To be submitted

NEW YORK STATE COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
vs.
CHARLES SMITH,
Defendant-Appellant.
APL. No. 2015-00036
vs.
TYRELL INGRAM
Defendant-Appellant.
APL. No. 2015-00221
vs.
ISMA MCGHEE,
Defendant-Appellant.
APL. No. 2015-00243

BRIEF FOR AMICUS CURIAE THE LEGAL AID SOCIETY IN SUPPORT OF DEFENDANT-APPELLANTS

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Other Authorities

Cristopher Slobogin, *Testilying: Police Perjury and What to Do*
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David N. Dorfman, *Proving the Lie: Litigating Police Credibility*
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Julia Simon-Kerr, *Systemic Lying,* 56 Wm. & Mary L. Rev. 2175 (2015) ..... 32 n.8 & 33 n.11

Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 Am. Crim. L. Rev. 1 (2010) 32 n.8, 33

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The Legal Aid Society submits this *amicus* brief in support of Defendants-Appellants in three cases: *People v. Smith*, 122 A.D.3d 456, 996 N.Y.S.2d 37 (1st Dep't 2014), *lv. granted,* 24 N.Y.3d 1123 (Jan. 27, 2015), *People v. Ingram*, 125 A.D.3d 558, 5 N.Y.S.3d 376 (1st Dep't 2015), *lv. granted,* 26 N.Y.3d 930 (Aug. 14, 2015), and *People v. McGhee*, 125 A.D.3d 537, 4 N.Y.S.3d 186 (1st Dep't 2015), *lv. granted,* 26 N.Y.3d 968 (Sept. 04, 2015).

STATEMENT OF *AMICUS CURIAE*

The Legal Aid Society (the "Society"), the nation's oldest and largest not-for-profit legal services organization, is an indispensable component of the legal, social and economic fabric of New York City – passionately advocating for low-income individuals and families across a variety of criminal, civil and juvenile rights matters, while also fighting for legal reform. The Society has performed this role in city, state and federal courts since 1876. With its annual caseload of more than 300,000 legal matters, the Society takes on more cases for more clients than any other legal services organization in the United States, and it brings a depth and breadth of perspective that is unmatched in the legal profession.

The Society's law reform/social justice advocacy also benefits some two million low-income families and individuals in New York City, and the landmark rulings in many of these cases have a national impact. The Society accomplishes this with a full-time staff of nearly 1,900, including more than 1,100 lawyers

working with over 700 social workers, investigators, paralegals and support and administrative staff through a network of borough, neighborhood, and courthouse offices in 26 locations in New York City. The Society operates three major practices — Criminal, Civil and Juvenile Rights — and receives volunteer help from law firms, corporate law departments and expert consultants that is coordinated by the Society's Pro Bono program.

The Society's criminal practice is the primary public defender in the City of New York. During the last year, our criminal practice represented over 200,000 indigent New Yorkers accused of unlawful or criminal conduct on trial, appellate, and post-conviction matters. In the context of this practice, the Society represents people accused of crimes from their initial arrest through the post-conviction process.

In 2014, the Society established the Cop Accountability Project and Database to assist its attorneys in collecting, organizing and using information about police officers' prior misconduct, including criminal court findings about credibility and evidence-gathering, prior bad acts sourced from federal civil rights lawsuits, news articles, administrative disciplinary hearings, *Brady* disclosures, and more.

QUESTIONS PRESENTED

I. Whether allegations of prior bad acts described in civil rights lawsuits filed against police officer witnesses provide a good faith basis to cross-examine that officer about the prior bad acts described in those complaints, and whether they were potentially relevant to the assessment of the credibility of the police witnesses?

II. Whether it was reversible error for the trial courts to preclude the proposed impeachment of key police witnesses on whose testimony the convictions necessarily turned?

SUMMARY OF THE RELEVANT FACTS

The First Department's rulings in these three cases diverge from decades of Court of Appeals jurisprudence broadly construing the types of information that may be used to cross-examine witnesses. "As to those accused of crime, it should be too obvious to need reiteration that restrictions on the right to cross-examine key prosecution witnesses can deprive a defendant of an important means of combating inculpatory testimony or at least demonstrating the existence of a reasonable doubt as to guilt." *People v Gissendanner*, 48 N.Y.2d 543, 423 N.Y.S.2d 893, 896 (1979) (*citing Davis v Alaska,* 415 U.S. 308, 315-17 (1974)). *See* U.S. Const. Amend. VI ("[t]he accused shall enjoy the right ... to be confronted with the witnesses against him"); N.Y. Const., art. I, § 6 ("the party accused shall be allowed to ... be confronted with the witnesses against him or her"). *See McGhee* App. Br. at 28-29, *Smith* App. Br. at 19-20, *Ingram* App. Br. at 13-15.

In *Smith*, *Ingram*, and *McGhee* lawyers for the defendants tried to question key police witnesses about directly relevant prior bad acts – namely, intentionally arresting people knowing that they did not commit any crimes, unlawfully strip searching them and using unjustified force against them – based on factual allegations asserted by multiple plaintiffs in Section 1983 lawsuits. The trial courts' reasoning for not allowing the questions in the three cases varied – in *Smith*, the court said that "mere accusations" of prior bad acts were insufficient to

support the proposed examination. Smith Appx. at A28-29. In *Ingram*, the court said that the proposed inquiry would be prejudicial. Ingram Appx. at A156. And in *McGhee*, the court acknowledged that the defense attorney had a good-faith basis, but said that the prior bad acts were nonetheless "irrelevant." McGhee Appx. at A130.

Amicus agrees with counsel in *McGhee*, who recognized that the fact of a lawsuit itself cannot be the subject of cross-examination any more than can an arrest. *McGhee* Appx. at A127-128. And to the extent the initial question by counsel in *Ingram* "have you ever been sued?" asked about the lawsuit rather than the facts underlying it, it was proper for the court to intervene. *Ingram* Appx. at A35. However, all three courts in these cases went too far in completely blocking all questions based on information described in lawsuits.

By affirming all three cases, the First Department has effectively endorsed a higher standard for impeaching police witnesses based on prior bad acts even where those prior bad acts bear directly on the credibility of the account put forth by defendants' key accusers. We respectfully submit that it was reversible error for the trial courts to have completely foreclosed these legitimate and probative lines of questioning, and that the First Department's affirmances of the convictions should be overturned.

People v. Smith

At his first trial, Mr. Smith was convicted of resisting arrest and of criminal sale of a controlled substance in the third degree based on testimony of Detective Zambrano, the prosecutor's "key witness," as well as Detective Lutufo, the only witness who testified to having seen Mr. Smith pass drugs. Smith Br. at 23 and 28, *citing* A517. Defense counsel sought permission from the court to ask both detectives about federal lawsuits in which they were accused of fabricating charges in other drug cases, assault and unlawful strip searching. *See* Smith Br. at 7, n. 2 discussing *Ambos and Hodges v. City of New York*, No. 08-Civ-1276 (Detective Lutufo, along with other officers, assaulted plaintiffs and then fabricated criminal allegations to cover up their misconduct), *Loglisci v. City of New York*, No. 09-Civ-1220 (Detective Lutufo, along with other officers, forcibly removed plaintiff to a precinct without justification, unlawfully strip searched him and then fabricated criminal allegations to cover up their misconduct), *Finno v. City of New York*, No. 11-Civ-6024 (Detective Zambrano, along with other officers, arrested and unlawfully strip searched plaintiff), and *Peidrahita v. City of New York*, No. 11-Civ-4887 (Detective Zambrano, along with other officers, when told by plaintiff that she could get surveillance video from a nearby store proving Mr. Finno was innocent and tried unsuccessfully to get that video, conspired to fabricate allegations of "tampering with evidence" against plaintiff as punishment

for attempting to prove Mr. Finno's innocence). In response to defense counsel's preliminary proffer, the judge said there was "simply nothing that goes to the officer's credibility." She did not allow defense counsel to propose a different "line of questioning" or to provide additional details about the lawsuits. Smith App. Br. at 6, *citing* A28-29.

The First Department affirmed the court's denial, holding that "[although] defendant was entitled, assuming good faith, to ask the officers about acts of misconduct bearing on their credibility, the proposed line of questioning went into accusations." The First Department also found that the "record fails to support defendant's assertion that the court prevented him from making a full offer of proof." *Smith*, 122 A.D.3d at 456-57, 966 N.Y.S.2d at 38.

People v. Ingram[1]

Based on testimony by Sergeant Timothy Deevy ("Sgt. Deevy") and Detective Anthony Schaffer ("Det. Shaffer"), Tyrell Ingram was convicted of criminal possession of a weapon in the second degree in Bronx County. *Ingram*, 125 A.D.3d at 558, 5 N.Y.S.3d at 376. Mr. Ingram's conviction was based primarily on Sgt. Deevy and Det. Schaffer's testimony that Mr. Ingram was the initial aggressor in a physical encounter with Sgt. Deevy that justified Sgt. Deevy's

[1] The State's response brief in *People v. Ingram* (due April 28, 2016) and reply brief (due May 13, 2016) is not available for review. Mr. Ingram was represented at trial by The Legal Aid Society, Criminal Defense Practice for Bronx County.

discharge of his weapon. Ingram Br. at 5-6 *citing* A166-168, A180-181, A208, and A269-271.

The defense argued that as a result of the firearm discharge, which may have impeded Sgt. Deevy's upcoming early retirement, the team fabricated charges that would justify the use of deadly force. In support of that theory, defendant named one specific lawsuit describing false arrests, excessive force and illegal strip searches. Ingram Appx. at A35-37. The defense explained the factual allegations in detail to the judge to support her questions. Ingram Br. at 12-14, *citing* A36-37 (discussing *Marcus Reyes v. City of New York*, 09-cv-05444-DGT-JO) (Deevy and others fabricated evidence, falsely arrested him, used excessive force, and illegally strip searched him)). Before Sgt. Deevy's cross-examination, the court sustained the prosecutor's objection, holding that the "prejudicial effect far outweighs the probative value at this stage since it is a pending lawsuit," and prohibited "any inquiry" at all by the defense concerning those lawsuits. *Id.* at A37, A156.

The First Department correctly affirmed that the court properly precluded inquiry "regarding the existence of a federal lawsuit." *Ingram,* 125 A.D.3d at 558, 5 N.Y.S.3d at 376. However, it also held that "the court did not prevent him from making [inquiries into the underlying facts of the lawsuit]" and that defense "failed to establish a good faith basis for eliciting the underlying facts of the lawsuit . . .

under the theory that they involved prior bad acts by this officer bearing on his credibility or any other theory of admissibility." *Id.* at 558-559, 5 N.Y.S.3d at 376.

People v. McGhee[2]

Isma McGhee was convicted in New York County of ten counts of criminal sale of a controlled substance in the third degree based on statements made by Detective Arnaldo Rivera and undercovers who identified Mr. McGhee as a participant in a series of drug sales during an undercover operation. McGhee Br. at 11-12. Before beginning his cross-examination of Detective Rivera, defense counsel told the court:

> I plan on asking [Detective Rivera] questions regarding ...prior bad and immoral acts. The basis for the questions ... arise out of lawsuits ... I intend *not* to ask him whether or not he's subject to the suit itself because I understand generally that would be irrelevant, however, ... [I will] ask whether or not he participated in some of the acts.

McGhee Appx. at A127-128.[3] The court initially said: "I cannot allow that. It's irrelevant to this case." *Id.* at A129. The Court later added: "I mean, you have a good faith basis, but it still seems irrelevant." *Id.* at A130. The Court also noted, in regards to the settled and pending lawsuits: "Nothing has been proven that he

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[2] The reply brief in McGhee (due April 25, 2016) is not available for review before submission.
[3] *See Hernandez v. City of New York, et al*, 11-cv-01030-SAS (plaintiff was subjected to an unlawful strip search and arrested by Rivera, with other officers, to cover up the unlawful strip search), *Kerr v. City of New York, et al*, 10-cv-04592-RJH (Rivera, with other officers, arrested Ms. Kerr even though the only drugs found in the apartment were found inside of a shoe that was inside the bedroom of the person named in the search warrant).

indeed falsely arrested anybody. It's a pending allegation from an unrelated subject." *Id.* at A129-130.

The First Department affirmed, holding that defendant "failed to establish a good faith basis for eliciting the underlying facts of these lawsuits under the theory that they involved prior bad acts by this detective bearing on his credibility." *McGhee,* 125 A.D.3d at 538, 4 N.Y.S.3d at 188.

ARGUMENT

I. COURT OF APPEALS PRECEDENT REQUIRES BROADLY CONSTRUING BOTH THE RELIABILITY OF THE SOURCE OF PRIOR BAD OR IMMORAL ACTS AND THE TYPES OF ACTS THAT MAY BE USED IN CROSS-EXAMINATION.

Only two years ago in *Garrett*, this Court declared that civil suit allegations are "favorable" as impeachment evidence in the context of a *Brady* claim. This remark clearly contemplated that defense lawyers would be allowed to ask about such allegations on cross-examination for impeachment. *See People v. Garrett*, 23 N.Y.3d 878, 886, 994 N.Y.S.2d 22, 29 (2014) ("the civil allegations against O'Leary were favorable to defendant as impeachment evidence").

This is consistent with the Court's jurisprudence on cross-examination for the past several decades. The Court has repeatedly ruled that there is no prohibition against cross-examining a witness with bad acts that have escaped prosecution or never been formally "proven," and it has always construed the types of information that may be used extremely broadly. *See, e.g., People v. Allen*, 50

N.Y.2d 898, 899, 430 N.Y.S.2d 588 (1980), *aff'g*, 67 A.D.2d 558, 560, 416 N.Y.S.2d 49 (2d Dep't 1979) ("there is no proper basis to restrict cross-examination of a non-defendant witness as to such prior acts of misconduct. Thus, defendant should have been allowed to cross-examine Morales and Davis as to any immoral, vicious or criminal act committed by them which may affect their character and show them to be unworthy of belief").

The Court of Appeals has even construed the prior use of aliases and false pedigree information as a prior bad act for cross-examination. *People v. Walker*, 83 N.Y.2d 455, 461-63, 611 N.Y.S.2d 118, 119-21 (1994). The Court held:

> Such cross-examination is not limited to questions about prior crimes or like misconduct. Rather, even where the proof falls outside the conventional category of immoral, vicious or criminal acts, it may be a proper subject for impeachment questioning where it demonstrates an untruthful bent or significantly reveals a willingness or disposition on the part of the particular witness voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society.

Id. at 476, 122 (internal citation marks and quotations omitted).

Furthermore, in this Court's seminal decision about what constitutes a "good faith basis" of information that entitles a litigant to cross-examine into possible prior misconduct, the Court ruled that even uncorroborated hearsay reports of drug-selling gave a "solid" basis. This was a far lower showing than the specific factual allegations, often sworn to under oath in court filings, that provided the lawyers' "good faith basis" in these cases. *See People v. Alamo*, 23 N.Y.2d 630,

632-35, 298 N.Y.S.2d 681, 682-84 (1969), *cert. denied*, 396 U.S. 879 (1969). In *Alamo*, the prosecution was permitted to impeach defendant based on "[reports] ...'from several parties' by a policeman, whose name was disclosed by the prosecutor, that defendant had sold marijuana cigarettes on a public beach . . . ." The Court found "solid basis for the questions that were asked."[4]

Another key part of the Court's ruling in *Alamo* involved whether a Grand Jury decision not to indict vitiated the right to cross-examine about the underlying allegations presented at the Grand Jury. Importantly, this Court ruled that it did not: "the failure of the Grand Jury to indict . . . did not make it improper for the prosecutor to question defendant as to the underlying fact[s]" of the purported misconduct. Because under *Alamo* a vote of "No True Bill" at a formalized Grand Jury proceeding (which, of course, can even permanently terminate a criminal case) is not tantamount to an acquittal for purposes of questioning about the underlying facts at issue – and it does not negate the questioner's "good faith basis" and "reasonable basis in fact" to ask about the possible prior misconduct – a civil defendant's agreement to settle a lawsuit also should not be considered tantamount to an acquittal, or negate the "good faith basis" and "reasonable basis

[4] The dissenting opinion further explains the factual context of the majority's ruling that such impeachment questioning was proper: "an undercover man was assigned to watch [defendant] on the beach but, significantly, the prosecutor could not report even a scintilla of evidence that defendant was, in fact, engaging in the sale of such cigarettes or any other illegal activity," and so the questions were based on "a rumor that is current only among members of the police department and some unnamed persons." *Id.* at 637, 686 (Burke, J., dissenting).

in fact" for questioning. *Id.* at 624-35, 681-84. *See also People v. Sorge*, 301 N.Y. 198, 200-01 (1950) (allowing prosecution to cross-examine defendant about her presence during the performance of abortions); *People v. Webster*, 139 N.Y. 73, 84 (1893) (adulterous relationship); *see also Davis*, 415 U.S. at 318 (finding a Confrontation Clause violation because "counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness"). To the contrary of the trial court's reasoning in *McGhee,* the fact that "[nothing] has been proven" in a lawsuit is not significant. *See* McGhee Appx. at 129-130.

In other prior cases as well, this Court has ruled that the cross-examiner possessed a "good faith" basis to ask about possible prior misconduct where the underlying source was simply unsworn hearsay information. *See, e.g.*, *People v. Spencer*, 20 N.Y.3d 954, 956, 959 N.Y.S.2d 112, 114 (2012) ("Defendant's alleged personal observations of complainant and the third party described by counsel to the court supplied a good faith basis for defendant's proposed trial testimony"); *People v. DePasquale*, 54 N.Y.2d 693, 695, 442 N.Y.S.2d 973, 976 (1981) ("Nor was there error in the trial court's ruling permitting cross-examination of defendant concerning uncharged crimes on the basis of information provided by the victim's

brother. Questioning about uncharged crimes is permissible in the exercise of the court's discretion so long as there is a good faith basis in fact for the inquiry").

Again, the lawyers in the three cases before the Court now had a far more substantial "good faith basis" from prior court filings that resulted in substantial settlements. This Court has also ruled that, even where a questioner had not attempted to ascertain the surrounding circumstances of the potential misconduct, there was still a proper "good faith basis" to ask on cross-examination about a purported "misappropriation" of property. *See People v. Kass*, 25 N.Y.2d 123, 125-26, 302 N.Y.S.2d 807, 809 (1969). The prosecutor in *Kass* was permitted to ask defendant if he had "'misappropriated two diamonds worth about $4,000 from a jeweler in New York City?'" *Id.* at 125, 809. The Court held that the question was proper because it was "made by the prosecutor in good faith and had some basis in fact." *Id.* at 126, 809. Even though defendant had agreed to return the diamonds the next day, the Court still held that "[the] prosecutor demonstrated his good faith at trial by stating on the record that he had been informed by the jeweler's attorney on the previous day that defendant had received the diamonds on consignment, and had failed to return the diamonds when due . . . ." *Id.* at 126, 809.[5]

[5] The concurring opinion further explains the factual context of the majority's ruling as follows: "the prosecutor himself admitted that he had spoken to the jeweler, who had given the stones to the defendant on a seven-day examination basis, for only 'a very brief moment,' and that he did

In addition to broadly construing the bases upon which examiners may rely in good faith, this Court has also broadly construed those acts which may be asked about. While this Court found that some prior acts may be more probative of credibility than others, acts that "demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others [go] to the heart of honesty and integrity." *People v. Sandoval*, 34 N.Y.2d 371, 376-77, 357 N.Y.S.2d 849, 855 (1974).

Sandoval's balancing test does not, however, apply to non-defendant witnesses, because the prejudice to the witness will not result in wrongful conviction. This Court has been clear that "for a non-defendant witness, however discomfited by impeaching revelations, neither conviction nor vindication, imprisonment nor freedom, hangs in the balance." *People v. Ocasio*, 47 N.Y.2d 55, 59, 416 N.Y.S.2d 581, 583 (1979). Witnesses other than defendants face "no danger that the jury will apply the evidence of prior bad acts of misconduct to anything but [their] credibility." *Allen*, 67 A.D.2d at 560, 416 N.Y.S.2d at 49;

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not know whether or if the defendant and the jeweler had made arrangements for the return of the diamonds. By his own admission, all the prosecutor knew was that the defendant had the diamonds on a 'consignment' from the jeweler and that they were apparently overdue in being returned. Nonetheless, the question put to the defendant, impliedly at least, contained the conclusion that the diamonds had been 'misappropriated.' Inquiry of the jeweler would have indicated that the jeweler wanted only to speak to Kass about returning the diamonds and that the jeweler himself did not consider that the stones were anything but late in being returned. The jeweler's affidavit on defendant's post-trial motion for a new trial indicates that the jeweler spoke to the prosecutor . . . and told him specifically that he had an appointment for the following day with Kass to have the diamonds returned (and they were, in fact, returned the following day)." *Id.* at 128-29, 811-812 (Burke, J., concurring).

accord People v. Jones, 193 A.D.2d 696, 697, 598 N.Y.S.2d 40, 42 (2d Dep't 1993).

While the State concedes that police witnesses may be impeached based on prior bad acts, as can any other witness (McGhee Resp. Br. at 28, Smith Resp. Br. at 21), it argues that lawsuits are "uniquely suspect" sources of information that alone cannot serve as "good faith" reliance by defendants. McGhee Resp. Br. at 37. The State in *Smith* argues that lawsuits are equivalent to "mere accusation." Smith Resp. Br. at 21. Yet lawsuits are more reliable than many other sources of bad act evidence that courts have allowed.

A. Lawsuits are reliable sources of prior bad or immoral acts upon which examiners may rely in good faith.

In addition to the lawsuit allegations that the Court of Appeals found to be "good faith factual predicates" discussed above (*Garrett*, 23 N.Y.3d at 886, 994 N.Y.S.2d at 6), other courts also have found civil rights lawsuit allegations to support "good faith predicates." *See, e.g., Jones*, 193 A.D.2d at 697, 598 N.Y.S.2d at 41 ("the trial court improperly prevented defense counsel from questioning a police witness about various civil actions brought against him for alleged police brutality, false arrest, and his alleged use of excessive force"); *People v. Daley*, 9 A.D.3d 601, 602, 780 N.Y.S.2d 423, 425 (3d Dep't 2004), (reversible error where defense was precluded from cross-examining "primary accuser" correction officer

"about a federal lawsuit that had been brought against [him] by an inmate who asserted that the officer had assaulted him"). Neither *Jones* nor *Daley* suggested that the lawsuits in question had been *resolved* against the officers or even *settled*, and yet they provided a "good faith basis" and "reasonable basis in fact" for cross-examination. *Jones*, 193 A.D.2d at 697-98, 598 N.Y.S.2d at 41; *Daley*, 9 A.D.3d at 602-03, 780 N.Y.S.2d 423 at 424-25.

Other sources upheld as "good faith predicates", in contrast to lawsuits, involved much less screening, investigating, procedural rules and ethical responsibilities by the sources. They include former employers testifying to facts surrounding dismissal from jobs for misconduct of a nature that would affect his credibility. *People v. Weinstein,* 254 A.D.2d 83, 84, 680 N.Y.S.2d 204, 204 (1st Dep't 1998); *People v. Yapor*, 308 A.D.2d 361, 362, 764 N.Y.S.2d 261, 362 (1st Dep't 2003). Courts consider other uncharged but unlawful conduct. *See, e.g.*, *People v. Melendez*, 74 A.D.3d 629, 630, 903 N.Y.S.2d 384, 387 (1st Dep't 2010) (uncharged robberies elicited from a fellow inmate); *People v. Sealy,* 167 A.D.2d 362, 363, 561 N.Y.S.2d 313, 315 (2d Dep't 1990) (triple hearsay in a police report referencing an interview with another individual who reported hearing from yet another that defendant confessed to another shooting); *People v. Lebovits*, 94 A.D.3d 1146, 1148-50, 942 N.Y.S.2d 638, 640-42 (2d Dep't 2012) (hearsay of unreported sexual abuse). Courts have even considered immoral but not unlawful

conduct. *People v. Elmy*, 117 A.D.3d 1183, 1186, 984 N.Y.S.2d 672, 675-76 (3d Dep't 2014) (bullying and the withholding of certain medications).

Lawsuits, virtually always written by attorneys who have investigated the allegations, are sources examiners may rely on in good faith. Federal rules require plaintiffs' attorneys to submit facts in pleadings only when "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation and discovery." Fed. R. Civ. P. 11(b)(3). In state court, the pleadings must be verified by the plaintiff "under oath that the pleading is true to the knowledge of the deponent." CPLR 3020(a) and (d).[6]

Lawsuits will also almost always exclusively be the legal vehicle with which people report police misconduct through private civil rights attorneys since people complaining about police misconduct generally cannot successfully seek justice against police in the criminal court system. The Knapp Commission (1970-1972) report laid bare the fundamental conflict between local prosecutors and local police departments, which explains why many police officers are not arrested or

[6] Additionally, many civil rights litigants in both federal and civil cases, to preserve state law claims, file a notice of claim within 90 days of an incident that must describe the incident and be signed by the claimant. N.Y. Gen. Mun. Law 50-e. This notice of claim often prompts the City of New York to request a "50-h hearing," during which an attorney for the City of New York essentially takes a truncated deposition about the incident underlying the complaint. *See id.* By the time the complaint is filed, whether or not it itself is verified by plaintiff, the attorney filing the complaint usually relies on the 50-h sworn statements by their clients supporting the allegations as written in the complaint.

prosecuted for their bad acts. The Commission expressed concerns that "[District Attorneys] work so closely with policemen that the public tends to look upon them—*and indeed they seem to look upon themselves*—as allies of the Department."[7]

This is also evident from the bad acts collected in The Legal Aid Society's database. There were sixty arrests of police officers in 2015 and 531 findings that a civilian complaint was substantiated, as compared with an average of fifty federal court lawsuits filed per month.[8] Additionally, unlike publicly filed federal lawsuits, the CCRB refuses to disclose the names of officers against whom they have substantiated complaints of on-duty misconduct after investigations or even publicly held administrative prosecutions because they take the position that such information is confidential under New York Civ. Rights L. 50-a. *In re Luongo v Records Access Officer*, 49 Misc.3d 708, 712, 15 N.Y.S.3d 636, 639 (N.Y. Cnty. 2015) (pending appeal). Under the rule applied by the lower courts and advocated by the prosecution here, out of a police force of more than 34,000 officers and in over 280,000 criminal proceedings, defendants could only impeach on cross-

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[7] Robert M. Pitler, *Superseding The District Attorneys in New York City – The Constitutionality and Legality of Executive Order No. 55*, 41 FORDHAM L. REV. 517, 534 (1973) (quoting the Knapp Commission Report at 14).

[8] John Annese and Graham Rayman, *Review board substantiates 30% of civilian complaints against NYPD in December with video evidence,* The Daily News, January 15, 2016. *Available at*: http://www.nydailynews.com/new-york/30-civilian-complaints-nypd-substantiated-article-1.2497121.

examination with information regarding alleged prior bad acts by police in a miniscule fraction of cases.

B. Prior bad or immoral acts described in lawsuits may be the subject of impeachment of credibility and, in certain cases, may be relevant to a material issue in the case.

In the majority of cases, extrinsic evidence will not be allowed to "prove up" prior bad acts. *See* McGhee Appx. at A128. On cross-examination, counsel is free to ask a witness about *any prior bad act* to try to show that the witness has poor character or is unbelievable. But if the witness denies committing it, the lawyer usually may not "prove up" the bad act by calling another witness or introducing other evidence to show that it actually occurred. This is because typically a bad act relates only to "general credibility," which is a *collateral* (non-material) issue. An exception is where a witness denies or equivocates about an actual *conviction*: a statutory exception allows the opposing party to introduce a certificate of conviction to "prove up" the falsely denied conviction. *See* N.Y. Crim. P. § 60.40(1).

On the other hand, if a prior bad act is relevant to a *material* issue in the case (such as bias against the defendant, a reason to fabricate or exaggerate the charge against the defendant, etc.), then the opposing party *does* have the right to call a witness or introduce other extrinsic evidence to "prove up" the bad act. *People v. Wise,* 46 N.Y.2d 321, 328, 413 N.Y.S.2d 334, 338 (1978). That includes "facts in

dispute, or matters such as a witness's bias, hostility, or impaired ability to perceive which may be proved independently for impeachment," *Badr v. Hogan*, 75 N.Y.2d 629, 635, 555 N.Y.S.2d 249, 252 (1990), and matters "such as motive or intention," *People v. Schwartzman*, 24 N.Y.2d 241, 245-46, 299 N.Y.S.2d 817, 820-22 (1969).

In certain cases, courts have ruled that records relating to police witnesses' "unrelated" prior bad acts, much like the prior bad acts described in lawsuits proffered in *Smith* and *Ingram*, can be a proper basis for "material" cross-examination and impeachment at trials. *Jones*, 193 A.D.2d at 697-98, 598 N.Y.S.2d. 40 at 41-2; *Daley*, 9 A.D.3d at 602-03, 780 N.Y.S.2d at 424-5. *See also, e.g.*, *People v. Hubbard*, 132 A.D.3d 1013, 1013-14, 18 N.Y.S.3d 681, 682-83 (2d Dep't 2015) ("internal investigation and federal lawsuits describing how primary detective had previously procured a false confession in an unrelated matter, was favorable to the defense and material"); *In re Shamik M.*, 117 A.D.3d 1056, 1057, 986 N.Y.S.2d 566, 568 (2d Dep't 2014) (vacating a fact-finding order when the officer's credibility, as called into question by misconduct described in a federal lawsuit, undermined his testimony that supported the adjudication); *People v. Santos*, 306 A.D.2d 197, 198-99, 761 N.Y.S.2d 651, 653-54 (1st Dep't 2003), *aff'd*, 1 N.Y.3d 548 (2003) (records of Corrections Officer's prior assaults on other inmates "went to the very heart of this defendant's trial defense" and "touche[d]

the very essence of a trial's truth finding goal: namely, to accord an accused a full and fair opportunity to present highly relevant evidence in his or her defense"); *People v. Mickel*, 274 A.D.2d 325, 326, 710 N.Y.S.2d 70, 71 (1st Dep't 2000) (reversible error when undisclosed Brady impeachment material included complainant's false sworn testimony at a civil deposition, prior inconsistent statements concerning the case, intentional failure of a psychological exam to gain early discharge from the Army and intentional failure to disclose this on his application for employment with the Department of Correction, assault of other inmates at Rikers Island, and filing of false reports to conceal his conduct in other assault cases); *People v. Higgs*, 249 A.D.2d 172, 173, 672 N.Y.S.2d 61, 63 (1st Dep't 1998) (noting that "the court permitted defendant to cross-examine the witness about the underlying facts of these civilian oversight agency complaints").

Prior bad acts do not have to be related to the incident in question in order to be "relevant and material" to the "unreliability of either the criminal charge or of a witness upon whose testimony it depends." *People v. Kozlowski*, 11 N.Y.3d 223, 242, 869 N.Y.S.2d 848, 860 (2008). Specifically recognizing the potential admissibility of police witnesses' prior bad acts in unrelated cases or incidents, the Court of Appeals in *Gissendanner* underscored that when the alleged facts of the other incident bear "peculiar relevance" to the defense's version of the events in the trial, they can be "material" and admissible. 48 N.Y.2d 543, 548-49, 423

N.Y.S.2d 893, 896-97 (1979). "Peculiar relevance" refers to a distinctive similarity or specialized connection between the alleged prior misconduct that potentially corroborates the defense's theory. That type of linkage entitles the defense to cross-examine the witness and/or to call defense witnesses regarding the unrelated incident. *Id.* The State also argues that, in addition to not being materially probative, false arrest allegations are generally not bad or immoral acts. McGhee Resp. Br. at 39; Smith Resp. Br. at 34-35 (arguing that the false arrest allegations in the lawsuits were not bad acts by Zambrano but by another officer). A false arrest claim from a lawsuit was, however, found by *Jones* as having "demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity." *Sandoval*, 34 N.Y.2d at 377, 357 N.Y.S.2d at 855.

Compared to other examples of "bad acts" courts have upheld, the types of misconduct described in the lawsuits proffered here clearly should also be allowed. Other examples of bad acts include sending harassing emails, *People v. Wells*, 51 A.D.3d 403, 403, 857 N.Y.S.2d 115, 116 (1st Dep't 2008); not timely returning borrowed diamonds, *Kass*, 25 N.Y.2d at 126, 302 N.Y.S.2d at 809; unindicted robberies and anecdotes about defendant selling marijuana cigarettes on the beach, *Alamo,* 23 N.Y.2d at 634, 298 N.Y.S.2d 681, 683; violent conduct, *People v. Yapor*, 308 A.D.2d 361, 362, 764 N.Y.S.2d 261, 362 (1st Dep't 2003); extensive

involvement in the drug trade, *People v. Chebere*, 292 A.D.2d 323, 324, 740 N.Y.S.2d 25, 26 (1st Dep't 2002); uncharged crimes, *People v. Wiggins*, 279 A.D.2d 370, 719 N.Y.S.2d 558 (1st Dep't 2001), *lv. denied*, 96 N.Y.2d 869; and uncharged drug sales, *People v. Ponder*, 1 A.D.3d 616, 616, 767 N.Y.S.2d 661, 661 (2d Dep't 2003).

C. In all three cases below, defendants should have been allowed to question police witnesses regarding prior bad and immoral acts described in lawsuits.

Plaintiffs reporting false arrest in lawsuits are, at the very least, reporting that defendants arrested them without "reasonably trustworthy information ... to warrant a person of reasonable caution" to believe "that the person to be arrested has committed or is committing a crime." *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996) (citing *Dunaway v. New York*, 442 U.S. 200, 208 n.9 (1979)). *See* McGhee App. Br. at 35.

The allegations detailed in the lawsuits defendants sought to question police witnesses about at the trials in these cases involved perjury, fabricated statements, acting knowingly based on the fabricated statements of other officers, collaborating with other officers on fabricated statements together knowing it would result in prosecution, collaborating with other officers to cover up misconduct, assault, unlawful imprisonment, retaliation and harassment. *See* discussion, *supra*, at 5-10. Based on the allegations relied upon by all three defendants, the officers did not

just lack probable cause, they intentionally fabricated criminal accusations to cover up misconduct. These are exactly the bad and immoral acts that may be used in impeachment.

These all go to credibility generally, and the courts below should have allowed all examiners to question the police witnesses about them. Additionally, in *Smith* and *Ingram*, the courts' discretion was more limited in prohibiting questions about prior bad acts because they proved knowledge of a unique or peculiar scheme, motive, interest, bias, and lack of mistake – all which would have materially undermined the reliability of the police witnesses' credibility in *Smith* and *Ingram*. *See People v. Wise,* 46 N.Y.2d at 328, 413 N.Y.S.2d at 338.

i. People v. Smith

The *Smith* defense sought impeachment not just of Detective Lutufo's and Detective Zambrano's credibility generally – but of their testimony to a specific pattern of events that occurred in the arrest of Mr. Smith which mirrored the pattern of events described by Detectives Lutufo and Zambrano in other arrest reports later reported by the people involved in them as false. Smith Br. at 23-24. Such conduct clearly qualifies as "[demonstrating] determination deliberately to further self-interest at the expense of society or in derogation of the interests of others." *Sandoval* , 34 N.Y.2d at 377, 357 N.Y.S.2d at 855. For officers to conspire together to cover up an unlawful use of the broad authority afforded them

as police officers – whether through force or strip searches – to prevent professional scrutiny or discipline at the expense of innocent people is absolutely immoral. *See* Smith Br. at 7, n.2.

The State argues that the fact that the lawsuits named multiple officers lessens the weight of any attribution of "bad acts" that can be assigned to one police witness. Smith Resp. Br. at 34. That bad acts were conducted in a group should not shield police from being confronted about them during cross-examination. Police-witnesses can always answer by assigning blame to whom it belongs if it was another officer acting outside of their control. If an officer was named in a lawsuit, it is because there was some indication to the plaintiff's attorney during pre-filing investigation or discovery that the officer was involved in an incident. If anything, Detective Zambrano's participation in a group-led violation of civil rights should itself be of more significance to the defense theory in this case, where defense's theory was that Zambrano and a group of officers collaborated to fabricate drug selling charges to retaliate against Mr. Smith for resisting arrest.

ii. People v. Ingram

The prior bad act impeachment of police in *Ingram* similarly would have gone "to the heart of the defense." *People v. Santos*, 306 A.D.2d at 198-99, 761 N.Y.S.2d at 653-54. While objection to counsel's initial question "have you ever

been sued" was properly sustained by the court, her subsequent proffer demonstrated a good faith basis to question the officers about materially probative prior immoral acts. Ingram Appx. at A35.

Ingram involved both police-initiated force and discharge of a firearm, justified in the police witnesses' self-serving accounts by the claim that Mr. Ingram initiated aggression and provoked force. To counter not only their credibility but, again, the likelihood of their testimony in light of similar patterns of misconduct described by other people who have been arrested by these officers, defense named at least one lawsuit on the record that similarly described an assault followed by false charges. Ingram Br. at 12-14 *citing* A36-37 (discussing *Marcus Reyes v. City of New York, et al*). Rather than limit questioning to the facts underlying the case, the trial court clearly prohibited "any inquiry" about prior lawsuits whatsoever. *Id.* at A37, A156.

In both *Smith* and *Ingram*, the trial courts essentially cut off the defendants' theories that police witnesses had the knowledge, ability, motive and previously-demonstrated willingness to fabricate criminal charges alongside other officers to further their own self-interest to the detriment of defendants, as defendants both alleged had been done in their cases. Without being allowed to elicit prior "peculiarly relevant" false arrests for the jury to hear and use in evaluating the detectives' responses, defense counsel in both *Smith* and *Ingram* were deprived of

pursuing a theory that the officers abusively used their power to arrest Mr. Smith and Mr. Ingram to cover up their own misconduct.

iii. People v. McGhee

McGhee is different from *Smith* and *Ingram* in that there was not the type of police-initiated forceful encounter followed by force that needed testimony tailored to justify those encounters. Yet even if the impeachment evidence of prior bad acts were collateral, the importance of the information to the defense was best demonstrated by the prosecutor's summation, in which he explicitly argued that the officers had no reason, motive or interest in lying. McGhee Appx. at A579. Even if Mr. McGhee's defense theory hinged less materially on evidence tending to implicate prior misconduct by the police, he obviously was deprived of presenting a counterfactual narrative to the jury that would negate the prosecution's claim that the police had no reason to perjure themselves to "get" Mr. McGhee. *Id.* Evidence of other people this lead detective arrested, knowing they had not committed any crimes, would have demonstrated to the jury that the detective need not have a personal vendetta for the target in order to pursue him without probable cause. Further, while the Court may have been on solid ground using its discretion to curtail some cross-examination by Mr. McGhee, its blanket prohibition on any questioning regarding prior bad acts was harmful.

In sum, the First Department courts erred by precluding the defendants from cross-examining key police witnesses based on prior bad acts alleged in civil rights complaints filed against them. In each case, the impeachment inquiry sought by the defense went to the officers' credibility – not generally, but with respect to outcome-determinative testimony, in the sense that the crux of the misconduct (e.g., falsely arresting an individual for a drug crime) was particularly relevant to the defense contemplated for the charged crime (e.g., false arrest for drug possession). The applicable standard for gauging harm is "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *People v. Crimmins*, 36 N.Y.2d 230, 240-41, 367 N.Y.S.2d 213, 218-19 (1975); *People v. Hudy*, 73 N.Y.2d 40, 58, 538 N.Y.S.2d 197, 208 (1988).

In each case here, defense counsel was denied the "traditional[]" right "to impeach, i.e., discredit" key police witnesses. *Davis*, 415 U.S. at 316. In each case, defense counsel "should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the [witnesses'] reliability . . . ." *Id.* at 318. In each case, therefore, defendants-appellants were "denied the right of *effective* cross-examination," and this was "constitutional error of the first magnitude [that] no

amount of showing of want of prejudice would cure . . . ." *Id.* at 318 (emphasis added) (quotation omitted).

II. PUBLIC CONFIDENCE IN THE CRIMINAL JUSTICE SYSTEM AND POLICING, AND THE RELIABILITY OF THE ADVERSARIAL PROCESS, ARE ALSO WELL SERVED BY THE TRADITIONAL RULE THAT ALLOWS SUCH CROSS-EXAMINATION.

The decisions under review essentially afforded police witnesses unwarranted deference akin to, if not broader than, the calibrated protection against prejudicial impeachment that *Sandoval* secures for *defendants* who take the stand. The decisions thus contradict the Supreme Court's reminder that trial court discretion not be "expanded" in a way that, by curtailing the scope of cross-examination, "keep[s] crucial impeachment testimony from a jury." *Gordon v. United States*, 344 U.S. 414, 423 (1953).

At a time when public attention increasingly focuses on police conduct, and grave *misconduct*, and the fairness of the criminal justice process in particular in cases where the propriety of police conduct may be at issue, the traditional adversarial process must be allowed to function fairly. Courts should not be seen to unilaterally insulate police officers from appropriate cross-examination by carving out new exceptions to this State's longstanding precedents, which permit broad cross-examination regarding possible misconduct, and which have approved of "good faith bases" considerably more speculative than those in civil rights lawsuit allegations.

By no stretch do all police officers lie every time they testify. But evidence shows that some do, and in the most serious cases the result is a false conviction that weakens the integrity and fairness of our criminal justice system. New York State courts have long identified non-credible police testimony. *See*, *e.g.*, *People v. Berrios*, 28 N.Y.2d 361, 369, 321 N.Y.S.2d 884, 890 (1971) ("Where the Judge at the suppression hearing determines that the testimony of the police officer is unworthy of belief, he should conclude that the People have not met their burden of coming forward with sufficient evidence and grant the motion to suppress"); *see also People v. Erwin*, 42 N.Y.2d 1064, 1066-67, 399 N.Y.S.2d 637, 638 (1977); *In re Shamik M.*, *supra*, 117 A.D.3d at 1056, 1057-58, 986 N.Y.S.2d at 568-89 (2d Dep't 2014); *People v. O'Hare*, 73 A.D.3d 812, 813, 900 N.Y.S.2d 400, 401 (2d Dep't 2010); *In re Robert D.*, 69 A.D.3d 714, 717, 892 N.Y.S.2d 523, 525-26 (2d Dep't 2010); *People v. Martinez*, 44 A.D.3d 795, 796, 844 N.Y.S.2d 56, 57 (2d Dep't 2007); *People v. Rutledge*, 21 A.D.3d 1125, 1126, 804 N.Y.S.2d 321, 322 (2d Dep't 2005); *In re Bernice J.*, 248 A.D.2d 538, 538, 670 N.Y.S.2d 207, 208 (2d Dep't 1998); *People v. Carmona*, 233 A.D.2d 142, 144, 649 N.Y.S.2d 432, 433 (1st Dep't 1996); *People v. Heath*, 214 A.D.2d 519, 520-21, 625 N.Y.S.2d 540, 540-41 (1st Dep't 1995); *People v. Lebron*, 184 A.D.2d 784, 784-85, 585 N.Y.S.2d 498, 500 (2d Dep't 1992); *People v. Quinones*, 61 A.D.2d 765, 766, 402 N.Y.S.2d

196, 197 (1st Dep't 1978); *People v. Garafolo*, 44 A.D.2d 86, 88, 353 N.Y.S.2d 500, 501 (2d Dep't 1974).

The federal courts also have documented police non-credibility in both criminal and civil cases:

> Informal inquiry by the court and among the judges of this court, as well as knowledge of cases in other federal and state courts, has revealed anecdotal evidence of repeated, widespread falsification by arresting police officers of the New York City Police Department. Despite numerous inquiries by commissions and strong reported efforts by the present administration-through selection of candidates for the police force stressing academic and other qualifications, serious training to avoid constitutional violations, and strong disciplinary action within the department-there is some evidence of an attitude among officers that is sufficiently widespread to constitute a custom or policy by the city approving illegal conduct of the kind now charged.

Colon v. City of New York, et. al, Nos. 09-CV-8, 09-CV-9, 2009 WL 4263362, at *2 (E.D.N.Y. Nov. 25, 2009) (Weinstein, J.); *see also United States v. White*, 692 F.3d 235, 239, 249-51 (2d Cir. 2012) ("Evidence that might lead a jury to conclude that the officer was willing to lie in a similar case in order to secure a criminal conviction is both relevant and probative"); *United States v. Cedeño*, 644 F.3d 79, 82–83 (2d Cir. 2011).

Twenty years ago, one author documented that many police officers began "lying to evade the consequences of the exclusionary rule" after the Supreme

Court's decision in *Mapp v. Ohio*, 367 U.S. 643, 650-59 (1961).[9] The tactic became "so common and so accepted in some jurisdictions" that police officers themselves – NYPD officers, no less – coined the term "testilying" to refer to it.[10] Even former prosecutors have described the practice as "routine, commonplace, and prevalent."[11] A recent article confirms that "systemic lying by police" remains a serious problem and, if left unchecked – including by the judicial branch – it threatens the legitimacy of our criminal justice system by "signifying that truth is not paramount in the courtroom."[12] Given the rate and damage done even by one episode of police lying, one scholar has emphasized the need for "full dress cross examination of police witnesses."[13] Here, the lower courts did exactly the opposite, shielding the officers from fair cross-examination.

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[9] Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. Colo. L. Rev. 1037, 1040 (1996). Slobogin's account of testilying continues to spark academic commentary. *See, e.g.*, Julia Simon-Kerr, *Systemic Lying*, 56 Wm. & Mary L. Rev. 2175, 2201-08, 2208 (2015) (offering an updated analysis of the phenomenon, and concluding that "even when they have every reason to disbelieve officers, judges routinely admit evidence that, from a legal perspective, clearly should be excluded"); Melanie D. Wilson, *An Exclusionary Rule for Police Lies*, 47 Am. Crim. L. Rev. 1, 4 n.20 (2010) (discussing testilying in connection with "the evidence and effects of police lies").

[10] Slobogin, *Testilying*, 67 U. Colo. L. Rev. at 1041-42 & n.11.

[11] *Id.* (noting that the 1994 "Mollen Report" on NYPD corruption addressed the phenomenon, which typically occurs during a case's investigative and pretrial stages, with police lying about the illicit gathering of evidence to avoid application of the exclusionary rule) (internal quotation marks and citations omitted).

[12] Simon-Kerr, *Systemic Lying*, 56 Wm. & Mary L. Rev. at 2176.

[13] David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 Am. J. Crim. L. 455, 464, 496-98 (1999).

According to the Presidential Task Force on 21st Century Policing: "Trust between law enforcement agencies and the people they protect and serve is essential to democracy. It is key to the stability of our communities, the integrity of our criminal justice system and the safe and effective delivery of policing services."[14] Unfortunately, that trust has dwindled, placing "the integrity of our criminal justice system" at risk. A recent Gallup poll reveals that confidence in the police has hit a twenty-two year low.[15] It is, of course, not news to this Court that "[t]he actions of police in certain U.S. cities – including Ferguson, Missouri; Staten Island, New York; and North Charleston, South Carolina – have recently come under scrutiny after black men were killed while being apprehended by white police officers."[16] Not surprisingly, in the African-American community in particular, these recent events have exacerbated "already negative views of the police."[17]

The Confrontation Clause requires that the reliability of evidence be tested in the "crucible" of cross-examination. *Crawford v Washington*, 541 U.S. 36, 61 (2004). *See* U.S. Const. Amend. VI. ("[t]he accused shall enjoy the right ... to be

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[14] 21st Century Presidential Task Force on Policing, http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf

[15] Jeffrey Jones, *In US, Confidence in Police Lowest in 22 Years,* Gallup, June 19, 2015. Available at: http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx

[16] *Id.*

[17] *Id.*

confronted with the witnesses against him"); NY Const., art. I, § 6 ("the party accused shall be allowed to ... be confronted with the witnesses against him or her"). *See* McGhee App. Br. at 31-32, Smith App. Br. at 19-20, Ingram App. Br. at 13-15.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis , 415 U.S. at 316. The defense is, the Court held, entitled to "effective" cross-examination: "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.*

Amicus asks this Court to rule that the trial courts must allow standard impeachment of police witnesses when the defense has a good faith basis to do so, and the testimony is relevant to witness credibility going to facts at the center of the case.

CONCLUSION

The trial courts in *Smith*, *Ingram* and *McGhee* all erred by precluding the defendants from cross-examining key police witnesses based on prior bad acts alleged in civil rights complaints filed against them. By affirming the convictions,

the First Department diverged from over a hundred years of jurisprudence broadly construing the types of information that may be used to cross-examine witnesses. For all of the reasons set forth above, the Society respectfully requests that this Court reverse the decisions below, vacate the convictions, and remand for new trials.

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Respectfully submitted,

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