Testimony of Rebecca Brown, Director of Policy, Innocence Project &
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Before the Governor's Commission on Law Enforcement Accountability, Community & Transparency
Relating to Public Access to Police Disciplinary Records
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The Innocence Project & the New England Innocence Project work to free the staggering number of people behind bars who were wrongfully convicted of crimes they did not commit. We regard each exoneration as an opportunity to examine the foundations of the criminal legal system and identify ways to prevent further injustice in the future. Since 1989, more than 2,600 exonerations have been revealed in the United States, according to the National Registry of Exonerations (NRE). In more than half of these cases, the NRE reports that police, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exonerated person's wrongful conviction.

The Innocence Project & the New England Innocence Project write to urge changes in the current law in New Hampshire, which permits the shielding of personnel records of police officers – even when those records reveal police misconduct – from public view. Currently under New Hampshire Statute § 91-A:5, police disciplinary records are exempt from public disclosure as personnel records. The current law keeps misconduct information from the public and the press and withholds it from not only the defense attorneys involved in the active defense of accused persons, but also prosecutors litigating cases. This law perpetuates a culture of secrecy that systematically and pervasively shields police misconduct. It is crucial to a fair and just system that the law be repealed and all allegations of misconduct be publicly disclosed.

Criminal cases frequently require a factfinder (either jury or judge) to assess the credibility of the police officers involved in a case. Because police are the first contact between the accused and the criminal legal system, they are central witnesses in criminal cases. Police credibility impacts every phase of a case from the initial charging decision to conditions of release, judicial determinations about the lawfulness of stops and frisks, searches and seizures, identification procedures, interrogations that lead to confessions, and the ultimate determination of guilt or innocence. It even effects the severity of the sentences. When a factfinder is denied information about a crucial witness's prior misconduct or dishonesty, as is the case where police misconduct records remain under lock and key, assessment of an officer's credibility becomes nearly

impossible and results in manifest injustice.

Police credibility is also vital to assessment of the use of force during a police encounter with a civilian. We need look no further than the murder of George Floyd. Mr. Floyd was killed in Minneapolis in May when a police officer who had a record of 18 disciplinary complaints kneeled on his neck for eight minutes and forty-six seconds. As the public reacts to the videotape taken by a civilian bystander of the murder of Mr. Floyd, consider that the officer's complaint record was not revealed to the public until recently and that police arrests are not generally videotaped by third parties with an unobstructed view that provides more telling footage than body cam videos. Questions of force too often lead to conflicting accounts between an officer and a civilian. In these circumstances, there is no substitute for appropriately transparent and fair disciplinary systems for the adjudication of civilian complaints and internal evaluation of officer misconduct. Officers with egregious hidden histories of racism, dishonesty, and use of excessive force should not have the power to arrest; indeed, they should not be serving as police officers.

The problem of hidden police misconduct isn't one of the past. Even following Mr. Floyd's murder, the ensuing smear campaign meant to justify the actions of the officers by touting Mr. Floyd's conviction history had the unintended consequence of revealing further misconduct in an additional state: Houston's district attorney concluded that Gerald Goines, a narcotics officer with the Houston Police Department, likely lied about a drug deal for which he arrested George Floyd in 2004 before he moved to Minnesota. Floyd was convicted and incarcerated for 10 months based on these lies. Goines, who also is charged with lying to obtain the search warrant that led to a deadly raid last year, is now the subject of a larger investigation into thousands of the cases he worked on as part of the narcotics squad.

In many instances, official misconduct takes the form of withholding of exculpatory information which could have enabled the innocent to prove he or she did not commit the crime for which he or she was initially charged. Without that information any attempt at an authentic fact-finding process, which is the bedrock principal of our criminal legal system, is thwarted. As a result, not only is an innocent person left to languish behind bars but also the actual perpetrators of the crime remain undetected and in the community. Of the 367 exonerations based on DNA evidence nationally, the true perpetrators of those crimes were subsequently detected in 50% of the cases. While the wrongfully convicted were incarcerated for crimes they did not commit, these 162 real perpetrators connected to wrongful conviction cases – who remained at liberty – committed an additional 150 crimes: 35 murders; 82 rapes; and 35 other violent crimes that could have been prevented if the actual perpetrator had been identified originally.[1] In this way, promoting transparency and accountability directly impacts the sincerity of a fact-finding mission which not only prevents massive miscarriages of justice affecting the innocent but also holds the promise of preventing further serious, violent crime and protecting public safety.

Public confidence in convictions based on guilty pleas is also at risk when transparency is compromised. In New Hampshire, the overwhelming number of criminal cases are adjudicated through guilty pleas rather than trial. It should be noted, too, that people facing even the most serious, violent felony charges have been shown to plead guilty to crimes they did not commit – more than 10% of the more than 360 people across the nation whose innocence has been proven

[1] See https://www.innocenceproject.org/dna-exonerations-in-the-united-states

through post-conviction DNA testing pleaded guilty to crimes of which they were innocent. When one considers the incredible pressure facing a defendant to plead guilty when the stakes are even lower and the defendant is facing less serious charges, we should be incredibly concerned about the number of actually innocent people ensnared in the plea system.

Given this backdrop, it is simply reckless to allow for a system that permits prosecutors to elicit and finalize plea agreements without ensuring their receipt of the vital information that may otherwise lead them to drop or reduce charges in many cases. Prosecutors, after all, base their charging decisions on the uncorroborated accounts given by law enforcement in many instances, and it is unfair to expect them to make robust assessments of whether to move forward with criminal charges in the absence of records that can bear on the credibility of the main source of the complaint.

One can only imagine the scope of wrongful arrests that hinge on the credibility of the arresting officers that would have otherwise been uncovered earlier in criminal proceedings if the prosecution had access to the disciplinary records of officers and attendant investigative reports. Those belatedly-corrected injustices have not only human costs but fiscal consequences as well. In January of 2017, for instance, New York City agreed to pay $75 million to settle a federal class-action lawsuit based on the issuance of hundreds of thousands of criminal summonses that were subsequently dismissed on the grounds of legal insufficiency.[2] The lawsuit covered a seven-year period (2007-2015) and alleged that police officers had been told – based on a minimum quota requirement - to issue summonses "regardless of whether any crime or violation had occurred."[3] One of the young victims, Pedro Hernandez, was found to have been falsely arrested 7 times, including for more than one murder charge, and he spent two years abused and beaten at Rikers Island before his innocence was revealed. Home at long last, his mother describes a young man who held so much promise that he was offered a full scholarship to college and who now can hardly leave his room. Had prosecutors had access to the disciplinary records of the arresting officers in his and many of these cases, the legal ordeals suffered by these people likely could have been avoided.

Or consider Jon Burge, a Chicago detective and area commander, who, along with his subordinates, were known as "the Midnight Crew," "Burge's Ass Kickers," and the "A-Team." Burge and his team coerced countless confessions — many of them false — from suspects through beatings, suffocations, mock executions at gunpoint, sexual assault, and the use of electroshock machines on suspects' genitals, gums, fingers, and earlobes. They directly participated in or approved the torture of at least 118 Chicagoans, most of whom were Black. Through these abusive tactics, Burge and his officers contributed to many wrongful convictions that have since been overturned, leading the City of Chicago to pay out nearly $60 million to survivors of his abuse. Yet because of exemptions written into Illinois's Freedom of Information Act, the disciplinary records of some of these officers are still being withheld from the public.

States are beginning to take notice of loopholes in their laws that allow police misconduct to continue unabated. Just last month, Governor Andrew Cuomo signed into law the repeal of Civil

[2] See https://www.nytimes.com/2017/01/23/nyregion/new-york-city-agrees-to-settlement-over-summonses-that-were-dismissed.html?login=email&auth=login-email.
[3] Ibid.

Rights Law 50-A. But had the law been repealed sooner, the damaging actions of former New York Police Department Detective Louis Scarcella might have been prevented. Scarcella pressured witnesses into falsely identifying suspects, fabricated and coerced confessions, and manufactured evidence leading to inquiries into dozens of the convictions he helped to secure. Thus far, 14 people Scarcella helped to convict — nearly all of whom are Black — have been revealed to be wrongfully convicted. The city and state so far have paid out over $50 million to his victims.

Given that liberty interests and the very integrity of the criminal legal system are at stake, the Innocence Project & the New England Innocence Project strongly support addressing the need for foundational reform to increase police accountability and transparency in governmental operations. Transparency is inimical to a government that earns the public trust, reduces the prevalence of wrongful prosecutions and wrongful convictions, and could save the state of New Hampshire millions of dollars over time.