



Testimony of  
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Before the  
Committee on Justice System

Oversight Hearing: The Technology Gap between Public Defenders and DAs

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My name is Sergio De La Pava and I am the Legal Director at New York County Defender Services (NYCDS), a public defense office that represents tens of thousands of New Yorkers in Manhattan's criminal courts every year. I have been representing clients accused of crimes in this city for more than twenty years. Thank you to Chair Lancman for holding this hearing on the wide technology gap between public defenders and prosecutors.

Late last year, the N.Y. Times ran a story about the Legal Aid Society's first-in-the-nation defender technology lab. To their great credit, Legal Aid invested in achieving greater defense access to police forensic technology to improve their ability to represent their clients. This involved gaining access to forensic devices and software from companies including Cellebrite, Magnet Forensics and Guidance Software, to improve their ability to represent their clients.<sup>1</sup> According to the article, the unit has invested \$100,000 in technology that allows defenders to make precise copies of computer drives or a person's phone in a format that holds up in court. This technology is critical to preserve evidence that may exonerate an accused person. But smaller defender offices like ours, who still represent thousands of clients every year but operate on a far lesser budget, do not have access to such tools.

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<sup>1</sup> Kashmir Hill, *Imagine Being on Trial. With Exonerating Evidence Trapped on Your Phone*. N.Y. TIMES, Nov. 22, 2019, available at <https://www.nytimes.com/2019/11/22/business/law-enforcement-public-defender-technology-gap.html>.

So the technology gap this hearing refers to is real. Worse, it threatens to grow over time as history tells us that reliance on technology and concomitant technological advancement are relentless. And this is especially true in the world of law enforcement and criminal prosecution. Meaning institutional defenders are not only behind but also falling more behind every day the problem goes unaddressed.

We call on City Council to address this problem, because it threatens to deny entire swaths of our most vulnerable citizens their constitutional right to due process and to the effective assistance of counsel. The Council should ensure that all of New York City's six public defense offices receive the resources we need to develop our own in-house technology labs. All people accused of crimes in our five boroughs deserve to have defenders who are equipped to not only vigorously represent them in court with their legal skills, but who also have the technological wherewithal to scrutinize the prosecution's case and establish possible defenses. While the legal burden remains with the prosecution to prove our client's guilt beyond a reasonable doubt, it is our constitutional obligation to hold them to that burden in every aspect of the prosecution. This certainly includes those increasingly common instances where the police and prosecution have relied on forensic or other technology. An accused person's outcome in their case should not depend on the luck of the draw as to whether Legal Aid was in arraignments the day the case begins. Every defender office must be on equal footing in this critical area.

We also strongly believe that these technology resources must be available in-house for each individual defender office and not via a shared system. New York City relies on multiple public defender offices because of ethical guidelines set out in the New York State Unified Court System Rules of Professional Conduct (Rules 1.7 through 1.10) that govern conflicts of interest in legal representation. By having multiple defense providers in the courtroom at every arraignment shift, the city ensures that co-defendants each receive an attorney who is able to represent only their interests. Because of these conflicts, it would be unethical for NYCDS to go to Legal Aid and ask them to share their equipment or expertise on a case where they represent the co-defendant or where there is any danger of one of their clients being implicated or harmed in any way.

So we do not believe that an independent citywide defender technology lab is the solution to the prosecutor/defender technology gap. Such a lab invites many questions. How would the lab prioritize which cases are reviewed first? How would the lab handle conflicts involving co-defendants? Could the lab actually be independent? Would we be reluctant to have evidence tested if we thought it might corroborate the prosecution's accusations? We also expect that, like other crime labs, a technology lab would be immediately backlogged, requiring our clients to wait for long periods of time, during which our clients might be incarcerated, as we wait to secure the evidence necessary to prove their innocence.

If NYCDS had its own lab, we could prioritize for ourselves which cases are most urgent. All of the analysis would remain in house, and if evidence came back, for instance, confirming our client's guilt, we could safely share that information with our client without fear of that evidence coming to light in violation of our ethical and professional obligations. All of the testing, because conducted by us, would fall within the attorney-client privilege. We would not need to negotiate with other defender offices about whose case goes first, or worry that sensitive information might come to light.

In terms of actual cost, we will be following up with a specific budget request that will detail the funding needed to be operational as soon as possible. But note that while a significant expense will be the purchasing of equipment, there will be other financial considerations. A technology unit would require constant training and staffing, not just the one-time expense of purchasing goods. But while the details need to be honed, it is self-evidence that every defender office must have a significant technology budget that it is free to use as it sees fit in the best interests of its clients and to the benefit of our entire criminal justice system.

Finally, as this Committee considers securing funding for defender offices to bridge the technology gap, we also urge you to pass the POST Act (Int. 487-2018), which would require NYPD to disclose to the public the types of surveillance technology that they use against New York City residents. Passage of the POST Act would ensure that defenders know what kinds of technology NYPD relies upon so that we may consider investing in and training our staff on the same. If we remain in the dark about what kinds of technology the other side has, our criminal justice system can never truly be fair.

If you have any questions about my testimony, please contact me at [sdelapava@nycds.org](mailto:sdelapava@nycds.org).