

No. 21-442

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In The  
**Supreme Court of the United States**

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RODNEY REED,

*Petitioner,*

v.

BRYAN GOERTZ,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Fifth Circuit**

—◆—  
**BRIEF OF THE LAW ENFORCEMENT  
ACTION PARTNERSHIP AND THE  
NATIONAL POLICE ACCOUNTABILITY PROJECT  
AS AMICI CURIAE SUPPORTING PETITIONER**

—◆—  
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**INTERESTS OF THE *AMICI CURIAE***<sup>1</sup>

**The Law Enforcement Action Partnership (LEAP)** is a non-profit organization whose members include police, prosecutors, judges, corrections officials, and other law enforcement officials advocating for criminal justice and drug policy reforms that will make our communities safer and more just. Founded by five police officers in 2002 with a sole focus on drug policy, today LEAP's speakers bureau numbers more than 200 criminal justice professionals advising on police community relations, incarceration, harm reduction, drug policy, and global issues. Through speaking engagements, media appearances, testimony, and support of allied efforts, LEAP reaches audiences across a wide spectrum of affiliations and beliefs, calling for more practical and ethical policies from a public safety perspective.

**The National Police Accountability Project (NPAP)** was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including a number of members who represent clients who have been falsely arrested and wrongfully convicted.

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<sup>1</sup> All parties have consented to the filing of this brief. No party other than *Amici* made a monetary contribution to the filing of this brief. No party other than *Amici* authored this brief.

Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as *amicus curiae* in cases, such as this one, presenting issues of particular importance for its members and their clients. NPAP has recently filed *amicus* briefs at this Court in *Vega v. Tekoh*, No. 21-499; *Egbert v. Boule*, No. 21-147; *Thompson v. Clark*, No. 20-659; and *Brownback v. King*, 19-546.



## SUMMARY OF THE ARGUMENT

DNA testing can both exonerate the wrongly convicted and identify the guilty. It also has the potential to enhance police accountability by exposing investigatory mistakes while fortifying the fairness, and therefore credibility, of the criminal legal system. Access to post-conviction DNA testing mutually serves individuals who are wrongfully convicted and law enforcement. But despite the systemic benefits of post-conviction testing, there is no universal infrastructure to make tests available. Section 1983 due process DNA testing claims provide a unique remedy to criminal defendants to initiate testing of their own accord, and may be the exclusive avenue for access in jurisdictions where law

enforcement lacks the acumen, capacity, and incentive to conduct a test without litigation.

Policing errors that undermine the integrity of a criminal conviction can have sweeping, system-wide consequences. They may lead to an innocent person's conviction, a guilty person's liberty, and a severe decline in public confidence in law enforcement. While front-end reforms are critical to minimize wrongful convictions, access to procedures that can identify and remedy policing errors after they occur is equally essential to the legitimacy of the criminal justice system. Post-conviction claims for DNA testing are often the only remedy available to people convicted as a result of police mistakes. Section 1983 access to post-conviction testing provides the erroneously convicted with an opportunity to expose policing errors, prove their innocence, and hold law enforcement accountable for misconduct. It also builds an essential layer of fairness into the criminal legal system that can partially restore trust deficits caused by the original error.

In this case, Petitioner's conviction was tainted by numerous policing errors caused by tunnel vision and bias. Post-conviction DNA testing would provide Petitioner with the opportunity to combat conclusions derived from these errors. Unfortunately, Petitioner is not unique in having had faulty policing contribute to his conviction. Police misconduct has been a feature in over one hundred DNA exonerations—which only underscores the importance of the issues before this Court.

Access to Section 1983 suits seeking DNA testing is necessary to uncover wrongful convictions obtained through official misconduct. Although other vehicles for post-conviction DNA testing exist, they largely depend on a third party to initiate the test. Despite the overall benefits to redressing wrongful convictions, police and prosecutors are often reluctant to initiate post-conviction investigations on their own accord. Section 1983 actions democratize access to relief by allowing a defendant to pursue testing without a conviction integrity unit or innocence commission's approval. Moreover, while a defendant has much to gain from Section 1983 testing actions, other players have little to lose. Section 1983 actions for DNA testing are circumscribed and efficient actions that do not tax judicial resources or require a significant burden on the responding government agency.

Testing also often benefits the law enforcement agencies that participated in the original conviction. Providing defendants with a process to correct errors enhances the fairness of the criminal justice system and bolsters the legitimacy of law enforcement activities. Additionally, DNA testing can tangibly benefit police and prosecutors by uncovering the actual perpetrators of the crime in question. Providing defendants with a meaningful opportunity to pursue Section 1983 due process testing claims benefits every stakeholder in the criminal justice system.



## ARGUMENT

### **I. The police investigation errors in this case can raise serious questions about the accuracy of the conviction.**

Police officers are tasked with the responsibility of thoroughly investigating crimes, which requires them to develop plausible theories of a case to help guide the investigation, interview key witnesses and persons of interest, and carefully collect and closely analyze evidence. However, criminal investigations can be tainted by failures such as miscalculating the likelihood of an event, misjudging the reliability of a witness, and failing to properly collect or assess evidence. D. Kim Rossmo & Joycelyn M. Pollock, *Confirmation Bias and Other Systemic Causes of Wrongful Convictions: A Sentinel Events Perspective*, 11 NE. U. L. REV. 790, 806-07 (2019).

One phenomenon that can trigger such failures is tunnel vision. Tunnel vision occurs when police officers become fixated on a particular conclusion—whether that is a particular theory of the case or a particular individual—and then “filter all evidence in a case through the lens provided by that conclusion,” leaving other potential theories and suspects unexplored and uninvestigated. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292. In the quest to reach the desired conclusion, officers may use “questionable investigative methods” that result in investigatory failures. See Findley & Scott, *supra*, at 326-27.

Investigatory failures caused by tunnel vision have been known to lead to wrongful convictions. *See, e.g.,* Rossmo & Pollock, *supra*, at 797 (“Several scholars have observed that tunnel vision and confirmation bias are also major causes of wrongful convictions.”) (internal citations omitted); Findley & Scott, *supra*, at 292 (“A theme running through almost every [wrongful conviction] case, that touches each of these individual [causes of error], is the problem of tunnel vision.”). When officers have tunnel vision, weak facts may get propped up as compelling evidence to support a particular theory and potential leads may be ignored if they do not fit that theory. *See* Findley & Scott, *supra*, at 292 (“[A]ll information supporting the adopted conclusion is elevated in significance, viewed as consistent with the other evidence, and deemed relevant and probative. Evidence inconsistent with the chosen theory is easily overlooked or dismissed as irrelevant, incredible, or unreliable.”).

In this case, tunnel vision may have caused the investigating officers to become fixated on the theory that whomever deposited the sperm must have been the person who raped and murdered the victim. *Ex parte Reed*, 271 S.W.3d 698, 705 (Tex. Crim. App. 2008). The officers did not develop evidence about several other possible explanations for the presence of sperm. Officers interviewed only a fraction of the victim’s coworkers and, most notably, failed to follow-up on witness statements indicating that she may have been in a consensual, intimate relationship with the Petitioner. *Id.* at 710. The fixation on one theory of the case

over other plausible theories may have influenced how the officers collected and analyzed evidence, made investigatory decisions, and filtered evidence related to Petitioner. *See Findley & Scott, supra*, at 327 (“deciding where and what type of evidence to look for is significantly influenced by the theory of how the crime unfolded”).

Similarly, tunnel vision may have caused the investigating officers to fixate on Petitioner and overlook other potential suspects, such as the victim’s police officer fiancé. *See Findley & Scott, supra*, at 298 (“[T]he premature focus on [one suspect] meant that no one pursued evidence that was available before trial that pointed toward the true perpetrator.”). For instance, the investigating officers failed to inspect the victim’s and fiancé’s apartment despite the fact that they shared it and that he was the last person to see her alive. *Ex parte Reed*, 271 S.W.3d at 708. Further, the officers did not fully investigate the nature of the victim’s relationship with her fiancé. If they had done so, they would have learned that the victim and her fiancé had a “tumultuous[] and seemingly violent[] relationship” before the murder. *Reed v. Texas*, 140 S. Ct. 686, 688 (2020) (Sotomayor, J., respecting denial of certiorari). Yet, the investigating officers—fixated on Petitioner—did not consider the police officer fiancé to be a prime suspect. The potential for tunnel vision in this case is only amplified, because investigating officers may have had a bias against suspecting the victim’s fiancé because he too was an officer. *See Section II.A., infra* at 10-11.

One of the ways investigatory errors caused by tunnel vision can be corrected in individual cases after an investigation has closed is to reexamine the investigation techniques and procedures that were used as well as how evidence, including forensic evidence such as DNA, was collected, analyzed, and used to support a particular theory of the case or the guilt of a particular individual. *See* Findley & Scott, *supra*, at 354-55. Section 1983 actions for post-conviction DNA testing provide access to this critical evidence and serve as a vehicle for evaluating past police misconduct.

**II. Section 1983 actions to compel DNA testing are one of the few avenues to enhance police accountability in this context.**

Wrongful convictions caused by law enforcement errors and misconduct are a “disturbingly common feature of the criminal justice system.” Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1143 (2013). In fact, at least 180 (46.3%) of the 389 underlying cases later resulting in a DNA-based exoneration involved police or prosecutorial misconduct or both. *See* Database Search, THE NATIONAL REGISTRY OF EXONERATIONS, <https://tinyurl.com/p7dz57cz> (last visited July 6, 2022). Filing an action for post-conviction DNA testing is often the only mechanism through which individuals harmed by faulty police investigations and prosecutions can seek to remedy the harm they have suffered.



**A. Section 1983 suits seeking potentially exonerating DNA evidence are a necessary accountability mechanism because law enforcement officers lack incentives to reinvestigate their own cases.**

Since its inception, the Section 1983 suit has been the primary vehicle for holding law enforcement officers accountable for their misconduct. Erwin Chemerinsky, *Federal Jurisdiction* 512 (7th ed. 2016); Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* 2 (3d ed. 1997) (“No statute is more important in contemporary America” than Section 1983). Cases like this one, where an incarcerated individual seeks potentially exculpatory evidence to support their claim of wrongful conviction, only underscore that importance.

The availability of the Section 1983 suit is particularly critical in cases alleging wrongful conviction because police officers are not inclined to unilaterally reopen the cases they purportedly solved. As one scholar notes, “[o]nce there has been a conviction, it is extremely difficult to convince prosecutors and officers that the convicted person is actually innocent. The officers are far too invested in the case, and their role in it, to capitulate to new challenges by the defendant.” Laurie L. Levenson, *Essay: Post-Conviction Death Penalty Investigations: The Need for Independent Investigators*, 44 *LOY. L.A. L. REV.* S225, S239 (2011). Police officers are reluctant to “investigat[e] their own alleged misconduct or that of their partners.” *Id.* at S226. Accordingly, involving the original investigating

officers in the post-conviction investigation “may skew that investigation and will certainly undermine confidence in it.” *Id.*

These concerns about inadequate post-conviction investigations are even more salient where, as here, a fellow police officer was a potential suspect during the initial criminal investigation. If a police officer is investigating an officer who works for the same agency, the investigating officer may “interpret evidence in a biased fashion” due to pressure to protect the reputation of both the officer being investigated and the agency. Kendall Godley, *Police Investigating Police: Systemic Injustice Shields Officers From Accountability*, 98 DENV. L. REV. FORUM 1 (2021). For instance, the investigating officer may give the officer being investigated preferential treatment that would not be afforded to a civilian, or may decline to share information that could support the officer’s guilt. *Id.* at 19-20.

In Petitioner’s case, it is possible that the investigating officers did not conduct a thorough investigation because they failed to consider a fellow officer—the victim’s fiancé—as a suspect due to their professional, and in some cases personal, relationships with him. At the time of the victim’s murder, the fiancé was a police officer at the Giddings Police Department. *Ex parte Reed*, 271 S.W.3d at 702. The fiancé had also previously worked as a jailer for the Bastrop County Sheriff’s Office, one of the agencies supporting the murder investigation. *Id.* at 702, 704. The bias present in investigations where police officers are investigating other police officers undoubtedly also

impacts decisions to reopen investigations during post-conviction proceedings.

Given the limitations on law enforcement's ability to properly police themselves, access to Section 1983 suits seeking to investigate police misconduct that resulted in a wrongful conviction is critical to holding police accountable.

**B. Conviction integrity units and innocence commissions are insufficient alternatives to Section 1983 suits seeking potentially exonerating DNA evidence.**

DNA testing statutes democratize error correction by granting incarcerated individuals direct access to potentially exculpatory evidence. Although conviction integrity units ("CIUs") housed within prosecutors' offices and innocence commissions can initiate DNA testing that leads to error correction, DNA testing statutes ensure that people who have been wrongfully convicted can initiate testing without having to rely on the help of a third party. CIUs and innocence commissions are important complements to, but inadequate replacements for, Section 1983 suits. The continued availability of individual access to DNA evidence is therefore necessary to ensure the wrongfully convicted can seek redress and hold law enforcement officers accountable for misconduct.

CIUs remain the exception, rather than the rule, in most prosecutors' offices. As of July 6, 2022, there were ninety-five CIUs in jurisdictions throughout the

country. *Conviction Integrity Units*, THE NATIONAL REGISTRY OF EXONERATIONS, [tinyurl.com/2p85k62z](https://tinyurl.com/2p85k62z) (last visited July 6, 2022). But there are over 2,300 prosecutors' offices in the United States, so only roughly four percent of prosecutors' offices have CIUs. *Prosecutors Offices*, BUREAU OF JUSTICE STATISTICS, [tinyurl.com/5es9huef](https://tinyurl.com/5es9huef) (last visited July 6, 2022). Neither of the prosecutorial offices with jurisdiction in Petitioner's case—Bastrop County District Attorney's Office and the Texas Attorney General's Office—have a CIU. THE NATIONAL REGISTRY OF EXONERATIONS, *Conviction Integrity Units*, *supra*.

The CIUs that do exist generally lack capacity to effectively investigate past convictions. Fifty-three of the ninety-five CIUs have never secured an exoneration. *Id.* The CIUs that have contributed to exonerations often do not work on their own but in collaboration with professional innocence organizations. The National Registry of Exonerations recorded 168 exonerations in 2021, but CIUs were only involved in sixty-three of those cases. Database Search, THE NATIONAL REGISTRY OF EXONERATIONS, [tinyurl.com/bddkyaax](https://tinyurl.com/bddkyaax) (last visited July 6, 2022). CIUs achieved thirty-two of those sixty-three exonerations in collaboration with professional innocence organizations. *Id.* The small output of CIUs is not for want of worthy cases. To the contrary, “[w]hat is so haunting about the known wrongful convictions is that those cases are the tip of the iceberg.” Brandon L. Garrett, *The Banality of Wrongful Executions*, 112 MICH. L. REV. 979, 980 (2014). The small number of exonerations secured by

CIUs can instead be attributed to capacity and the various institutional constraints CIUs face.

Besides capacity, one major structural constraint the CIU faces is its placement within prosecutors' offices. Although the CIU's connection to the prosecutors' office may lend the CIU power and legitimacy,<sup>2</sup> it also presents conflicts of interest that can stymie meaningful review of convictions. "[T]he culture of many prosecutors' offices is conviction-oriented" and "internal advancement at many offices is driven by conviction rates." Evelyn L. Malavé & Yotam Barkai, *Conviction Integrity Units: Toward Prosecutorial Self-Regulation?*, in *WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE* 199 (Marvin Zalman & Julia Carrano, eds., 2014). Moreover, the nature of a CIU's work places its staffers in the difficult position of questioning the legitimacy of investigations conducted by their colleagues in both the prosecutors' office and the collaborating police department. *Id.* at 202; Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 *BERKELEY J. CRIM. L.* 335, 392-93 (2015) (describing the need for CIUs to ignore the economic and reputational effects of post-conviction relief). Because the CIU's findings can conflict with the interests

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<sup>2</sup> Notably, most innocence commissions are not housed in prosecutors' offices. This lack of "structural ties to any prosecutor's office" renders innocence commissions "a step removed from traditional [CIUs] in [their] ability to affect change in individual cases, and [they] ha[ve] no authority to implement reforms that might prevent such errors from reoccurring." John Holloway, *Conviction Review Units: A National Perspective* 18 (2016).

of the prosecutors' office, CIUs must have the authority to make decisions independent of the District Attorney, but most CIUs do not. Holloway, *supra*, at 23.

Even if all CIUs exercised the independence necessary to zealously uncover wrongful convictions within their jurisdictions, they would nevertheless fail to catch every individual case. CIUs and innocence commissions exercise immense discretion in determining which allegations of wrongful conviction to investigate. Malavé & Barkai, *supra*, at 199; David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1070 (2010) (explaining the common critique of innocence commissions that they have complete discretion as to which miscarriages of justice they correct and which ones they permit to continue). For example, CIUs regularly decline to investigate cases in which the defendant pled guilty during the initial criminal proceedings, even though innocent individuals can and often do plead guilty. Holloway, *supra*, at 43. By limiting their investigations to only specific types of cases, CIUs and innocence commissions inevitably allow meritorious allegations of wrongful conviction to fall through the cracks.

CIUs and innocence commissions are inadequate substitutes for Section 1983 due process testing claims, and their existence does not justify restricting the availability of those actions. The direct efforts of incarcerated people to establish their own wrongful convictions—whether represented by professional innocence

organizations, individual counsel, or *pro se*—remain an indispensable accountability mechanism.

**C. There are no public policy concerns supporting the limitation of Section 1983 suits seeking access to DNA evidence.**

Although concerns about judicial economy may apply to certain cases brought by incarcerated people, those concerns do not apply to suits, like this one, seeking only DNA evidence. In fact, this Court already considered and rejected the claim that Section 1983 suits seeking DNA evidence drain scarce judicial resources. In *Skinner v. Switzer*, 562 U.S. 521, 535 (2011), the Court deemed as “unwarranted” any concerns that “allow[ing] § 1983 claims for DNA testing” would cause “any litigation flood or even rainfall.” Moreover, Section 1983 suits for DNA evidence are not particularly burdensome for the state to litigate or for the courts to adjudicate. Compared to Section 1983 suits seeking monetary damages, these suits for solely injunctive relief involve uncomplicated discovery and straightforward legal issues. In any event, concerns about “scarce” judicial resources “should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.” *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).

There are already ample safeguards preventing an onslaught of frivolous Section 1983 suits brought by incarcerated people. As the Court recognized in

*Skinner*, the Prison Litigation Reform Act of 1995 (PLRA) has already “placed a series of controls on prisoner suits,” including “new procedures and penalties for prisoner lawsuits under § 1983.” 562 U.S. at 535. Layering an additional, erroneous statute of limitations barrier on top of the PLRA would amount to an outright ban on Section 1983 suits seeking potentially exculpatory DNA evidence.

In all, Section 1983 suits for DNA evidence can hugely benefit the wrongfully convicted with little impact on judicial economy in the courts.

### **III. Access to DNA testing is essential to preserving the integrity of the law enforcement profession and criminal justice system.**

Preventing the punishment of the innocent, even at the expense of false acquittals, is foundational to Anglo-American law. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”); *Coffin v. United States*, 156 U.S. 432, 456 (1895); Alexander Volokoh, *Aside: n. Guilty Men*, 146 U. PA. L. REV. 173, 174-77 (1997) (collecting commentators and cases identifying Blackstone’s ratio as a core principle of criminal legal jurisprudence). The premium placed on minimizing wrongful convictions is due in part to the profound damage this type of error can have on the legitimacy of the criminal justice system. *See, e.g.*, Jeffrey Reiman & Ernest van den Haag, *On the Common Saying that It Is Better that Ten Guilty Persons Escape than that One*



*Innocent Suffer: Pro and Con*, 7 SOC. PHIL. & POL'Y 226, Spring 1990 at 237 (describing the public policy rationale for safeguards and remedies for wrongful convictions). Erroneous convictions undermine public confidence in the fairness of the criminal legal system and permit the actual perpetrator of the crime to remain at liberty, where they can commit future harms. Robert J. Norris et al., *The Criminal Costs of Wrongful Convictions: Can We Reduce Crime by Protecting The Innocent*, 19 CRIMINOLOGY & PUB. POL'Y 367, 368 (2020). Law enforcement accordingly has a double imperative to correct wrongful convictions. First, remedies for wrongful convictions can restore public trust, a prerequisite for community cooperation and collaboration that is essential to effective policing. Second, the exoneration process can help police identify the individuals who were responsible for the crime in question, which could help prevent future crimes. Accessible DNA testing serves both of these interests.

**A. Erroneous convictions delegitimize law enforcement.**

Law enforcement leaders across the country have described the lasting adverse impact that wrongful convictions have on community trust in the criminal justice system writ large as well as in the agencies involved in a particular case. See George Gascon, *Using Sentinel Events to Promote System Accountability*, in NATIONAL INSTITUTE OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS 42 (Sept. 2014), <https://www.ojp.gov/pdffiles1/nij/247141.pdf>; Anthony

W. Batts, Maddy deLone, & Darrel W. Stephens, *Policing and Wrongful Convictions* 21 (Aug. 2014), <https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/PolicingWrongfulConvictions.pdf>; Tom Jackman, *As Prosecutors Take a Larger Role in Reversing Wrongful Convictions, Philadelphia DA Exonerates 10 Men Wrongfully Imprisoned for Murder*, WASH. POST (Nov. 12, 2019), <https://www.washingtonpost.com/crime-law/2019/11/12/prosecutors-take-larger-role-reversing-wrongful-convictions-philadelphia-da-exonerates-men-wrongly-imprisoned-murder/>. Specifically, erroneous convictions foster doubt in the fair administration of justice and impair public safety by allowing individuals who are actually responsible for the crime to evade accountability. Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U.D.C. L. REV. 275, 299 (2004).

These types of declines in public confidence make it more difficult for law enforcement to investigate crimes and detect criminal activity. See Gascon, *supra*, at 42. There is a demonstrated link between trust in police and whether communities cooperate with law enforcement. Tom R. Tyler and Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities*, 6 OHIO ST. J. CRIM. LAW 231, 250 (2008) (data correlation between a person's perception of police legitimacy and willingness to cooperate with the police); Patrick J. Carr, Laura Napolitano, & Jessica Keating, *We Never Call the Cops and Here is Why: Qualitative Examination of Legal Cynicism in Three Philadelphia Neighborhoods*, 45

CRIMINOLOGY 445, 457 (2007) (survey showing youth with negative views about police were unlikely to report criminal activity). Victims and witnesses are less likely to report crimes or voluntarily provide information to police in communities with public trust deficits. See Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1119 (2000); NATIONAL INSTITUTE OF JUSTICE, *Research for Practice: Factors That Influence Public Opinion of the Police* 10 (June 2003), <https://www.ojp.gov/pdffiles1/nij/197925.pdf>.

Moreover, erroneous convictions undermine law enforcement's public safety mission because they allow a person with a criminal propensity to remain at large. The threat to public safety posed by those who are wrongfully at liberty is not hypothetical. One study revealed that perpetrators who evaded justice due to a wrongful conviction went on to commit additional crimes in 93% of cases. Norris, *supra*, at 373. Wrongful convictions are detrimental to the entire criminal justice system and law enforcement has a strong interest in errors being corrected after they occur.

**B. Robust access to DNA testing is necessary for error correction and preserving public confidence in the criminal justice system.**

While after-the-fact correction cannot prevent damage to community confidence, the harm can be partially ameliorated by error correction mechanisms that facilitate exoneration. The availability of remedies for

law enforcement mistakes can significantly improve the public's perception of the system's fairness. Mark Houldin, *Stepping Back to Move Forward: Recognizing Fallibility and Interdependency*, in MENDING JUSTICE (2014), *supra*, at 30; Fiona Leverick, Kathryn Campbell, & Isla Callander, *Post-Conviction Review: Questions of Innocence, Independence, and Necessity*, 47 STETSON L. REV. 45, 69-70 (2017). Errors that can be challenged and corrected have a lesser impact on law enforcement legitimacy than those that are allowed to stand.

Accordingly, accessible DNA testing can play an integral role in restoring public confidence that has been diminished by wrongful convictions. See Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656-57 (2005) (recommending procedures for obtaining DNA evidence to bolster the credibility of the criminal justice system as a whole). First, due process DNA testing claims create a method to stop ongoing wrongful punishment by giving the wrongfully convicted access to evidence that could prove their innocence. Rachel Steinback, *The Fight for Post-Conviction DNA Testing is Not Over Yet*, 98 J. CRIM. LAW & CRIMINOLOGY 329, 332 (2007). DNA testing claims in particular bolster public faith in the system because they help ensure that access to potentially exonerating evidence is not contingent on the benevolence of a third-party actor. Section III, *supra*. Additionally, DNA testing claims can restore system integrity by revealing evidence about the actual perpetrators of crime. Forty percent

of exonerations achieved through DNA testing statutes also identified the actual perpetrator of the crime. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited July 6, 2022). In some instances, exoneree-initiated DNA testing can even lead to the resolution of other crimes besides those for which the plaintiff is seeking exoneration. Kayleigh E. McGlynn, Note, *Remedying Wrongful Convictions Through DNA Testing: Expanding Post-Conviction Litigants' Access to DNA Database Searches to Prove Innocence*, 60 B.C. L. REV. 709, 712 (2019) (describing additional murder discovered by Michael Morton exoneration); see also Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1632 (2008) (testing in Frank Lee Smith Florida case assisted in 10 other sexual assault investigations). DNA testing access greatly benefits law enforcement and is integral to a fair, legitimate criminal justice system.

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## CONCLUSION

Section 1983 actions to access DNA testing serve vital purposes in our criminal justice system. They redress wrongful convictions, foster police accountability and public trust that improves law enforcement's ability to do its work, and often even help identify actual perpetrators of underlying and unrelated crimes. Moreover, no available alternatives to self-directed Sections 1983 actions serve those same purposes or

offer remotely similar effectiveness. This Court should maintain availability of those actions, and should reverse the judgment of the Fifth Circuit.

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