**Innocence Project Testimony to Judge Analisa Torres of the United States District Court, Southern District of New York**

**On the Honorable James Yates’ Report to the Court on Police Misconduct and Discipline**

**December 24, 2024**

The Innocence Project works to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for everyone. Founded in 1992 by Barry C. Scheck and Peter J. Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University, the organization is now an independent nonproﬁt. Our work is guided by science and grounded in anti-racism. Since our inception, the Innocence Project has used DNA and other scientiﬁc advancements to prove innocence.

We are equally dedicated to transforming the inequities and failings that lead to wrongful convictions and disproportionately harm communities of color, especially Black people. Working alongside policymakers, supporters, and partner organizations, the Innocence Project spearheads federal and state-based legislative changes that promote greater police and prosecutor accountability; improve access to justice, including through post-conviction DNA testing; and meaningful compensation of the wrongfully convicted. Our eﬀorts have led to the passage of more than 200 transformative state laws and federal reforms.

The Innocence Project deeply appreciates the extraordinary report produced by the Honorable James Yates. Judge Yates has a unique and valuable perspective – he was a Legal Aid lawyer in Brooklyn when our Co-Founders began as Legal Aid lawyers in the Bronx in 1976, he was counsel to two Speakers of the New York State Assembly and helped write many of New York’s statutes on criminal law and procedure, and he was a trial court judge. Those of us who have practiced in New York’s criminal legal system in positions of responsibility learned a lot from this report and we can only hope it will serve as an inflection point for an overarching effort to develop a fair and effective system of oversight, discipline, and professionalism for every police and correction officer in our state. This Report is a remarkably comprehensive investigation of NYPD’s disciplinary practices that has application beyond SQFS encounters. The Report exposes an overly complex system that buries officer misconduct in an avalanche of unnecessarily redundant and confusing procedures, that prevents the public, stakeholders, and NYPD itself from understanding how officers are behaving on both individual and systemic levels. This broken disciplinary system masks patterns of misconduct that we now know are the antecedents of wrongful convictions and disciplinary determinations that are unfair to both complainants and accused officers.

This lack of transparency and dysfunction is simply unacceptable in an age where AI tools have the capability of tracking patterns of misconduct in ways we never thought was possible. All police and correction officers working in the City of New York should have licenses with unique identifiers (badge numbers are re-usable and common names impede accurate data collection).[[1]](#footnote-2) Recent legislation in the state of California has instituted such a system and it enables criminal legal stakeholders (prosecutors, defenders, courts) and, most significantly, the press, the public, the data scientists in academic institutions, and the non-profits working with impacted community groups to track and supplement misconduct information.[[2]](#footnote-3)

Police misconduct can take a variety of forms, from wrongful SQFS ecounters to improper interrogation practices involving deception and coercion that generate false confessions, lying in police reports and tailored testimony. It’s important to emphasize that police misconduct doesn’t just undermine relationships between law enforcement and the community members they have pledged to serve; misconduct also leads to wrongful convictions.

Nationally, 43.8% of wrongful convictions include an incident of police misconduct, according to the [National Registry of Exonerations](https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=OM%5Fx0020%5FTags&FilterValue1=OF). In New York City, the statistics are even more stark. Of 252 total exonerations in the five boroughs since 1989, police officer misconduct contributed to 48% of them. A breakdown of the proportion of exonerations that included instances of police misconduct by borough is below.

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| --- | --- | --- | --- |
| **Borough** | **Exonerations** | **Exonerations with police misconduct** | **Percentage** |
| The Bronx | 54 | 18 | 33.3% |
| Kings | 95 | 57 | 60% |
| New York | 53 | 25 | 47.2% |
| Queens | 47 | 19 | 40.4% |
| Staten Island | 3 | 2 | 66.7% |
| **Total** | **252** | **121** | **48%** |

Some of these exonerations are famous for the police misconduct that drove the wrongful conviction. The exonerations of Anton McCray, Kevin Richardson, Yusef Salaam, Raymond Santana and Korey Wise of the Exonerated 5 led to an excellent documentary (The Central Park 5), a television miniseries (*When They See Us*), and an opera about their case. Brooklyn police detective Louis Scarcella became infamous after more than a dozen murder convictions that had been secured through his interrogations and investigations were vacated. However, as these exoneration statistics demonstrate, police misconduct leading to wrongful convictions is a systemic problem that requires public transparency of day-to-day activities to be fully understood and addressed.

The nature of the relationship between wrongful convictions and police misconduct has become easier to see after the repeal of 50-A. Former Innocence Project policy advocate Laurie Roberts compared wrongful conviction case files to NYCLU’s database of officer complaints and was able to find 99 exonerations in which an identified officer listed in the database had committed misconduct. According to Roberts, “more than 40 percent of these cases involved at least one officer with six or more civilian complaints. More than half involved at least one officer with ten or more discrete allegations of misconduct, despite such officers comprising around just 15 percent of our sample (and less than 3 percent of active-duty cops). In other words, officers accused of more misconduct than their peers more often worked cases later that were found to have resulted in a wrongful conviction in which official misconduct was alleged.”[[3]](#footnote-4)

As Roberts points out, the universe of officers with the extensive misconduct records that correlate with wrongful convictions is small, but it is more than just a few bad apples. According to CCRB, there are currently approximately 34,000 active-duty officers in the NYPD. Roberts reports finding fewer than 3% of active-duty officers have ten or more discrete allegations of misconduct. Even assuming the number dips as low as 2% leads us to a roster of 680 officers patrolling the streets who have demonstrated conduct that is connected to wrongful convictions. This is a systemic problem.

It’s notable that these are officers *accused* of misconduct but the ultimate finding was “unsubstantiated” as opposed to “unfounded.” Regardless of the ultimate disposition of an individual case, high numbers of “unsubstantiated” allegations of misconduct are clearly correlated with involvement in wrongful convictions. Accordingly, Recommendation 9 of the Yates Report is extremely important: “Exonerated” means “the subject officer engaged in the alleged misconduct but to determine whether or not the acts alleged officer’s actions were lawful and proper.” “Unfounded” means “the officer did not perform the acts or engage in the conduct attributed to the officer.” “Unsubstantiated” means there is “insufficient evidence to determine whether or not the acts alleged occurred or that the officer performed the acts or engaged in the conduct attributed to the officer.” Keeping track of “unsubstantiated” findings and distinguishing those findings from “unfounded” complaints is essential for multiple investigatory NYPD investigative bodies that deal with SQFS cases and other misconduct allegations as described in Recommendation 10.

The Roberts’ research demonstrates there is a correlation between adjudicated acts of misconduct and multiple “unsubstantiated” complaints and wrongful convictions. But that research only scratches the surface of what could be discovered with proper collection and access to misconduct data. Ensuring the public has access to “unsubstantiated” allegations as well as adjudicated acts of misconduct allows stakeholders and civil society outside the NYPD to identify patterns of misconduct and thereby provide crucial oversight. In Chicago “unsubstantiated” allegation data is available and has made it possible for researchers to go beyond the narrow notion of “problem officers,” the proverbial “bad apples.”[[4]](#footnote-5) A social network and machine learning approach allowed the empirical investigation of potential “crews” of officers between 1971 and 2018. Results detected approximately 160 possible crews, comprised of less than 4% of all Chicago police officers. Officers linked to these crews accounted for approximately 25% of all use of force complaints, city payouts for civil and criminal litigations, and police-involved shootings. The detected crews also contributed to racial disparities in arrests and civilian complaints, generating nearly 18% of all complaints filed by Black Chicagoans and 14% of complaints by Hispanic Chicagoans. Implementation of the recommendations in the Yates report would allow even better empirical analyses.[[5]](#footnote-6)

The 51 recommendations in this report can make an important difference in police practice to both prevent and reveal misconduct. In addition to Recommendations 9 and !0, the Innocence Project calls the court’s attention to ten additional recommendations that are especially relevant to reducing wrongful convictions by increasing public transparency and allowing internal disciplinary investigations to patterns of misconduct.

*Recommendation 1: Any items in the Departmental Manual pertaining to Fourth Amendment or Fourteenth Amendment enforcement, compliance, and related discipline should be made publicly available including: procedures, supervisory responsibility, investigations, interviews, reporting and decision-making regarding misconduct, interaction with Civilian Complaint Review Board (CCRB) or other investigative bodies. Such provisions in the Departmental Manual, which includes the Patrol Guide and the Administrative Guide, should be publicly posted and available to the public, with exceptions as provided in NYC Admin. Code § 14164 (confidential information non-routine investigative techniques, material which could compromise safety or ongoing investigations and operations).*

New Yorkers have a right to know the guidelines that their police department is operating under. The guardrail here provides protection against any disclosure of police procedure that could undermine investigatory capabilities, but it is critical for the public, researchers and advocates to understand exactly what is expected of officers to understand what qualifies as misconduct and whether policy changes would be appropriate.

*Recommendation 4: Upon receiving notice and a directive to impose discipline or guidance of a substantiated SQFS (Stop, Question, Frisk, Search of Person) finding by CCRB, the CO must report back to the Department Advocates Office (DAO) the final result, including the specific penalty or guidance imposed and the date of imposition, within 30 days. This should be forwarded immediately to CCRB and be made publicly available. Any complainant should be personally advised of the penalty outcome.*

The court has been very clear about the parameters around NYPD’s SQFS procedures and the public has the right to know when the NYPD is violating those guidelines. Beyond that, though, these dispositions must be shared in a timely manner with CCRB and made public to detect the patterns of misconduct that signal an officer is likely to be involved in wrongful convictions. The untimely disclosure of past misconduct by officers who become involved in publicized and fatal encounters, such as the Eric Garner case in Staten Island, the George Floyd case in Minnesota, or the Laquan McDonald case in Chicago have profound effects in terms of undermining public confidence in the police department.

*Recommendation 5: Command disciplines imposed for SQFS misconduct are not “technical” findings under Public Officer’s Law § 86 and should be publicly available under FOIL.*

*Recommendation 6: NYPD’s “Officer Profile” posting of “Disciplinary History” should include all substantiated SQFS allegations accepted by the Police Commissioner (with date of incident and specific outcome, including guidance or penalty). This should include SQFS substantiations whether made by CCRB, IAB, or within the Department.*

*Recommendation 7: When CCRB has referred Other Possible Misconduct Noted (OPMN) to NYPD arising from an SQFS investigation, the Department should promptly advise CCRB of the disposition, level of discipline, and penalty, if any, imposed. Substantiated dispositions should be listed on the publicly posted online profile and in CCRB’s listing of MOS disciplinary outcomes.*

Disciplinary history made available to the public should be complete. SQFS allegations should not be excluded for any reason; these allegations represent serious misconduct and can be part of a pattern of misconduct that should be compiled together. The press and impacted community groups will be able to use AI based tools to track adjudicated acts of misconduct and keep the community informed in real time. It is important for line officers and supervisors to know about this data to keep the community and officers safe and productively engaged.

*Recommendation 12: When investigating misconduct, CCRB and NYPD should examine and consider allegations, findings, judgments and settlements, made in court or before the Comptroller, for related complaints, inconsistent statements, and in assessing credibility, motive, assertions of good faith or mistake, and in identifying patterns of misconduct, as well as when recommending or imposing a penalty.*

*Recommendation 13: A CCRB panel should have available upon request a complete disciplinary history of the subject officer, including all Departmental investigations, when recommending a penalty for substantiated SQFS misconduct. The CCRB executive director should be able to obtain this history at an earlier point, upon request, during investigation, when relevant to any of the issues arising in that investigation.*

An officer’s disciplinary history should be made available to investigators making disciplinary determinations. That is common sense. It is good management. It does not and should not mean that the history should be regarded as constituting a propensity for misconduct any more than the criminal history or prior bad acts of any accused individual. There are, however, long established rules holding prior bad acts can establish motive, intent, identity, absence of mistake, modus operandi or other relevant factors. These rules should apply to police officers in disciplinary proceedings.

*Recommendation 16: When CCRB cases with SQFS allegations are “closed pending litigation,” CCRB should review the matter upon conclusion of the litigation and determine, unless opposed by the complainant, whether to re-open the matter for investigation or recommendation. The Law Department should send a notice to the Legal Bureau or IAB upon conclusion of litigation, when advised that a CCRB investigation was closed pending litigation. The IAB liaison should be responsible for advising CCRB of the status.*

Litigation should not preclude consideration of professional discipline and it certainly shouldn’t serve to erase part of an officer’s disciplinary record within the department. NYPD and the Law Department must be able to coordinate their efforts.

*Recommendation 24: If the subject officer asserts “good faith,” “inadvertence,” “mistake,” or asserts that misconduct was an “isolated” incident (under PG 212-11), the panel should have complete access to all prior investigations where an SQFS allegation was investigated at CCRB and/or within NYPD, whether or not prior cases were substantiated or “sealed.”*

To understand whether an act of misconduct is truly a good faith mistake, it is important to know whether it has happened before. When taken individually, many seeming mistakes may add up to a pattern of misconduct.

*Recommendation 20: “Training” as a finding should be individualized, addressing the specific circumstances of SQFS misconduct, performed in-person (not video), and completed within a reasonably short period of time after the misconduct finding is finalized*.

The issue of training is another area where the use of AI tools can be extremely beneficial to NYPD. Perhaps the most impressive and scientifically sound training initiative we have seen in the area of police “stops” is the work of Professor Jennifer Eberhardt and Dr. Dan Jurafsky. Along with colleagues they have published two articles in the Proceedings of the National Academy of Science that show how using body worn camera footage as “data” can identify police practices that result in bad stops and, in turn, also produce training programs that significantly reduce bad stops. Only the advent of AI tools to analyze the body camera footage made this research possible.

The first study involved 1,440 stops of white and Black drivers by Oakland police officers in April 2014 conducted by 2435 different officers. From 183 hours of footage from these interactions, and using computational linguistic methods, researchers were able to extract patterns of interaction showing officers spoke with consistently less respect to Black versus white community members, even after controlling for the race of the officer, the severity of the infraction, the location of the stop, and the outcome of the stop.[[6]](#footnote-7) The second study published in September of this year shows how a procedural training program derived from the first study helped police officers actually improve their interactions with community members using five behavioral modifications: (i) Begin the stop by greeting the driver and introducing themselves; (ii) explicitly state the legal justification for the stop early in the encounter; (iii) express concern for driver safety; (iv)reassure the driver during the interaction; and (v) using formal rather than informal titles when addressing the driver.[[7]](#footnote-8) Post-training assessments from body cam footage showed that officers followed the training regardless of the race of the driver except for the use of formal rather than informal titles. This kind of rigorous scientific research using body cam footage as data could certainly be done to improve SQFS encounters in New York, both a study of current practice and then a study of an effective training procedure. There is no reason to believe the method would not work for in-person stops versus vehicle stops, but if there were significant differences, that would, itself, be important to know.

We appreciate the opportunity to submit comment and look forward to contnued efforts to reduce wrongful convictions through the identification and remediation of law enforcement misconduct.

Respectfully submitted,

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1. The use of tax identification and social security numbers to be “unique identifiers” in New York is an ill-considered system because of the obvious privacy risks it creates for law enforcement personnel. [↑](#footnote-ref-2)
2. On January 1, 2022 California enacted a certification and de-certification system for all police and correction officers. Cal. Penal Code Section 13510.1 et. seq. Simply put, all police and correction officers get a license and can be de-certified if they commit one of nine “serious acts of misconduct.” The same disciplinary rules apply across the board for over 700 law enforcement entities in the state. [↑](#footnote-ref-3)
3. Laurie Roberts, “Where Were You When the Lights Went Out in New York City?”: Police Disciplinary Histories and Wrongful Convictions in the Big Apple, 44 *Amicus Journal* 29 (2023). [↑](#footnote-ref-4)
4. Jain, Sinclair, & Papachristo, Identifying misconduct-committing officer crews in the Chicago police department. PLosOne 17(5): e0267217. <https://doi.org/10.1371/journal.pone.0267217>, published May 4, 2022. [↑](#footnote-ref-5)
5. A paper published this month by Bocar Ba, Nayoung Rim, and Roman Rivera for the National Bureau of Economic Research entitled “The Relationship Between Officer Misconduct and Conviction-Less Arrests” dives deeper, again using Chicago data that tracks “unsubstantiated” allegations of misconduct. Working Paper 33276, https://www.nber.org/papers/w33276. This paper finds that arrests made by officers with high misconduct records are 10.5% less likely than arrests made by no-misconduct officers to result in charges and are 14% more likely to have a “Not Guilty” outcome. They also find that increased transparency of police misconduct through public disclosure of complaint records and increased oversight reduces conviction-less arrests. [↑](#footnote-ref-6)
6. “Language from police body worn camera footage shows racial disparities in officer respect,” Voight, Camp, Prabhakran, and Eberhardt. June 5, 2017. <https://doi.org/10.1073/pnas.1702413114>. [↑](#footnote-ref-7)
7. “Leveraging body-worn camera footage to assess the effects of training on cofficer communication during traffic stops,” Camp, Voigt, Hamedani, Jurafsky, and Eberhardt. September17 2024. <https://doi.org/10.1093/pnasnexus/page359>. [↑](#footnote-ref-8)