

No. 21-6770

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IN THE  
**Supreme Court of the United States**

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DAVE ELYSEE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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On Petition for Writ of Certiorari  
to the United States Court of Appeals  
for the Eleventh Circuit

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**BRIEF OF AMICUS CURIAE  
CLAUSE 40 FOUNDATION IN SUPPORT  
OF PETITIONER**

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**QUESTION PRESENTED**

Whether a criminal defendant has a due process right to mount a defense based on an inadequate police investigation into another suspect.

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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

Clause 40 Foundation is a non-partisan nonprofit organization whose mission is to honor, preserve, and promote due process rights guaranteed in the U.S. Constitution. It has a particular interest in ensuring procedural fairness in the criminal system and increasing accountability of law enforcement and prosecutors. The Eleventh Circuit’s decision would leave criminal defendants in Florida, Georgia, and Alabama vulnerable to conviction and incarceration without their guilt proven beyond a reasonable doubt, in direct violation of the Fifth Amendment. *Amicus Curiae* writes to protect those individuals’ Constitutional rights.

## SUMMARY OF ARGUMENT

The Due Process Clauses require that a criminal defendant is innocent until proven guilty beyond a reasonable doubt—the highest standard of proof in the United States legal system. U.S. Const. amend. V, XIV; *see In re Winship*, 397 U.S. 358, 363-64 (1970). The reasonable doubt standard minimizes the chances that defendants lose their freedom—or even their lives—for crimes they did not commit. Criminal defendants are not guilty if any common-sense doubt of their guilt exists, even if the trier of fact believes the defendant likely committed the crime.

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<sup>1</sup> Under Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief. Under Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of the intent to file this brief and consented to this filing.

For this burden of proof to be faithfully implemented, courts cannot categorically prohibit “as a matter of law” the trier from hearing certain evidence that could raise reasonable doubt about a defendant’s guilt. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that the Constitution “guarantees criminal defendants a meaningful opportunity to present a complete defense.” (internal quotation marks omitted)); *see also Rivera v. Dir., Dep’t of Corr.*, 915 F.2d 280, 281-83 (7th Cir. 1990) (reversing on the grounds that the trial court categorically excluded exculpatory evidence of another person’s confession to the crime). That type of prohibition hamstrings the defendant’s ability to mount a “reasonable doubt” defense, it misleads the trier into a false sense of certainty about the verdict, and it violates the defendant’s fundamental due process rights.

The Eleventh Circuit made that grave mistake here. In an unprecedented decision that departs from those reached by other federal courts of appeals and state high courts, the Circuit prohibited, “as a matter of law,” criminal defendants from presenting a reasonable doubt defense based on the police’s failure to investigate another suspect. The Circuit excluded this evidence because an unreliable police investigation is not a recognized “affirmative defense,” and that even if such an affirmative defense existed, Federal Evidence Rule 403 made the particular evidence of a third party’s confession inadmissible. But the Eleventh Circuit missed the point by overlooking the relevance of an unreliable police investigation to whether there is reasonable doubt that the defendant actually committed the crime. This mistake led the Circuit into reversible legal error.

The Circuit’s legal error has serious consequences that warrant the Supreme Court’s attention. *First*, the

prohibition on evidence showing an unreliable police investigation of another suspect deprives criminal defendants in Florida, Georgia, and Alabama of their due process rights by barring an entire category of evidence that could raise reasonable doubt. The trier cannot apply the reasonable doubt standard that due process requires if evidence that may create reasonable doubt is prohibited as a matter of law. *Second*, this decision grossly deviates from the decisions of other federal courts of appeal and state high courts in a way that leaves criminal defendants in Florida, Alabama, and Georgia with less ability to defend themselves than criminal defendants elsewhere. *Amicus* is unaware of any court—federal or state—that categorically prohibits criminal defendants from presenting a reasonable doubt defense based on an unreliable police investigation. *Third*, the Eleventh Circuit’s decision will lead to more wrongful convictions as well as additional burden and cost to our criminal legal system. Many reputable studies find that unreliable police investigations or police misconduct increase the likelihood of a wrongful conviction. Yet the Circuit’s decision will prevent defendants from challenging deficient police investigations as part of their reasonable doubt defense. And to make matters worse, this prohibition gives law enforcement perverse incentives to take shortcuts rather than expend resources to properly investigate crimes. The result will be less thorough police investigations, more criminal cases against innocent people, and more wrongful convictions.

This Court has the opportunity to address the Circuit’s grave mistake of barring a reasonable doubt defense based on unreliable police investigations in violation of the Due Process Clauses, eliminate a split in

authority, and avoid the severe consequences that follow. The Court should therefore grant the petition.

## ARGUMENT

### I. Due Process Permits Criminal Defendants To Present Evidence Of A Police Investigation's Unreliability.

There are two types of defenses to criminal charges at trial: a defendant may either (1) raise reasonable doubt as to the prosecution's case-in-chief, or (2) argue an affirmative defense that justifies or excuses otherwise criminal conduct (e.g., duress or insanity). *In re Winship*, 397 U.S. at 363-64; *see also* Fed. R. Crim. P. 12.1-12.3. In crafting its opinion, the Eleventh Circuit disregarded how evidence of an unreliable police investigation is relevant to the first type of defense—i.e., a reasonable doubt defense. It instead assessed only whether such evidence is appropriate as the second type. Pet. App. at 19a-20a. That determination tainted the entirety of the Circuit's subsequent legal analysis, leading the Circuit to create a significant split with other circuits and state courts that permit evidence of an unreliable police investigation as part of a defendant's reasonable doubt defense. And in the context of Rule 403, this decision forecloses the proper individualized assessment of the probative value that evidence of an unreliable police investigation would have on the prosecution's *prima facia* case, effectively lowering the burden of proof to secure convictions of criminal defendants in violation of the Due Process Clauses.

**A. Evidence Of A Police Investigation’s Unreliability Casts Reasonable Doubt On The Prosecution’s Case.**

The Eleventh Circuit should have considered the value that evidence of an unreliable police investigation has to a reasonable doubt defense. Reasonable doubt requires consideration of relevant evidence that tends to suggest the innocence of criminal defendants. *In re Winship*, 397 U.S. at 363-64. To secure convictions, prosecutors’ *prima facie* case must overcome a criminal defendants’ reasonable doubt defenses. *Id.* As this Court has emphasized, failing to require prosecutors to secure convictions that overcome criminal defendants’ claims of reasonable doubt effectively lowers the required burden of proof prosecutors must meet to secure convictions. *Id.*; *see also Jackson v. Virginia*, 443 U.S. 307, 316 (1979) (“no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof . . . to convince a trier of fact beyond reasonable doubt of the existence of every element of the offense.”); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (reversing a conviction on the basis that the government failed to prove beyond a reasonable doubt the defendant voluntarily consented to a search over the defense’s objections that the consent was involuntary); *Conde v. Henry*, 198 F.3d 734, 739 (9th Cir. 1999) (holding that a trial court’s preventing the defendant from raising a reasonable doubt defense at closing “relieved the prosecution of its burden to prove its case beyond a reasonable doubt.”).

Evidence of unreliable police investigations can cast reasonable doubt on a criminal defendant’s guilt in several ways. For example, such evidence can show a police department’s failure to properly investigate known third-party suspects. *See Chambers v. Mississippi*, 410

U.S. 284, 296-97 (1973); *see also Commonwealth v. Phinney*, 843 N.E.2d 1024, 1033 (Mass. 2006) (noting that a police report should have been admissible to show that the police were on notice of another suspect but failed to investigate that suspect). From that evidence, a jury can legitimately question the investigation’s reliability and rightfully find reasonable doubt in the prosecution’s case. *Phinney*, 843 N.E. 2d at 1033. A lack of reliability in who the actual culprit is can sway the jury to acquit. *Id.* Additionally, evidence of shoddy investigations can impeach the credibility of police-officer witnesses. *See Cargle v. Mullin*, 317 F.3d 1196, 1216 (10th Cir. 2003) (stating “impeachment would have shown the jury that even the police testimony in this case may not be believed, making the jury’s task of discerning the truth of petitioner’s guilt beyond a reasonable doubt even less attainable”). This kind of evidence can shed light on whether the police followed appropriate procedures and conducted proper tests, or whether police ignored evidence that did not conform with their initial hypothesis about the case.

Courts can use, and have used, evidence showing an unreliable police investigation as a basis to reverse convictions. *See Camm v. Faith*, 937 F.3d 1096, 1110 (7th Cir. 2019) (reversing a defendant’s conviction because law enforcement failed to test the DNA profile on relevant evidence after promising to do so); *see also Crane*, 476 U.S. at 687-91 (holding that trial court erred when it categorically excluded evidence of improper police interrogation tactics used to coerce the defendant’s confession). Courts therefore cannot categorically prohibit this evidence, especially as it relates to another suspect’s culpability. Such a prohibition violates due process. *See Rivera*, 915 F.2d at 281-83 (reversing because the trial

court categorically excluded exculpatory evidence of a third-party’s confession to the crime); *People v. Cisneros*, No. B215151, 2011 WL 437791, at \*8 (Cal. Ct. App. Feb. 9, 2011) (“Evidence that someone other than the defendant committed the crime cannot constitutionally be excluded if it is capable of raising a reasonable doubt as to the defendant’s guilt.”).

The Circuit’s misclassification of evidence showing an unreliable police investigation led it to commit another error: misapplying Rule 403. In its Rule 403 analysis, the Circuit should have considered all the aforementioned probative value of the evidence to support Mr. Elysee’s reasonable doubt defense. But it never did. Instead, the court applied Rule 403 only to the extent that an unreliable police investigation supported a hypothetical affirmative defense. Consequently, the Circuit conducted an erroneous Rule 403 analysis that prohibited Mr. Elysee from presenting evidence in support of his sole reasonable doubt defense, violating his constitutional right to due process. *In re Winship*, 397 U.S. at 363-64; *see also Jackson*, 443 U.S. at 316. Such a violation requires this Court’s intervention and reversal.

#### **B. The Eleventh Circuit’s Decision Is An Outlier.**

The categorical exclusion of evidence showing an unreliable police investigation directly conflicts with the rulings in the state court cases cited by Petitioner. And federal cases discussing due process violations, such as *Brady* violations, have recognized the probative value and importance of introducing evidence of unreliable police investigations.

State courts, unlike the Eleventh Circuit, recognize that evidence of unreliable police investigation raises reasonable doubt. The hallmark case on this issue is *Commonwealth v. Phinney*, 843 N.E.2d 1024 (Mass. 2006). There, the court considered the admissibility of the officer’s report to show that the police knew of another suspect, and they investigated that suspect. *Id.* at 1028. The court held the report admissible and declared that “[d]efendants have the right to base their defense on the failure of police adequately to investigate a [crime] in order to raise the issue of reasonable doubt as to the defendant’s guilt in the minds of the jury.” *Id.* at 1033 (citing *Commonwealth v. Bowden*, 399 N.E.2d 482 (1980)). This conclusion derives from the defendant’s right to raise doubt on the overall credibility of the evidence presented to the jury. *Id.*

Other states, including Connecticut, Arizona, and Michigan, have similarly acknowledged reasonable doubt defenses based on the unreliability of a police investigation. *See State v. Wright*, 140 A.3d 939, 945 (Conn. 2016) (holding that a trial court’s limitation of evidence amounts to a due process violation when the limitation precludes a defendant “from placing the police officers’ investigation into a meaningful context for purposes of the defendant’s inadequate investigation defense”); *see also State v. Gomes*, 256 A.3d 131, 148 (Conn. 2021) (affirming the “recognition of a defendant’s entitlement to present an investigation inadequacy defense”); *State v. Johnson*, 447 P.3d 783, 820 (Ariz. 2019) (“[Defendant] argued the investigation was inadequate and inferred that someone else committed the crime. . . .”), *cert. denied*, 140 S. Ct. 1154 (2020); *People v. Ridenour*, No. 342748, 2019 WL 5418330, at \*5 (Mich. Ct. App. Oct. 22, 2019) (“Defendants were free to argue that the police officers’

inadequate investigation established reasonable doubt.”).

Decisions in this Court and in other federal circuit courts addressing due process violations also support a defendant’s right to attack the credibility of a police investigation. In *Kyles v. Whitley*, this Court directly alluded to the right of criminal defendants to attack “the reliability of the [police] investigation in failing even to consider [another suspect].” 514 U.S. 419, 446 (1995). The logic could not follow more clearly: if the Constitution and this Court permit evidence of unreliable police investigations to attack the reliability of the prosecution’s case, then the categorical prohibition of such evidence conflicts with the Constitution and the precedent set in this Court. Thus, the Eleventh Circuit acted outside its authority when it categorically prohibited evidence of an unreliable investigation properly asserted to raise reasonable doubt of Mr. Elysee’s guilt.

In addition to *Kyles*, several cases from federal circuit courts of appeals demonstrate how the Eleventh Circuit’s opinion is an outlier on this issue. *See, e.g., Alvarez v. Ercole*, 763 F.3d 223, 233-34 (2d Cir. 2014) (finding a Sixth Amendment violation for excluding evidence of an inadequate police investigation); *see also Camm*, 937 F.3d at 1110 (finding that a defendant may introduce evidence of “shoddy” police investigations to raise reasonable doubt); *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986) (stating “[a] common tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible [due process] violation”).

To be sure, these cases dealt with *Brady* violations and the suppression of evidence. However, each case also recognized that the suppression of evidence ultimately relates to the overall reliability of the police investigation and how that reliability, or lack thereof, can raise reasonable doubt in the minds of jurors. It follows logically that evidence showing careless police investigations may lead the jury to believe that the police identified the wrong suspect, *Fontenot v. Crow*, 4 F.4th 982, 1081 (10th Cir. 2021), *petition for cert. filed*, No. 21-970 (U.S. Jan. 6, 2022), or that the prosecution's evidence is unreliable, *see Phinney*, 843 N.E.2d at 1033. Both inferences may lead the jury to acquit, rather than convict, the defendant. Therefore, by categorically excluding evidence of an unreliable police investigation as a matter of law, the Circuit simply decided this case incorrectly.

## **II. If The Eleventh Circuit's Ruling Stands, It Will Lead To More Wrongful Convictions.**

The Court should grant certiorari because allowing the Eleventh Circuit ruling to stand will lead to more wrongful convictions. The Circuit's decision effectively lowers the prosecution's burden of proof, making it easier for prosecutors to convict innocent persons. This holding is contrary to a host of Constitutional principles, including the right to due process and to a fair trial. U.S. Const. amend. V, VI, and XIV. This holding is also contrary to Americans' correct understanding that it would be a grave miscarriage of justice to tolerate a judicial system that permits the incarceration of innocent

people.<sup>2</sup> *See, e.g., Furman v. Georgia*, 408 U.S. 238, 367 n.158 (1972) (Marshall, J., concurring); *Coffin v. United States*, 156 U.S. 432, 456 (1895). By granting review of this case, this Court can address the fundamental role law enforcement plays in securing wrongful convictions and hold law enforcement accountable for their investigations. Denying review leaves those states under the Eleventh Circuit’s jurisdiction vulnerable to the detrimental impacts associated with the incarceration of innocent people.

**A. Evidence Of Unreliable Police Investigations Prevents Wrongful Convictions By Improving Law Enforcement Accountability.**

The actions of law enforcement play a significant role in wrongful convictions. Police officers have discretion during the entire investigation of a crime that shapes who will be charged and what evidence is uncovered. They have discretion when making an arrest, when determining which information to include in their police report, and when deciding which “leads” to investigate. And police officers are typically a key witness at trial in support of the prosecution’s case.<sup>3</sup>

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<sup>2</sup> Cato Institute, *Blackstone’s Ratio: Is it more important to protect innocence or punish guilt?* (2016), <https://www.cato.org/policing-in-america/chapter-4/blackstones-ratio>.

<sup>3</sup> Samuel R. Gross et al., *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, Nat'l Registry of Exonerations 96 (Sept. 1, 2020), [https://www.law.umich.edu/special/exoneration/Documents/Government\\_Misconduct\\_and\\_Convicting\\_the\\_Innocent.pdf](https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf).

Perhaps unsurprisingly, studies have shown that law enforcement errors significantly contribute to wrongful convictions. For example, some of the main sources of wrongful convictions include<sup>4</sup>: (1) mistaken eye-witness identification; (2) false confessions elicited by overly aggressive police interrogation tactics; (3) tunnel vision by prosecution and law enforcement—that is, the phenomenon where “the more law enforcement practitioners become convinced of a conclusion . . . the less likely they are to consider alternative scenarios that conflict with this conclusion”<sup>5</sup>; (4) general prosecutorial and police misconduct; and (5) race biases and inadequate post-conviction remedies.

Under the Circuit’s decision, even the sloppiest investigation can lead to a conviction because the defendant cannot present evidence of an inadequate police investigation to the jury. This categorical exclusion of evidence not only conflicts with the way other circuits and state courts have interpreted the Constitution, but does so in a way that creates dangerously perverse incentives for local prosecutors. For example, state law in Florida, where the present case originated, permits evidence of unreliable police investigations as a means to mount a reasonable doubt defense. *See Martin v. State*, 311 So. 3d 778, 806-07 (Fla. 2020) (noting that defense counsel’s strategy was to argue that the state had not proved its case “beyond a reasonable doubt,” in part by “calling into question the police investigation.”), *cert. denied*, 141 S. Ct. 417 (2020); *see also Nolley v. State*, 237 So. 3d 469,

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<sup>4</sup> Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After A Century of Research*, 100 J. Crim. L. & Criminology 825, 828 (2010).

<sup>5</sup> *Id.* at 851.

476 (Fla. Dist. Ct. App. 2018) (noting it was the “defense’s argument that the police investigation was inadequate. . .”); *Tompkins v. State*, 872 So. 2d 230 (Fla. 2003) (defense counsel raising multiple unreliable police investigation defenses related both to *Brady* violations and due to law enforcement losing evidence which might have been favorable to the defendant.). The significant split between the Circuit’s decision here and Florida state courts will incentivize local prosecutors who receive cases supported by inadequate police investigations to refer those cases to federal prosecutors so that the prosecution evades any need to defend the integrity of the underlying investigation at trial. Because the public generally has no visibility into the prosecutorial decision-making process, this litigation tactic can occur without the public knowing. The end result is easier convictions for the government, while depriving citizens of their due process rights.

Preventing wrongful convictions requires scrutinizing the actions of law enforcement.<sup>6</sup> One benefit of our trial system is that it helps provide this scrutiny by enabling defendants to challenge legal and operational flaws in a police investigation in order to cast doubt on the prosecutor’s case. The ability to present this type of defense disincentivizes inadequate police investigations and, most importantly, police misconduct. For example, according to the National Registry of Exonerations, in 7% of all exonerations (or 178 of 2,400 exonerations), police lied about the conduct of their investigation.<sup>7</sup>

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<sup>6</sup> Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 Wash. U. L. Rev. 1133, 1137-43 (2013).

<sup>7</sup> Gross, Nat'l Registry of Exonerations, *supra*, at 97.

Attacking the reliability of a police investigation has led to the exonerations or acquittals of criminal defendants like Steven DeWitt, Christopher Roesser, and James Walker, who were all subject to conviction on the basis of unreliable police investigations that law enforcement later lied about. *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992); *DeWitt v. District of Columbia*, 43 A.3d 291 (D.C. 2012); *Roesser v. State*, 751 S.E.2d 297 (Ga. 2013). Mr. Elysee could have similarly exonerated himself based on this type of defense, if he was permitted to present it to the jury. Here, the police never investigated a confessor to a crime, which could have persuaded the jury that the evidence offered to convict Mr. Elysee—e.g., police officer testimony—was unreliable.

Utilizing criminal trials as a mechanism to ensure law enforcement accountability is also particularly important when considering the limited availability of other remedies. Police officers are often not held accountable or subject to discipline by their police departments internally. Many times, unions, police chiefs, and fellow officers are reluctant to discipline officers for misconduct due to their code of silence.<sup>8</sup> Sometimes, there is simply no adequate system in place to hold law enforcement accountable internally.<sup>9</sup> Other times, when there is a system in place, delays of months or even years keep police officers that should be suspended or fired on

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<sup>8</sup> Darrel W. Stephens, *Police Discipline: A Case for Change*, Nat'l Inst. Just. 4-5 (June 2011), <https://www.hks.harvard.edu/sites/default/files/centers/wiener/programs/pcj/files/PoliceDisciplineACaseforChange.pdf>.

<sup>9</sup> *Id.* at 4-6.

the street.<sup>10</sup> Those officers are free to continue abusing their power and commit misconduct. Further, civil suits are usually ineffective ways of ensuring police accountability. The qualified immunity doctrine has historically been utilized to prevent liability but for a few rare cases.<sup>11</sup> Indeed, making sure that law enforcement is accountable for their actions starts with addressing deficiencies in their investigations from the very beginning of the criminal trial process. The paucity of alternative mechanisms for discouraging misconduct or inadequate investigation by law enforcement heightens the importance of ensuring that unreliable investigations can be challenged in criminal trials. In granting certiorari, this Court can prevent the Circuit from foreclosing this necessary avenue for ensuring police accountability.

**B. Failing To Protect Innocent Persons From Wrongful Convictions Has Detrimental Consequences On Innocent Defendants And Society As A Whole.**

Wrongful convictions are a serious problem in the United States. Since 1989, approximately 2,795 individuals have been exonerated after being wrongfully convicted for crimes they did not commit.<sup>12</sup> The consequences of failing to protect innocent people from wrongful convictions are plentiful and deeply

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<sup>10</sup> *Id.* at 7.

<sup>11</sup> Dasha Kabakova, *The Lack of Accountability for the New York Police Department's Investigative Stops*, 10 Cardozo Pub. L. Pol'y & Ethics J. 539, 555 (2012).

<sup>12</sup> Nat'l Registry of Exonerations, *25,000 Years Lost to Wrongful Convictions* 1 (June 14, 2021), <https://www.law.umich.edu/special/exoneration/Documents/25000%20Years.pdf>.

concerning. Wrongful convictions offer no positive benefits to public safety, cost taxpayers billions of dollars, and unnecessarily put the liberty and lives of innocent people at risk.

Considering public safety, cutting corners in police investigations and convicting the wrong person does nothing to increase safety or lower crime. Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. Crim. L. & Criminology 1031, 1044 (2015). Since 1989, at least 367 people have been exonerated by DNA evidence after being wrongly convicted.<sup>13</sup> In nearly half of these cases, the actual offender was later identified.<sup>14</sup>

Wrongful convictions also have steep economic costs. Taxpayers are left holding the “hideously expensive” tab to cover the imprisonment of innocent persons. *Id.* at 1045. Altogether, including thirty-six states and the District of Columbia have so far paid an estimated \$2.9 billion in compensation—\$756 million in statutory awards for wrongful imprisonment and almost \$2.2 billion in judgments and settlements in civil lawsuits, have been paid by state and municipal governments.<sup>15</sup> The wrongfully convicted person suffers economically both with the initial loss of employment and the long-term difficulty in finding gainful employment after extended

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<sup>13</sup> Innocence Project, *DNA Exonerations in the United States*, <https://innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Feb. 3, 2020).

<sup>14</sup> *Id.*

<sup>15</sup> Nat'l Registry of Exonerations, *25,000 Years Lost, supra*, at 4.

periods of incarceration.<sup>16</sup> Additionally, children of incarcerated parents miss out on the economic security of having the financial support of an additional parent. Those children are more likely to be impoverished and in need of social welfare (e.g., counseling and therapy). *Id.* at 1045.

Moreover, the impact wrongful convictions have on those persons spending years behind bars cannot be overstated. Someone who is wrongfully incarcerated loses their liberty and is severed from their family and their community, sometimes for years. Indeed, if his conviction is not reversed, Mr. Elysee will spend most of the next 20 years behind bars. As of 2018, the National Registry of Exonerations reported that exonerated defendants had collectively served 20,000 years in prison for crimes they did not commit.<sup>17</sup> Just over three years later, that number now exceeds 25,000 years—and that includes only the time served by those innocent people that have secured their exoneration.<sup>18</sup>

The direct consequence of a wrongful conviction is not just limited to prison time. The Equal Justice Initiative found that approximately one person on death row has been exonerated for every nine people executed in the United States since 1973.<sup>19</sup> Sometimes, the exoneration does not come quickly enough. There have been several contemporary instances of individuals who were executed, but whose guilt was later seriously called into

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<sup>16</sup> *Id.* at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Equal Just. Initiative, *Death Penalty*, <https://eji.org/issues/death-penalty/> (last visited Feb. 3, 2022).

question.<sup>20</sup> One of those individuals was Carlos DeLuna, who was executed for the fatal stabbing of a Texas convenience store clerk in 1989 after the police failed to investigate an alternative suspect, Carlos Hernandez, who had confessed to the murder.<sup>21</sup> After DeLuna's execution, an investigation by Columbia Law Professor James Liebman and his students in the DeLuna Project uncovered powerful evidence of DeLuna's innocence, including multiple deficiencies in the police investigation.<sup>22</sup>

Less tangible than the loss of time, life, or economic resources is the societal cost of wrongful convictions in undermining the public's faith in the criminal system. That loss of faith is likely increased by the fact that wrongful convictions are likely secured disproportionately against people of color. As of December 2021, 67% of the 237 people exonerated through the work of the Innocence Project have been people of color, 58% of them Black.<sup>23</sup> Looking more broadly, 47% of the individual exonerations in the United States between 1989-October 2016 were of Black defendants, and "the great majority of more than 1,800 additional innocent defendants who were framed and convicted of crimes in 15 large-scale

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<sup>20</sup> Death Penalty Info. Ctr., *Executed but Possibly Innocent*, <https://deathpenaltyinfo.org/policy-issues/innocence/executed-but-possibly-innocent> (last visited Feb. 3, 2022).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Innocence Project, *Explore the Numbers: Innocence Project's Impact*, <https://innocenceproject.org/exonerations-data/> (last visited Feb. 3, 2022).

police scandals and later cleared in ‘group exonerations’” were Black.<sup>24</sup>

This disparity is particularly relevant to the question presented by the petitioner because there is evidence that wrongful convictions are more likely to involve certain deficiencies in police investigations in cases involving Black defendants. For example, according to the National Registry of Exonerations, in murder exonerations “there is a large difference in the rate of misconduct by police: 55% for black murder exonerees compared to 33% for whites (and 59% compared to 44% among death-sentenced exonerees).”<sup>25</sup> In sexual assault exonerations, eyewitness errors—which are presumably more likely to lead to a wrongful conviction if the police fail to conduct a thorough investigation—occurred much more often in cases involving Black defendants: 79%, compared to 51% for White defendants.<sup>26</sup> Therefore, a categorical prohibition on presenting evidence of deficiencies in law enforcement investigations as part of a defendant’s reasonable doubt defense will disproportionately impact Black defendants, leading to more unjust convictions for this racial group of defendants.

These already troubling statistics only include those known individuals who have been wrongfully convicted. Undoubtedly, there are many more individuals still incarcerated for crimes they did not commit. The public

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<sup>24</sup> Samuel R. Gross et al., *Race and Wrongful Convictions in the United States*, Nat'l Registry of Exonerations at ii (Mar. 7, 2017), [https://www.law.umich.edu/special/exoneration/Documents/Race\\_and\\_Wrongful\\_Convictions.pdf](https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf).

<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 11-12.

cannot maintain confidence in a criminal system that does not produce just results. The people are right to question the accuracy and legitimacy of criminal court proceedings, especially considering the pervasiveness of police misconduct in our society. The Court should grant review and avoid blessing lackadaisical police investigations that will lead to the incarceration of more innocent people.

### CONCLUSION

The Eleventh Circuit decision violates criminal defendants' due process rights. If this decision stands, it will lead to more wrongful convictions and create perverse incentives for law enforcement. Accordingly, this Court should grant certiorari so it may review, and then reverse, the Eleventh Circuit's outlier decision.

Respectfully submitted,

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