnumts2q36nu-story.html>.

¹⁶ Stephen Eide, *Systems Under Strain: Deinstitutionalization in New York State and City*, (Manhattan Institute, Nov. 2018), available at <https://www.manhattan-institute.org/deinstitutionalization-mental-illness-new-york-state-city>.

CONCLUSION

People experiencing homelessness are 11 times more likely to face incarceration when compared to the general population, and formerly incarcerated people are almost 10 times more likely to be homeless than the general public.¹⁷ When coupled with mental illness, substance abuse, and/or trauma, it becomes even more difficult for people to find and maintain permanent housing. For too long, we have relied on the criminal legal system to “solve” these problems, but these serious issues require serious policy solutions.

Our current approach is not working. Even when people are able to access treatment and support through our criminal court system, it can take months or years to get the services they need. Moreover, all too often the services available fail to reach the heart of the issue.

The question remains whether we want to send people to jail or prison for months or years, or if we want to invest in better solutions; solutions that will ensure that people can stop living on the margins of society, reintegrate with their families and communities, and build a better life for themselves.

As we grow towards a national consensus around how to end the harm of mass incarceration, policymakers need data about the kinds of cases that are being prosecuted to determine how our resources can best be utilized to keep our communities safe. We hope that this report will be useful to those ends.

¹⁷ Bailey Gray, Doug Smith & Allison Franklin, *Return to Nowhere: The Revolving Door between Incarceration and Homelessness* (Texas Criminal Justice Coalition, 2019), available at <https://www.texascjc.org/system/files/publications/Return%20to%20Nowhere%20The%20Revolving%20Door%20Between%20Incarceration%20and%20Homelessness.pdf>.