
State of New York
Court of Appeals



In the Matter of
NYP HOLDINGS, INC. and CRAIG MCCARTHY,
Petitioners-Respondents,

-against-

NEW YORK CITY POLICE DEPARTMENT, DERMOT F. SHEA,
in his official capacity as Commissioner of the New York City
Police Department,
Respondents,

POLICE BENEVOLENT ASSOCIATION OF THE
CITY OF NEW YORK,
Respondent-Appellant.

**BRIEF OF AMICUS CURIAE THE INNOCENCE PROJECT
IN SUPPORT OF PETITIONERS-RESPONDENTS**

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INTEREST OF AMICUS CURIAE

The Innocence Project is a nonprofit organization that works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Since its founding in 1992, it has helped to free or exonerate more than 250 people. In addition to litigating individual cases, it also advocates for reforms intended to enhance the truth-seeking function of the criminal legal system, including legislation promoting police accountability and transparency.¹

Police misconduct is a leading cause of wrongful convictions. It contributed to the wrongful convictions in well over 1500 cases that culminated in exonerations, more than 40 percent of all recorded exonerations since 1989.² Indeed, there have been hundreds of wrongful convictions in New York alone due to police misconduct.³

Police disciplinary records can play a crucial role in uncovering and preventing such wrongful convictions. As an advocate for the wrongfully convicted, the Innocence Project has an interest in ensuring that attorneys, incarcerated people, and the public be allowed to access police personnel files that can help provide proof of innocence.

¹ The Innocence Project supported the 2020 repeal of Civil Rights Law Section 50-a and was a signatory to a letter urging Governor Cuomo to sign this legislation into law. *See* Innocence Project, *In a Historic Victory, Governor Cuomo Signs Repeal of 50-A Into Law* (June 9, 2020), <https://innocenceproject.org/in-a-historic-victory-the-new-york-legislature-repeals-50-a-requiring-full-disclosure-of-police-disciplinary-records/>.

² Nat'l Registry of Exonerations, *Exoneration Detail List*, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Nov. 12, 2024) (filter by official misconduct tag “OF” for “police officer misconduct”).

³ *Id.* (filter by official misconduct tag “OF” and by state).

INTRODUCTION

There have been thousands of documented wrongful convictions caused, in part or whole, by police misconduct. The annals of wrongful convictions are replete with cases where police officers planted evidence;⁴ coerced and even tortured innocent suspects into false confessions;⁵ plied informants with inducements such as drugs, sex, and money;⁶ threatened witnesses;⁷ and lied under oath.⁸

Access to police personnel files can play a vital role in uncovering and preventing such wrongful convictions. Police disciplinary records not only provide

⁴ See, e.g., Nat'l Registry of Exonerations, *New York 1994*, <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/new-york-1994> (last visited Nov. 12, 2024) (discussing the “Dirty Thirty” cases); Lauren del Valle, CNN, *Baltimore State’s Attorney Announces Third Body Camera Video of ‘Questionable’ Police Conduct*, CNN (Aug. 21, 2017), <https://www.cnn.com/2017/08/21/us/third-baltimore-body-cam/index.html> (reporting on cases of evidence planting caught on camera in Baltimore).

⁵ See, e.g., Mark Guarino, *Disgraced Chicago Police Commander Accused of Torture Freed From Prison*, *The Guardian* (Oct. 2, 2014), <https://www.theguardian.com/world/2014/oct/02/chicago-police-commander-jon-burge-torture-released> (discussing Chicago Police Commander Jon Burge’s use of torture to elicit confessions from over 100 Black men and women); Jan Ransom, *3 Detectives Obtained a False Murder Confession. Was It One of Dozens?*, *N.Y. Times* (Feb. 15, 2021), <https://www.nytimes.com/2021/02/15/nyregion/3-detectives-obtained-a-false-murder-confession-was-it-one-of-dozens.html> (reporting on the tactics detectives used to coerce a false confession from Huwe Burton, and possibly other innocent people).

⁶ See, e.g., Samantha Melamed, *Sex for Lies*, *The Philadelphia Inquirer* (July 20, 2021), <https://www.inquirer.com/news/a/philadelphia-homicide-detectives-bribes-exonerations-murder-20210720.html> (reporting how Philadelphia homicide detectives offered jailhouse informants drugs and sex in exchange for testimony).

⁷ See, e.g., Jennifer Gonnerman, *Home Free*, *The New Yorker* (June 13, 2016), <https://www.newyorker.com/magazine/2016/06/20/derrick-hamilton-jailhouse-lawyer> (reporting Jewel Smith’s allegation that she falsely accused Derrick Hamilton of shooting her boyfriend because a NYPD detective had threatened to put her in jail and take her kids).

⁸ See, e.g., Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 *Wash. U. L. Rev.* 1133, 1138 (2013) (discussing the LAPD Rampart scandal, which “expos[ed] hundreds of instances in which evidence or contraband was planted on suspects, false statements were coerced or fabricated, and police officers offered perjured testimony in court”).

evidence of prior misconduct by the officers involved in a case, but can also lead to finding an officer's partners, other witnesses, or other victims of malfeasance. And a pattern of allegations of similar misconduct can help support a claim of innocence. Even if some or all of the allegations of misconduct are unsubstantiated,⁹ a jury could conclude from a pattern of allegations that where there's smoke, there's fire.

Until the 2020 repeal of Civil Rights Law Section 50-a ("50-a"), however, records of police misconduct were kept secret in New York. Section 50-a hid from people accused of crimes that the officers involved in their case had been accused of roughing up suspects, arrested themselves, or committed perjury. Deprived of such information, innocent people could claim that the police or key witnesses were lying, or that they had been coerced into confessing, but they often had nothing but their word to support such a claim. Innocent people went to prison because they were framed—often for decades—even as evidence that could help substantiate their claims that they were wrongfully convicted remained hidden in police personnel files.

⁹ A finding that an allegation was “unsubstantiated”—unlike a finding that an allegation was “unfounded” or “exonerated”—does not mean that it was proven false or that an officer committed no misconduct. Instead, it means that there was not enough evidence to come to a determination one way or another. A typical case would be if a complainant testifies to one version of events, the police officer another, and there is no particular reason to believe one over the other. To avoid confusion, the CCRB now uses the term “unable to determine” rather than “unsubstantiated.” See CCRB, *Explanation of All Potential Board Findings*, at 2 & n.2, https://www.nyc.gov/assets/ccrb/downloads/pdf/investigations_pdf/case-outcomes/ExplanationOfBoardFindings.pdf (last visited Nov. 12, 2024).

Limiting the repeal of 50-a to disciplinary records that were generated after its repeal, as the Police Benevolent Association (PBA) urges, would close off a crucial avenue for innocent people to vindicate their claims of innocence. For people in prison, requests made under the Freedom of Information Law provide the only means of post-conviction discovery. Restoring the veil of secrecy to pre-2020 police personnel files would mean that anyone convicted before 2020 has little way to investigate the police officers involved in their case. Wrongfully convicted people might spend decades in prison, protesting their innocence, without access to information that could help demonstrate that they were wrongfully convicted.¹⁰

This Court should reject the PBA's effort to restrict the effect of 50-a's repeal. Although the PBA argues that its members have privacy rights and reliance interests in pre-2020 allegations of misconduct remaining hidden, the legal system's interest in protecting the wrongfully accused and ensuring the integrity of convictions outweighs any privacy and reliance interests police officers may have in continued secrecy.

¹⁰ The average exonerated person listed in the National Registry of Exonerations spent more than nine years in prison; some people lost over four decades of their lives to wrongful convictions, or died in prison. Nat'l Registry of Exonerations, *Longest Incarcerations*, <https://www.law.umich.edu/special/exoneration/Pages/longestincarceration.aspx> (last visited Nov. 12, 2024).

ARGUMENT

I. Police misconduct is one of the leading causes of wrongful convictions.

Derrick Hamilton was a 25-year-old father of three when Detective Louis Scarcella framed him for murder. He would not leave prison for almost 21 years. Detective Scarcella coerced Jewel Smith into identifying Hamilton as the man who had killed her boyfriend, threatening to send her back to jail for a parole violation and take away her children. Smith then testified at trial that Hamilton was the shooter, even though she had previously told the police she hadn't even been present, and Hamilton was convicted based on her false testimony. As it turns out, Hamilton had been in New Haven, Connecticut—not Brooklyn—at the time of the shooting. But his alibi witnesses failed to appear at his trial. One of them later swore under oath that officers had threatened to arrest her husband if she testified in Hamilton's defense.¹¹

After Hamilton's trial, he filed one post-conviction motion after another. Not only did Smith recant her trial testimony at a post-conviction hearing, testifying that she only implicated Hamilton because Scarcella had threatened to charge her with the crime, but Hamilton also produced affidavits from alibi witnesses and eyewitnesses identifying another man as the shooter. Nevertheless, all of his motions were denied.¹²

¹¹ Nat'l Registry of Exonerations, *Derrick Hamilton*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4601> (last visited Nov. 12, 2024); see also Gonnerman, *supra* note 7.

¹² *People v. Hamilton*, 115 A.D.3d 12, 1519 (2d Dep 2014) (summarizing procedural history).

Only after Hamilton was released on parole did his efforts to prove what had really happened finally gain traction. After the Appellate Division remanded his latest motion for a hearing,¹³ the Brooklyn District Attorney's Office reinvestigated the case, concluded that Hamilton was in fact innocent, and dismissed all charges.¹⁴

Derrick Hamilton is one of 17 people whose wrongful convictions have been overturned (so far) because of Detective Scarcella's campaign of coerced confessions, witness intimidation, and incentivized informants.¹⁵ Collectively, the victims of Scarcella's misconduct spent over 300 years behind bars. One of them died in prison.¹⁶ Another "was just 14 when he was arrested on murder charges."¹⁷ Taxpayers have paid \$110 million (and counting) in compensation for Scarcella's misconduct.¹⁸

Scarcella's misconduct is not an isolated example. Falsifying paperwork and lying under oath is so prevalent in the New York City Police Department (NYPD)

¹³ *Id.* at 19, 28.

¹⁴ Stephanie Clifford, *Wrongfully Convicted Man Was His Own Best Advocate*, N.Y. Times (Jan. 9, 2015), <https://www.nytimes.com/2015/01/10/nyregion/wrongly-convicted-man-was-his-own-best-advocate.html>.

¹⁵ The other 16 wrongful convicted individuals were: Darryl Austin, John Bunn, Vincent Ellerbe, Vanessa Gathers, Roseann Hargrove, Robert Hill, James Irons, Alvena Jennette, Roger Logan, Thomas Malik, Sundhe Moses, Ronald Pondexter, David Ranta, Shabaka Shakur, Jabbar Washington, and Shawn Williams. See Nat'l Registry of Exonerations, *Scarcella Cases*, https://www.law.umich.edu/special/exoneration/Documents/Scarcella_cases.pdf (last visited Nov. 12, 2024).

¹⁶ Nat'l Registry of Exonerations, *Darryl Austin*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4427> (last visited Nov. 12, 2024).

¹⁷ Frances Robles, *An Ex-Detective's Overturned Murder Cases Have Cost New York \$110 Million*, N.Y. Times (Nov. 20, 2023), <https://www.nytimes.com/2023/11/20/nyregion/louis-scarcella-nypd-settlements.html>.

¹⁸ *Id.*

that there's a term for it: *testilying*. This portmanteau first became widely known with the Mollen Commission Report on police corruption 30 years ago, which found that “New York City police officers often make false arrests, tamper with evidence and commit perjury on the witness stand.”¹⁹ But the practice is far older. Recent scholarship has unearthed numerous cases of false statements and fabricated charges from the 19th and early 20th century, concluding that there is “a longstanding tradition of rank perjury dating back to the origins of modern policing.”²⁰

The practice of police perjury continues to this day, largely unchecked. A 2018 investigation documented how judges have repeatedly found that New York City police officers lied under oath, but little has been done about it; instead of receiving reprimands, officers are often promoted.²¹ For instance, one officer was promoted to the position of detective supervisor on a joint NYPD-federal task force despite the Appellate Division, Second Department twice casting doubt on his testimony in reversing convictions—and costing New York millions in civil suits for wrongful convictions.²² Similarly, findings by the Civilian Complaint Review Board (CCRB)—

¹⁹ Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. Times (Apr. 22, 1994), <https://www.nytimes.com/1994/04/22/us/new-york-police-often-lie-under-oath-report-says.html>.

²⁰ Samuel Dunkle, Note, “*The Air Was Blue With Perjury*”: *Police Lies and the Case for Abolition*, 96 N.Y.U. L. REV. 2048, 2052, 2068–78 (2021), available at <https://nyulawreview.org/wp-content/uploads/2021/12/Dunkle-ONLINE.pdf>.

²¹ Joseph Goldstein, “*Testilying*” by Police: *A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), <https://www.nytimes.com/2018/03/18/nyregion/testilying-police-perjury-new-york.html>.

²² Tom Robbins, *The High Price of a New York City Cop*, The New Yorker (May 24, 2021), <https://newyorker.com/news/our-local-correspondents/the-high-price-of-a-new-york-city->

an independent civilian oversight agency—that NYPD officers had lied rarely result in punishment. A 2018 article analyzing 81 cases of false official statements found that only 2 cases appeared to have resulted in *any* discipline, even though the CCRB brings such charges only when there is strong evidence that an officer lied.²³ A follow-up report in 2022 found that, although NYPD officers are supposed to be fired for making false official statements, in the past decade only 5 of the 181 officers found to have lied by the CCRB were disciplined at all—and not a single one was fired.²⁴

Prosecutors have acknowledged the prevalence of police perjury. Indeed, in recent years district attorneys have vacated many hundreds of convictions after realizing that NYPD detectives such as Joseph Franco and Kevin Desormeau had repeatedly fabricated evidence and lied under oath.²⁵ Prosecutors in Westchester, too,

cop; *see also* *People v. O'Neill*, 141 A.D.3d 606 (2d De[2016) (reversing conviction on weight-of-the-evidence grounds); *People v. Battle*, 116 A.D.3d 782 (2d Dep 2014) (same).

²³ Joseph Goldstein, *Promotions, Not Punishments, for Officers Accused of Lying*, N.Y. Times (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/nyregion/new-york-police-perjury-promotions.html>. Although many findings of substantiated misconduct rely on credibility findings and may involve the CCRB crediting the complainant or other witnesses over the accused officer, a finding of a false official statement requires additional evidence of mendacity such as a video recording, contradictory police paperwork, or the statements of independent witnesses or other police officers. *See* CCRB, *2014 Annual Report*, at 13, <https://www.nyc.gov/html/ccrb/downloads/pdf/Annual%20Report%202014-Rev2Final.pdf> (discussing the criteria for a finding of a false official statement).

²⁴ Jeff Coltin, *NYPD Officers Are Supposed to Be Fired for Lying. They Aren't*, City & State (Apr. 11, 2022), <https://www.cityandstateny.com/policy/2022/04/nypd-officers-are-supposed-be-fired-lying-they-arent/365517/>.

²⁵ *See, e.g.*, Samantha Max, *Bronx Judge Tosses Convictions That Hinged On Former NYPD Detective Accused of Perjury*, Gothamist (Sep. 7, 2023), <https://gothamist.com/news/bronx-judge-tosses-convictions-that-hinged-on-former-nypd-detective-accused-of-perjury>; Noah Goldberg, *Queens Judge Vacates 60 Convictions Obtained by Crooked Cops*, N.Y. Daily News (Nov. 8, 2021), <https://www.nydailynews.com/2021/11/08/queens-judge-vacates-60-convictions->

recently vacated dozens of convictions after discovering discrepancies in police paperwork and learning of secret recordings of narcotics officers discussing framing innocent people.²⁶ Westchester prosecutors also just vacated 12 convictions that “relied on testimony or search warrant affidavits” from a detective “who resigned and pleaded guilty to perjury,” and then made admissions “in a civil lawsuit deposition ‘suggesting he did not understand his responsibility for the truth and the facts.’”²⁷

This problem is, of course, not limited to New York or the NYPD. Police officers outside of New York have sent thousands of people to prison based on coerced confessions, manufactured identifications, and perjured testimony as well. Between 1972 and 1991, Chicago Police Commander Jon Burge and his subordinates tortured hundreds of people into confessions—many false—by staging mock executions, beating and suffocating suspects, and using electroshock machines on

obtained-by-crooked-cops/; Troy Closson, *A Detective Was Accused of Lying. Now 90 Convictions May Be Erased*, N.Y. Times (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/nyregion/brooklyn-criminal-convictions.html>; Joseph Goldstein, *He Excelled as a Detective, Until Prosecutors Stopped Believing Him*, N.Y. Times (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/nyregion/he-excelled-as-a-detective-until-prosecutors-stopped-believing-him.html>.

²⁶ George Joseph, *Westchester DA Moves to Vacate 26 Convictions Following Release of Police Whistleblower’s Secret Recordings*, The City (May 10, 2023), <https://www.thecity.nyc/2023/05/10/westchester-da-rocah-vacate-convictions/>.

²⁷ Jonathan Bandler, *Twelve Convictions Tied to Disgraced Yonkers Detective Vacated*, Rockland/Westchester Journal News, Nov. 13, 2024, <https://www.lohud.com/story/news/local/westchester/yonkers/2024/11/13/convictions-tied-to-former-yonkers-ny-detective-christian-koch-vacated/76250144007/>.

detainees’ fingers, faces, and genitals.²⁸ Kansas City detective Roger Golubski planted drugs on suspects for decades, coercing some into sex and sending others to prison, until he was arrested in 2022.²⁹ Houston narcotics officer Gerald Goines sent dozens, if not hundreds, of innocent people to jail and prison in “a pattern of deceit involving fictional drug buys, perjured search warrant affidavits, and false testimony” that only ended when Goines was charged with murder—in 2019.³⁰ And “there are many more officers who produced similar reigns of terror — Martin Devlin, Mark Handy, Frank Jacztrembski, Sevelie Jones, Manuel Santiago, Stanley Schiffman, Frank Viggiano. But these are just some of the officers whose misconduct has been discovered.”³¹

To track the thousands of cases dismissed en masse due to the systemic misconduct of police officers and other government officials, the National Registry of Exonerations maintains a database of “group exonerations.” Over one thousand of

²⁸ Chicago Tribune, *Jon Burge and Chicago’s Legacy of Police Torture*, Sept. 19, 2018, <https://www.chicagotribune.com/2018/09/19/jon-burge-and-chicagos-legacy-of-police-torture/>.

²⁹ Amanda Lee Myers, “*It’s Going to Take Years*”: *After Cop Charged in Sex Crimes, Hundreds of Other Cases Under Scrutiny*, USA Today (Nov. 23, 2022), <https://www.usatoday.com/story/news/nation/2022/11/23/golubski-kansas-city-detective-indictment-sex-crimes/10721680002/>.

³⁰ Jacob Sullum, *A Houston Drug Cop’s Lies Sent This Man to Prison for 29 Years*, Reason (July 22, 2022), <https://reason.com/2022/07/22/a-houston-drug-cops-lies-sent-this-man-to-prison-for-25-years/>; see also Nat’l Registry of Exonerations, *Texas 2020*, <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations/texas-2020> (last visited Nov. 12, 2024) (detailing the 29 exonerations stemming from Goines’s misconduct thus far).

³¹ Rebecca Brown, *It’s Time to Make Police Disciplinary Records Public*, Innocence Project (July 2, 2020), <https://innocenceproject.org/its-time-to-make-police-disciplinary-records-public/>.

these mass exonerations were in New York.³² In addition to these group exonerations, the National Registry of Exonerations has recorded more than 1500 individual exonerations nationwide that were caused, at least in part, by police misconduct—1581 of the 3614 recorded exonerations, or 43.7%.³³ Almost half of the exonerations in New York State involved police misconduct (171 out of 357).³⁴ By any measure, then, police misconduct is one of the leading causes of wrongful convictions.

II. Police transparency can help prevent and uncover wrongful convictions.

Access to police disciplinary files is crucial to preventing and uncovering wrongful convictions. Findings that a police officer lied under oath or allegations that they have previously falsified paperwork, coerced confessions, or threatened witnesses are not merely impeachment material. Instead, in cases where the police are accused of fabricating crucial evidence, evidence of prior, similar misconduct by officers goes to the “very heart” of the defense and may be critical to vindicating innocence.³⁵

Lavone Hill’s exoneration illustrates how allegations of police misconduct can undermine the basis for a criminal prosecution and support a claim of innocence. Hill

³² The current tally is 1186 exonerations in New York. *See* Nat’l Registry of Exonerations, *The Groups Registry*, <https://exonerations.newkirkcenter.uci.edu/groups/group-exonerations> (last visited Nov. 12, 2024) (add up the number of New York cases).

³³ Nat’l Registry of Exonerations, *Exoneration Detail List*, *supra* note 2 (filter by official misconduct tag “OF” for “police officer misconduct”).

³⁴ *Id.* (filter by official misconduct tag “OF” and by state).

³⁵ *See People v. Santos*, 306 A.D.2d 197, 198 (1st Dep’t 2003) (holding that where defendant was accused of assaulting a correctional officer, the “complainant’s [undisclosed] history of assaultive behavior went to the very heart of this defendant’s trial defense,” and affirming vacatur of conviction based on newly disclosed evidence), *aff’d*, 1 N.Y.3d 548 (2003).

was convicted of a double murder in Detroit based on the statement of a single eyewitness, who had been threatened with arrest by the police officer who took the statement—Sergeant William Bates.³⁶ The eyewitness recanted his statement at trial in 2002, but Bates testified that he never threatened anyone—and the jury credited the witness’s initial statement, bolstered by Bates.³⁷ Upon reinvestigating the case, the Michigan Innocence Clinic discovered that the supposed eyewitness “could not read or write proficiently” and that his written statement implicating Hill was “actually written by . . . Bates.”³⁸ What’s more, post-conviction counsel discovered that—unbeknownst to trial counsel—Sergeant Bates had been suspended from the Detroit Police Department at the time of the trial and was later convicted of a string of bank robberies.³⁹ The prosecution agreed to vacate the conviction and dismiss the charges; the elected district attorney stated that Hill “will not be retried because there is no way in the world that this office would put Walter Bates on any witness stand.”⁴⁰

Experience teaches that a police officer who is willing to lie or cut corners once is often willing to do the same thing again. Detective Scarcella’s misconduct is a case

³⁶ Nat’l Registry of Exonerations, *Lavone Hill*, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6895> (last visited Nov. 12).

³⁷ *Id.*

³⁸ Tiarra Braddock, *Detroit Man’s Conviction Overturned After Spending 22 Years in Prison*, WXYZ Detroit (Oct. 24, 2024), <https://www.wxyz.com/news/region/wayne-county/detroit-mans-conviction-overturned-after-spending-22-years-in-prison>.

³⁹ Nat’l Registry of Exonerations, *Lavone Hill*, *supra* note 36.

⁴⁰ *Id.*

in point. But, as discussed above, it is far from an isolated one. NYPD officers have “candidly described in interviews how the practice of lying runs like a fault line through precincts.”⁴¹ One officer, speaking on condition of anonymity, described some of his fellow officers as “lie guy[s]” and discussed how “a supervisor and a detective had each encouraged him to lie about the circumstances of drug arrests.”⁴²

Evidence of prior police misconduct can have a powerful effect on the jury. As the Second Department said in discussing a claim of newly discovered evidence based on Scarcella’s misconduct, “it is not difficult to imagine ‘the reactions of the jurors’ if they had been made aware of the new evidence that Detective Scarcella had engaged in a pattern of facilitating false identification testimony.”⁴³ A jury (and a judge) is likely to weigh an accused person’s testimony that they are being framed for a crime they didn’t commit far differently if they hear that the investigating officer has previously been found to have lied under oath or been accused of similar misconduct.⁴⁴

Indeed, many of the 17 people who were wrongly convicted of murder because of Detective Scarcella’s malfeasance spent decades trying to prove their innocence

⁴¹ Goldstein, “*Testilying*” by Police: *A Stubborn Problem*, *supra* note 21.

⁴² *Id.*

⁴³ *People v. Hargrove*, 162 A.D.3d 25, 66 (2d Dep’t 2018) (quoting *People v. Rensing*, 14 N.Y.2d 210, 214 (1964)) (affirming the grant of a new trial based on newly discovered evidence).

⁴⁴ See, e.g., Jake Pearson & Mike Hayes, *This Man’s Conviction Was Overturned After Two Years in Prison. But the City Said He Didn’t Deserve a Dime*, ProPublica (Apr. 27, 2023), <https://www.propublica.org/article/nypd-wrongful-conviction-lawsuit-law-department> (reporting on a \$2 million jury verdict in a civil lawsuit by a man who claimed he had been framed and falsely convicted for robbery by a group of narcotics officers who, it came out after the criminal trial, had repeatedly been sued for false arrest and evidence fabrication).

before evidence of Scarcella’s misconduct in other cases spurred prosecutors and judges to finally take a second look. Derrick Hamilton, for instance, filed motion after motion demonstrating that the sole witness against him had been pressured into her testimony (and had subsequently recanted), that alibi witnesses could testify he was in another state at the time of the crime, and that another man had committed the crime.⁴⁵ But his case was not remanded for a hearing by the Second Department or reinvestigated by the Brooklyn District Attorney’s Office until after David Ranta, another one of Scarcella’s victims, was exonerated in 2013. In fact, the Brooklyn District Attorney ordered a review of Scarcella’s cases only after a New York Times reporter had “examined a dozen cases involving Mr. Scarcella and found disturbing patterns, including the detective’s reliance on the same eyewitness, a crack-addicted prostitute, for multiple murder prosecutions and his delivery of confessions from suspects who later said they had told him nothing.”⁴⁶ It is likely that the trials of these 17 exonerees would have gone far differently—or their cases would have been dismissed before trial—had Scarcella’s pattern of deceit come to light sooner.

By making police disciplinary records public, the repeal of Civil Rights Law Section 50-a provides people falsely accused and convicted of crimes with a critical mechanism to vindicate their claims of innocence. As Derrick Hamilton said at the

⁴⁵ See *Hamilton*, 115 A.D.3d at 15–19.

⁴⁶ Frances Robles & N.R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. Times (May 11, 2013), <https://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html>.

time of 50-a's repeal, "Scarcella was a corrupt cop. They knew he was. Repealing 50-a would have made them turn around the records to the public."⁴⁷ Shabaka Shakur, another one of Scarcella's victims, noted: "When we went to trial and we asked for [Scarcella's] record, they would not give it to me. . . . They fought us tooth and nail."⁴⁸

In fact, the repeal of 50-a has already resulted in the overturning of wrongful convictions. Less than two months ago, Antonio Mallet's conviction was vacated on a joint defense-prosecution motion based, in part, on previously undisclosed police personnel records. After the sole eyewitness to identify Mallet as the shooter in a murder-robbery recanted his trial testimony, the Westchester District Attorney's Conviction Review Unit reinvestigated the case, concluding that this statement had been the product of "physical and psychological coercion" and that the police officers involved in the investigation were corrupt.⁴⁹ The Conviction Review Unit obtained police disciplinary records for the investigating detective, apparently not possessed by the prosecution at the time of the trial, which showed that this detective "had been accused of hijacking a business's owner video store and using the premises to sell

⁴⁷ Danielle Selby & Alicia Maule, *Why These Exonerees Hope the Repeal of 50-A Will Break Down the "Blue Wall of Silence,"* Innocence Project (June 11, 2020), (alterations in original), <https://innocenceproject.org/50a-repeal-police-exonerees-accountability-scarcella/>.

⁴⁸ *Id.*

⁴⁹ Asher Stockler, "One of the Worst" Wrongful Convictions: Man Falsely IDed Exonerated Almost 30 Years Later, *Rockland/Westchester Journal News* (Sept. 30, 2024), <https://www.lohud.com/story/news/crime/2024/09/30/westchester-da-review-exonerates-brooklyn-man-30-years-after-murder-conviction/75362007007/>. The Westchester District Attorney's Office handled the reinvestigation because the Bronx District Attorney had presided as judge over some of Mr. Mallet's prior 440 motions.

counterfeit videos.”⁵⁰ The NYPD investigated this incident, “deeming it ‘partially substantiated,’” and the detective was later arrested.⁵¹ Someone else alleged that this detective had abused his authority to falsely accuse and arrest one of his tenants.⁵² But “[d]espite these and other allegations of misconduct against a second officer involved in the case, ‘none of the officers’ disciplinary records’ were turned over to Mallet’s defense attorney.”⁵³ And until 50-a was repealed and these records disclosed, none of Mallet’s prior motions to vacate his conviction had been met with any success.⁵⁴

Crucially, the Freedom of Information Law (FOIL) provides the only avenue for post-conviction discovery in New York State. Without it, incarcerated people would have no access to previously undisclosed police or prosecution records. Jabbar Collins’s case shows how FOIL can be used to help prove innocence. Collins was convicted of murder after “two witnesses identified him as the man they had seen fleeing the scene, while a third witness claimed to have been present when Collins allegedly planned the crime.”⁵⁵ Through a series of FOIL requests, he “obtained

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* Other convictions have been vacated under *Brady v. Maryland*, 373 U.S. 83 (1963), since the repeal of 50-a because the prosecution failed to disclose police disciplinary records that showed a pattern of misconduct by police witnesses. See *People v. White*, 214 N.Y.S.3d 649 (Sup. Ct. Bronx Cnty. 2024); Michelle Rotuno-Johnson, *\$810k Settles Wrongful Conviction in Manhattan Newsstand Robberies*, Patch (Apr. 8, 2024), <https://patch.com/new-york/new-york-city/810k-settles-wrongful-conviction-manhattan-newsstand-robberies>.

⁵⁵ Joel B. Rudin, *An Injustice Overruled* (June 16, 2010), <https://innocenceproject.org/an-injustice-overturned/>.

evidence showing that one witness's account was apparently a fabrication, that two witnesses had received secret benefits in exchange for their testimony, and that at least two witnesses' testimony had been coerced."⁵⁶ Ultimately, after a witness testified at a federal habeas hearing that a prosecutor "had threatened to hit him over the head with a table and to keep him in prison for years if he did not testify against Collins," the District Attorney's Office agreed to vacate the conviction.⁵⁷ But without access to police and prosecution records through FOIL, none of this would have come to light.

Limiting the repeal of 50-a to disciplinary records generated after its repeal would deprive any accused person whose case involves police officers who were on the force before 2020 of crucial information. Not only can police personnel files themselves provide a treasure trove of information, they can also provide a valuable source of investigative leads. Even lackluster internal investigations may point to potential witnesses or help demonstrate a pattern of conduct. Police disciplinary histories can also document that an officer has been previously reprimanded or fired for unethical behavior, has a history of mental health issues, or has been arrested.⁵⁸

Although the PBA claims that its member officers have privacy rights and reliance interests in the continued secrecy of their disciplinary history, limiting 50-a's repeal to post-2020 personnel files would effectively weigh the interests of police

⁵⁶ *Id.*

⁵⁷ *Id.*; see also *Collins v. City of New York*, 923 F.Supp.2d 462, 469 (E.D.N.Y. 2013).

⁵⁸ See, e.g., Covey, *supra* note 8 (discussing the various issues with an undercover officer who repeatedly perjured himself in Tulia, Texas, leading to the conviction of 38 innocent people).

officers over those of the innocent and wrongfully accused. Continuing to bury records of police misconduct could “imperil the very foundations of [the legal system’s] legitimacy. . . . For the gravest manner of injustice that we know is the imprisonment of a fellow human being for a crime that he or she did not commit.”⁵⁹

CONCLUSION

For the foregoing reasons, this Court should affirm the First Department’s decision, and hold that the repeal of Section 50-a means that pre-2020 police personnel records are no longer to be kept hidden from the public. The importance of preventing and uncovering wrongful convictions far outweighs any privacy rights or reliance interests police officers may have in the secrecy of their disciplinary history.

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Respectfully submitted,



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⁵⁹ *Hargrove*, 162 A.D.3d at 29.

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