

Conviction Review Today: A Guide for Prosecutors



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Prosecutors' Center for Excellence

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Introduction

“Justice cannot be for one side alone, but must be for both.”

Eleanor Roosevelt

Goal of the Paper

Conviction review deserves priority by prosecutors. Uncovering actual innocence is an essential part of a prosecutor’s work. As articulated by Lake County (Illinois) State’s Attorney Michael Nerheim:

“This is every bit as [much] a part of a prosecutor’s job as the initial trial, and it’s something that not only should we, but we have to, as prosecutors, be leading the charge on this. It is our responsibility.”¹

Prosecutors have implemented conviction review in a variety of ways, often depending on available resources. Some offices create a separate unit with its own designated staff, while others create a conviction review process that uses various resources from the entire office on a case-by-case basis. Regardless of the method used, key objectives for prosecutors include:

- Creating a specialized process or unit to review claims of innocence and remedy wrongful convictions in the furtherance of justice,
- Enhancing community confidence in the criminal justice system, and
- Continuing to foster an office wide culture of integrity and creating prosecutor best practices to reduce the likelihood of future wrongful convictions.

The goal of this paper is to provide guidance and encouragement for prosecutors as they embark on the important process of conviction review. In years to come, we hope that conviction review will become a standard and valued expression of a

¹ Telephone interview with Michael G. Nerheim, State’s Attorney, Lake County, Illinois. Notes on file with PCE. (02/19/2020).

prosecutor’s commitment to justice.²

Structure and Content of the Paper

This paper is divided into two parts. The first gives an overview of the various types of conviction review in which prosecutors participate. The second provides guidance on how prosecutors in any sized office can develop or enhance a Conviction Review Unit or conviction review process. The units performing conviction review in a prosecutor office have various names, but for the purpose of this paper such a unit will be referred to as a Conviction Review Unit (CRU).

To obtain current information about the conviction review process in prosecutor offices, the Prosecutors’ Center for Excellence (PCE) conducted original research including interviews with 18 current and former prosecutors doing conviction review work from 16 offices throughout the United States, reviewed available CRU websites and forms, and examined related literature and other sources. PCE’s review has found 67 prosecutor offices that maintain a CRU or a formalized conviction review process to review claims of innocence, as well as six statewide conviction review processes.³ In addition, a 2019 survey of prosecutors in 20 states revealed that 100 prosecutor offices in those states have some form of conviction review, including formal or informal conviction review.⁴ Undoubtedly, further research would reveal additional prosecutor offices that have embraced conviction review.

² As recently as February 2019, the New York State Bar Association’s Task Force on Wrongful Convictions recommended that every district attorney’s office in the state develop a specialized conviction review unit or equivalent effort as a new best practice. Task Force on Wrongful Convictions, Report of Task Force on Wrongful Convictions, New York State Bar Association, 6, 02/08/2019, <https://nysba.org/report-on-the-task-force-on-wrongful-convictions/> (last visited 07/07/2020).

³ See Appendix *infra* for chart containing links to CRU webpages, statewide programs and 2019 Prosecutor Survey chart.

⁴ This survey was part of the National Prosecutor Consortium Project, and it asked a variety of questions to prosecutors about their work including: “Does your office have a Conviction Review Program (a person or unit that reviews claims of postconviction innocence), Yes or No.” The scope of the question included all types of conviction review ranging from a CRU to an office with a conviction review process handled by a single person. Further research is needed to identify what type of program exists in each of the offices that responded affirmatively to the survey question. Some of the 67 identified CRUs are included in the survey responses. See Appendix *infra* for 2019 Prosecutor Survey chart.

Executive Summary

The following is a summary of the report’s guidance on developing or enhancing conviction review in a prosecutor office. The full report includes examples from prosecutor offices of all sizes and a fuller discussion of the various challenges faced by a CRU.

Types of Conviction Review

- **Conviction Review Unit:** A conviction review unit is a distinct unit within a prosecutor office, or in an Attorney General’s Office, in which one or more experienced prosecutors are tasked with reviewing past cases in which outcomes are in question, most often due to a claim of actual innocence.
- **Conviction Review Process:** A conviction review process, usually found in smaller offices, has formal procedures for conducting conviction review on a case-by-case basis utilizing various resources from a prosecutor office.
- **Review of Systemic Issues:** These reviews investigate errors that could have negatively impacted a number of cases, rather than just one case. In some instances, this specialized review is assigned to the CRU and in others it is assigned as a special project within a prosecutor office.
- **Proactive Case Review:** Some offices conduct a review of cases in a systematic fashion on their own initiative, rather than through a request from an outside source. Most commonly, these offices have reviewed the available DNA evidence in older homicide cases from a time when DNA technology was unavailable or less discriminating.

Creating a CRU or a Conviction Review Process

The principles outlined in this quick guide apply to Conviction Review Units and conviction review processes. For the ease of expression, both will be referred to as CRU.

What are the benefits of a CRU?

- They offer an avenue to review and remedy claims of actual innocence and significant injustices in past convictions,
- They enhance community confidence in the criminal justice system, and

- They continue to foster an office-wide culture of integrity and can create prosecutor best practices to reduce the likelihood of future wrongful convictions.

Considerations for Starting a CRU:

- **Input:** Gather input on how to form a CRU from a wide array of stakeholders, including community members, the defense bar, local innocence project, other prosecutor offices with a CRU and members of the prosecutor’s office.
- **Decision Maker:** Clarify that the final decision will be made by the head of the office.
- **Office Morale:** Consider potential impacts on office morale and develop a plan for addressing this issue.
- **CRU Leader:** Choose a CRU leader who is experienced and well-respected. The leader can be a prosecutor from within the office, a prosecutor from another office or a former defense attorney.
- **Non-Legal Staff:** Assign non-legal staff to the CRU, either full-time or part-time, to track requests and outcomes and to assist with finding needed records and evidence. Some CRUs also have investigators to assist with reinvestigations.
- **CRU Independence:** Ensure the CRU’s independence from prosecutors and staff that previously handled the case and from the appeals unit that may be defending the case in question.
- **External Review Panel:** Decide whether to include an external review panel to provide advice to the CRU and the decision maker.

Developing Procedures for the CRU

- **Sources of Requests:** Identify the sources of requests for conviction review which can include incarcerated individuals, innocence organizations, defense counsel, prosecutors within the office, investigative reporters and others.
- **Criteria for Accepting a Claim:** Create criteria for when a claim will be accepted, such as the request must contain “a credible claim of innocence” or “clear evidence of injustice”.
- **Types of Cases Accepted:** List the types of crimes that will be considered for review and whether the unit will review pleas as well as trials. When the unit begins, the list may be limited to violent felonies and trial cases, and then expand if resources allow.

- **How to Prioritize:** Determine how to prioritize requested reviews, for example, the incarceration status of the defendant is often a factor considered by prosecutors.
- **Available Records and Evidence:** Determine how to assess whether the records and evidence needed for the review still exist, and if so, how they can be obtained.
- **Systemic Reviews:** Decide if the CRU will handle systemic reviews, such as when false evidence or a discredited witness has been uncovered that may have impacted a number of cases.



Policies and Forms

- **Written Policies:** Develop CRU written policies that outline the work of the CRU. Note that policies can change over time.
- **Standard Forms:** Create standard forms for the CRU such as an intake form, a letter acknowledging receipt of the application and a letter providing the outcome of the review.
- **Tracking System:** Establish a system for tracking requests for review, the progress of the review and the outcome.
- **Posting of the CRU Mission and Forms:** The mission of the CRU, the application form and application process can be posted on the office's website and in other locations that are available to the public.

Conducting the CRU Investigation

- **Role of the Original Prosecution Team:** Define the involvement, if any, of the original prosecutors or investigators of the case being reinvestigated.
- **Locate Files and Evidence:** Identify where files or evidence can be found. This can include prosecutor and police files, as well as records associated with post-judgment appeals and other litigation, forensic testing, court proceedings, parole, probation and the Department of Corrections.
- **Retesting of Evidence:** Determine whether any evidence should be retested.
- **Pending Litigation:** Decide whether any pending appeals or post-judgment motions related to the reinvestigated case should be stayed.
- **Role of Defense Counsel:** Define the role of defense counsel in the investigation and determine what agreements need to be made concerning the sharing of prosecutor files, obtaining defense files, waiver of attorney client privilege, timing of the investigation, interviewing witnesses and contact with the media.
- **Ethical Concerns or Wrongdoing:** Develop a method to address ethical concerns or wrongdoing committed by any actor involved in the case that is uncovered during the reinvestigation.
- **Contact with the Victim:** Determine when and how to reach out to the victim in the reinvestigated case and explore if services are needed for the victim.

Vacating a Conviction

- **Types of Exonerations:** There are a variety of scenarios that support an exoneration or dismissal. They include DNA evidence or newly discovered evidence that establishes actual innocence, interest of justice dismissals where cases cannot be retried and partial exonerations.
- **How to Vacate a Conviction:** The legal steps needed to vacate a conviction vary from state to state and case to case. Prior to vacating a conviction, the prosecutor should notify all relevant parties, including the victim and prior prosecution team, arrange for release of the defendant, and consult with defense counsel about needed support for the defendant. The prosecutor should also prepare for possible media attention.

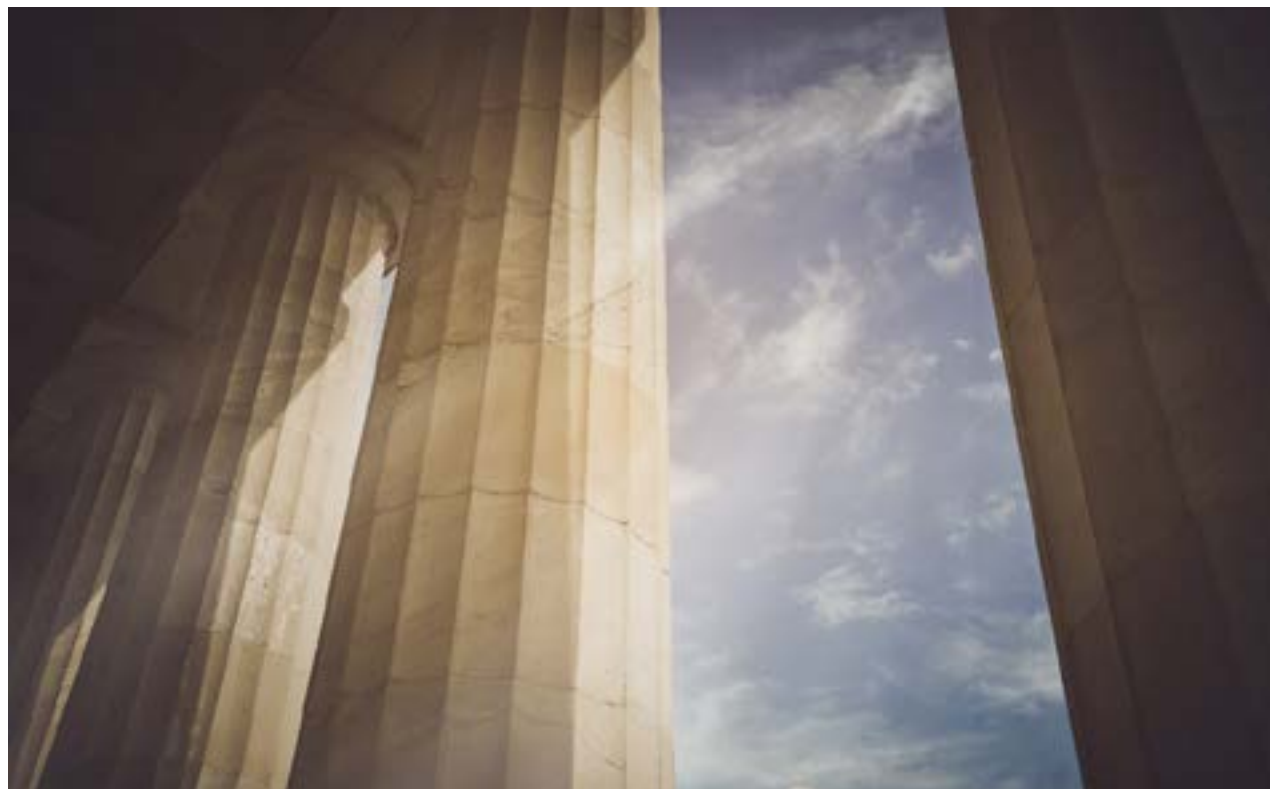
Get It Right the First Time

A CRU should work proactively to learn from mistakes of the past and seek to

prevent the mistakes from happening again. There are a variety of approaches to learning from lessons of the past:

- **Training:** Training can include common causes of error, examples of wrongful convictions and methods for improving initial investigations.
- **Checklists:** Lists of issues to consider during the initial review of a case can assist with identifying common causes of error.
- **Pre-Trial Exoneration Review Initiative:** Review cases where the prosecutor uncovered innocence prior to the final disposition of the case and seek to rectify the cause.
- **Root Cause Analysis:** Convene participants in the exonerated case to determine what went wrong and propose remedial action to prevent similar mistakes.

As there is no one way to create a CRU or a conviction review process, this paper presents the perspectives, challenges, With time, new approaches will emerge that will further broaden and improve the conviction review process.



Part 1 - Conviction Review Overview

The Start and Evolution of the Conviction Review Process

In 1992, the Innocence Project was formed as a law clinic at the Cardozo School of Law by Barry Scheck and Peter Neufeld. As stated by Barry Scheck, “[w]e knew that this new DNA technology would not only prove people guilty, but also prove people innocent.”⁵ As their work produced conclusive findings of innocence through DNA, their approach spread around the country, inspiring other defense groups and universities to create similar programs. The Innocence Project has since expanded into the Innocence Network, which has 67 member organizations, all around the country, that provide legal and investigative services to individuals seeking to prove their innocence.⁶ The work of the Innocence Project and related organizations has freed hundreds of innocent people since 1989.⁷

The work of the Innocence Project made clear that wrongful convictions occur despite the many procedural safeguards of the criminal justice system and in cases that may otherwise not have been reinvestigated. This was a wake-up call for prosecutors.

Over time, prosecutors embraced the need to have their own formalized conviction review processes to evaluate claims of innocence.

Conviction review, whether in a unit or as part of a formal process, is the manner in which a prosecutor re-examines a previously obtained conviction. Conviction review is “extrajudicial,” and “fact-based.”⁸ The review is outside of the judicial process used in typical criminal cases and is not constrained by procedural bars. The investigation is a search for the truth focused on assessing a prior conviction in order to determine its validity. The primary goal of conviction review is to assess whether an innocent person was convicted and, if so, to recommend ameliorative action in the interest of justice.⁹

5 Innocence Project, *DNA's Revolutionary Role in Freeing the Innocent*, 04/18/2018, <https://www.innocenceproject.org/dna-revolutionary-role-freedom/> (last visited 08/06/2020).

6 Innocence Network, <https://innocencenetwork.org/about/> (last visited 08/06/2020).

7 Innocence Project, *Exonerate the Innocent*, <https://www.innocenceproject.org/exonerate/> (last visited 07/09/2020).

8 John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 2, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020).

9 Issues at a Glance: Internal Oversight, *Accountability and Performance Issues: Conviction Integrity Units*, Fair and Just Prosecution, 2017, <https://fairandjustprosecution.org/wp-content/uploads/2019/08/CONVICTION-INTEGRITY-STATEMENT-OF-PRINCIPLES.PDF> (last visited 07/08/2020).

The first CRU in the United States was formed in 2004 in the Santa Clara District Attorney's Office in California.¹⁰ The next was created in 2007 in Dallas and became a model for other offices. After studying the Dallas CRU, Cyrus Vance, Jr., the newly elected District Attorney of New York County, established a CRU called the Conviction Integrity Program in 2010. Since then, the number of CRUs has grown as prosecutors have increasingly embraced the concept. This study has identified 67 prosecutor offices with a CRU, as well as six statewide units.

It is important to note that in the past prosecutors have exonerated the innocent without a formal conviction review process. Most notably, in 2002, the New York County District Attorney Robert M. Morgenthau conducted his own investigation and exonerated the Central Park Five for the 1989 rape and beating of the Central Park Jogger.¹¹ Though justice was ultimately done in that case, the concept of a CRU had not been fully developed at that time.

Although most prosecutor offices do not yet have specialized CRUs, often due to lack of resources, many offices have a conviction review process, which can be formal or informal. A formal process has pre-existing protocols for performing reviews which are usually listed on an office's website, whereas an informal process addresses claims of innocence on an *ad hoc*, case-by-case basis. A 2019 survey of prosecutors in 20 states revealed that 100 prosecutor offices in those states have some form of conviction review, including formal or informal conviction review.¹² A broader survey is needed to identify all prosecutor offices that engage in conviction review and to learn more about their processes.

A recent trend has been the development of a statewide CRU. Attorneys General

[TY-STATEMENT-OF-PRINCIPLES.PDF](https://fairandjustprosecution.org/wp-content/uploads/2019/08/CONVICTION-INTEGRITY-STATEMENT-OF-PRINCIPLES.PDF) (last visited 07/08/2020).

10 John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 10, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020).

11 Robert D. McFadden, *Robert Morgenthau, Longtime Manhattan District Attorney, Dies at 99*, NY Times, <https://www.nytimes.com/2019/07/21/nyregion/robert-morgenthau-dead.html> (last visited 08/14/2020) (also noting that the Innocence Project's Barry Scheck called Morgenthau's action in the Central Park Five case “his finest hour”).

12 This survey was part of the National Prosecutor Consortium Project, and it asked a variety of questions to prosecutors about their work including: “Does your office have a Conviction Review Program (a person or unit that reviews claims of postconviction innocence), Yes or No.” The scope of the question included all types of conviction review ranging from a CRU to an office with a conviction review process handled by a single person. Further research is needed to identify what type of program exists in each of the offices that responded affirmatively to the survey question. Some of the 67 identified CRUs are included in the survey responses. See Appendix *infra* for 2019 Prosecutor Survey chart.

in several states have instituted statewide CRUs.¹³ These units often provide assistance to smaller offices that do not have the resources for complex conviction review.



Size and Number of Prosecutor Offices

Before explaining the various types of conviction review, it is important to put the prosecutor offices into context. They come in many sizes and have varying resources for specialized programs. According to the most recent data from the Bureau of Justice Statistics, there are 2,330 prosecutor offices across the United States.¹⁴ Of that number, 74% serve fewer than 100,000 constituents or have only part-time prosecutors.¹⁵ A Missouri prosecutor office, in a county of 67,000 people, is an example that falls within this range. The office has six attorneys, including the elected prosecutor, who each manage heavy caseloads.¹⁶ Conviction review in an office of this size will look very different from a program in an office with hundreds of prosecutors. This paper provides various suggestions for how offices both large and small can engage in conviction review.

¹³ See New Jersey Office of the Attorney General, Statewide Conviction Review Unit, <https://nj.gov/oag/opia/cru.html> (last visited 08/10/2020); New York Attorney General, Conviction Review Bureau, <https://ag.ny.gov/bureau/conviction-review-bureau> (last visited 08/10/2020); Pennsylvania Office of the Attorney General, Conviction Integrity Unit, <https://www.attorneygeneral.gov/ciu/> (last visited 08/10/2020); Delaware Attorney General, Actual Innocence Program, <https://attorneygeneral.delaware.gov/publictrust/actual-innocence-program/> (last visited 08/10/2020); Michigan Department of Attorney General, Conviction Integrity Unit, https://www.michigan.gov/ag/0,4534,7-359-82917_96122_96123-510853--,00.html (last visited 08/10/2020). See also chart in *Appendix*.

¹⁴ See Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 – Statistical Tables*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1, 12/2011, <https://www.bjs.gov/content/pub/pdf/psc07st.pdf> (last visited 07/08/2020).

¹⁵ See *Appendix infra* for chart on State Prosecutor Offices by Population Served.

¹⁶ See Mark Marberry, *Gilliam Talks About Office Assessment*, Daily Journal, 07/19/2020 https://dailyjournalonline.com/news/local/crime-and-courts/gilliam-talks-about-office-assessment/article_8ae3ad24-0f08-50ee-bc09-d9479e93bd81.html (last visited 08/12/2020).

Conviction Review Units

A standard CRU is a distinct unit within a prosecutor's office in which one or more experienced criminal lawyers are tasked with reviewing past cases in which outcomes are in question, most often due to a claim of actual innocence. Though a review of actual innocence is common to all such units, some have a broader view of the scope of their work to include such issues as: excessive sentences, serious due process violations and systemic irregularities. Given the need for dedicated lawyers and staff, CRUs are usually found in large- and medium-sized offices, but not always.

Dallas County District Attorney's Office, Texas

Population: 2.6 million; Number of Prosecutors: 280

- **Staff:** Three assistant district attorneys, an administrative legal assistant and an investigator. A grant funds an additional attorney, investigator and an administrative assistant.
- **Scope:** Reviews actual innocence for all cases, pleas and trials. Additional claims will be reviewed once an actual innocence claim is accepted. In the interest of justice, and on a case-by-case basis, other types of claims may also be accepted for review.
- **Final Decision:** The district attorney.
- **Other:** The CRU serves as the office's liaison to the Texas Forensic Science Commission and provides training for the district attorney's office and other groups on CRU-related issues.¹⁷

¹⁷ The information in this section is based on a telephone interview with Cynthia Garza, Special Fields Bureau Chief, Dallas County's District Attorney's Office, Texas. Notes on file with PCE. (02/24/2020) and see Dallas County District Attorney, Conviction Integrity Division, <https://www.dallascounty.org/government/district-attorney/divisions/conviction-integrity.php> (last visited 08/10/2020).

Nevada County District Attorney's Office, California
Population 100,000; Number of Prosecutors: 11

- **Staff:** One supervising assistant district attorney and one secretary. Office investigators are employed as needed.
- **Scope:** Reviews actual innocence for all cases, pleas and trials.
- **Final Decision:** The district attorney makes the final decision, following round-table discussions with other experienced prosecutors.¹⁸

Statewide Assistance with Conviction Review¹⁹

Attorney General Conviction Review

As elected state officers with large budgets and many staff, state attorneys general can offer direct conviction review support to small district attorneys' offices with more limited resources. State attorneys general have formed statewide CRUs in Delaware²⁰, Michigan²¹, New Jersey²², New York²³ and Pennsylvania²⁴. Attorney General CRUs can be an excellent way for prosecutors in small offices to receive needed assistance with conviction review.

¹⁸ The information in this section is based on a telephone interview with Christopher Walsh, Assistant District Attorney, Nevada County District Attorney's Office, California. Notes on file with PCE. (02/24/2020).

¹⁹ Although not the focus of this paper and existing outside of prosecutor offices, a state-wide innocence commission provides a statutory approach to conviction review. In 2006, the North Carolina General Assembly created the North Carolina Innocence Inquiry Commission (NCIIC). The NCIIC has acted as a centralized review board for actual innocence claims throughout North Carolina since 2017. See North Carolina Innocence Inquiry Commission, [HTTP://INNOCENCECOMMISSION-NC.GOV/](http://innocencecommission-nc.gov/) (last visited 08/10/2020).

²⁰ See Delaware Attorney General, *Actual Innocence Program*, [HTTPS://ATTORNEYGENERAL.DELAWARE.GOV/PUBLICTRUST/ACTUAL-INNOCECE-PROGRAM/](https://attorneygeneral.delaware.gov/publictrust/actual-innocence-program/) (last visited 08/10/2020)

²¹ George Hunter, *Michigan Attorney General Launches Wrongful Conviction Unit*, The Detroit News, 04/10/2019, [HTTPS://WWW.DETROITNEWS.COM/STORY/NEWS/2019/04/10/MICHIGAN-ATTORNEY-GENERAL-LAUNCHES-WRONGFUL-CONVICTION-UNIT/3421148002/](https://www.detroitnews.com/story/news/2019/04/10/michigan-attorney-general-launches-wrongful-conviction-unit/3421148002/) (last visited 07/08/2020).

²² David Wildstein, *Grenval Forms Conviction Review Unit, Cold Case Unit*, New Jersey Globe, 04/11/2019, [HTTPS://NEWJERSEYGLOBE.COM/FR/GREWAL-FORMS-CONVICTION-REVIEW-UNIT-COLD-CASE-UNIT/](https://newjerseyglobe.com/fr/grewal-forms-conviction-review-unit-cold-case-unit/) (last visited 07/08/2020).

²³ See New York Attorney General, *Conviction Review Bureau*, [HTTPS://AG.NY.GOV/BUREAU/CONVICTION-REVIEW-BUREAU](https://ag.ny.gov/bureau/conviction-review-bureau) (last visited 08/10/2020).

²⁴ See Pennsylvania Office of the Attorney General, *Conviction Integrity Unit*, [HTTPS://WWW.ATTORNEYGENERAL.GOV/CIU/](https://www.attorneygeneral.gov/ciu/) (last visited 08/10/2020).

New York Attorney General's Office

In 2012, the New York Attorney General's Office (NYAGO) created a Conviction Review Bureau (CRB).²⁵ The attorney general does not have jurisdiction to review a claim of innocence, and therefore cannot conduct an independent review of the case without the agreement of the district attorney with jurisdiction over the matter. If the CRB receives a request for review, it will conduct an initial screening and forward the request to the district attorney with jurisdiction over the case. The CRB will then follow up with that office to check in on its processing of the transferred case but will have no additional contact with the case.

The CRB will become more involved in a conviction review if it receives a request for assistance from a district attorney, usually due to lack of resources or a conflict. A district attorney can ask the CRB to assist with anything from conducting a full reinvestigation to supplying specific resources, such as paying for forensic experts, assisting with interviewing witnesses and providing guidance on avenues of reinvestigation.

The CRB has a chief, an assigned analyst, clerical staff, and occasionally a student intern. The CRB also has access to any staff within the NYAGO, including investigators, if needed.²⁶

Mutual Assistance

Another approach to statewide assistance for prosecutors is one in which prosecutors provide voluntary assistance to fellow prosecutors who may not have the resources or expertise to re-investigate an old case. This approach can be particularly helpful for small prosecutor offices.

²⁵ See New York Attorney General, *Conviction Review Bureau*, [HTTPS://AG.NY.GOV/BUREAU/CONVICTION-REVIEW-BUREAU](https://ag.ny.gov/bureau/conviction-review-bureau) (last visited 08/10/2020).

²⁶ The information in this section is based on a telephone interview with Gail Heatherly, Senior Counsel, Criminal Justice Division and Bureau Chief, Conviction Review Bureau, Office of the Attorney General of New York. Notes on file with PCE. (02/28/2020).

Mutual Assistance Committee of the New York District Attorney's Association

The District Attorneys Association of the State of New York (DAAS-NY) created the Mutual Assistance Committee (MAC), composed of DAASNY leadership, to assist with conviction review. New York district attorneys can request the MAC's assistance with conviction review. The scope of the review is decided by the requesting district attorney. If the MAC receives a request for assistance with a reinvestigation, it can create a "Case Review Team" of one or more experienced prosecutors from a pool of volunteers drawn from other prosecutor offices around the state. After the review, the MAC presents its recommendations to the requesting district attorney, who maintains the final decision-making authority for any action taken flowing from the review.

Conviction Review Process

Many offices do not have CRUs, but instead have formalized processes for reviewing convictions. In this model, an office has a protocol for accepting claims and designating a prosecutor to lead the review. Thus, the designated prosecutor can vary from case to case.²⁷ These protocols are usually posted on the office's website. A conviction review process differs from an *ad hoc* system in that it has a pre-determined method for receiving, investigating and resolving claims of innocence. An office of any size can create a formal conviction review process, as the example of the Putnam County District Attorney's Office illustrates below.



²⁷ Multnomah County (Portland), Oregon established a centralized process of review through a position referred to as the "post-conviction deputy." The deputy does not have dedicated support staff, but rather coordinates with prosecutors and investigators on an as-needed basis based on the volume of the work. See Zoom Interview with Rod Underhill, Multnomah County's District Attorney's Office (retired). Notes on file with PCE. (05/15/2020).

King County Prosecuting Attorney's Office (Seattle), Washington State

Population: 2.25 million; Number of Prosecutors: 175²⁸

- **Staff:** A prosecutor is appointed to review a claim as needed.
- **Scope:** In the interest of justice, the office will accept cases from almost any source and for any matter, including petitions for clemency, procedural irregularities and over-sentencing.
- **Final Decision:** The elected prosecuting attorney.²⁹

Putnam County District Attorney's Office, New York

Population: 100,000; Number of Prosecutors: 10

- **Staff:** The elected district attorney and an investigator conduct the review. The help of additional staff is added as needed.
- **Scope:** An initial claim of actual innocence is required, but other issues will be reviewed once the case is accepted.
- **Final Decision:** An office investigator and two outside defense counsel review the case independently and provide their opinions separately to the district attorney. The decision is made by the district attorney based on the reviews from inside and outside the office.³⁰

Review of Systemic Issues

Prosecutors may need to review cases in which certain systemic issues create the potential for error.³¹ These reviews can occur even if an office does not have a

²⁸ The office has a total of 250 civil and criminal attorneys.

²⁹ The information in this section is based on a telephone interview with Mark Larson, Former Chief Deputy, Criminal Division, King County Prosecuting Attorney's Office of the State of Washington. Notes on file with PCE. (10/21/2019).

³⁰ The information in this section is based on a telephone interview with Robert Tendy, District Attorney, Putnam County's District Attorney's Office, New York. Notes on file with PCE. (05/26/2020).

³¹ See Barry Scheck, *Conviction Integrity Units Revisited*, 14 Ohio State Journal of Criminal Law 705, 720-722, 2017, https://kb.osu.edu/bitstream/handle/1811/80789/OSJCL_V14N2_705.PDF (last visited 07/08/2020) (discussing systemic reviews by CRUs based on forensic science and misconduct concerns); see also Issues at a Glance: Internal Oversight, Accountability and Performance Issues: Conviction Integrity Units, Fair and Just Prosecution, 2017,

formalized CRU or conviction review process. System failures can stem from many sources, including errors in forensic science, technology or expert opinions. Errors or misconduct by law enforcement, the prosecution or defense can also trigger the need for a retroactive review.³² So, rather than investigating a claim of innocence related to a specific case, these reviews investigate errors that could have negatively impacted a number of cases. In some instances, this specialized review is assigned to the CRU and in others it is assigned as a special project within a prosecutor’s office.

Review of a Detective

In 2013,³³ the Kings County District Attorney’s Office’s CRU in Brooklyn, New York, instituted a review of some 150 cases involving New York Police Department Detective Louis Scarcella, a “charismatic and ostensibly productive homicide detective.”³⁴ Scarcella’s cases have accounted for some 32% of the Brooklyn CRU’s overturned murder convictions, with many additional cases still under review.³⁵

<https://fairandjustprosecution.org/wp-content/uploads/2019/08/Conviction-Integrity-Statement-of-Principles.pdf> (last visited 07/08/2020) (discussing a broad purview for CRUs); John Hollway, Conviction Review Units: A National Perspective, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 77-78, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020) (highlighting CRUs as a means of addressing concentrated incidences of misconduct due to particular actors).

32 See Grace Huack, Prosecutors Have Thrown Out Nearly 100 Convictions Tied to ‘Rogue’ Chicago Cop, USA Today, 02/12/2020, <https://www.usatoday.com/story/news/nation/2020/02/11/chicago-police-misconduct-convictions-tied-ronald-watts-vacated/4724876002/> (last visited 07/08/2020).

33 See Frances Robles & N.R. Kleinfield, Review of 50 Brooklyn Murder Cases Ordered, NY Times, 05/11/2013, <https://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html> (last visited 07/08/2020).

34 Noah Goldberg, Disgraced Detective Louis Scarcella to Testify at Hearing on 1998 Murder, Brooklyn Daily Eagle, 03/26/2019, <https://brooklyneagle.com/articles/2019/03/26/detective-louis-scarcella-testify-1998-murder/> (last visited 07/08/2020); Alan Feuer, Another Brooklyn Murder Conviction Linked to Scarcella Is Reversed, NY Times, 01/11/2018, <https://www.nytimes.com/2018/01/11/nyregion/scarcella-murder-conviction-reversed.html> (last visited 07/08/2020)

35 Noah Goldberg, Disgraced Detective Louis Scarcella to Testify at Hearing on 1998 Murder, Brooklyn Daily Eagle, 03/26/2019, <https://brooklyneagle.com/articles/2019/03/26/detective-louis-scarcella-testify-1998-murder/> (last visited 07/08/2020).

Proactive Case Review

Some offices conduct a review of cases in a systematic fashion on their own initiative, rather than through a request from an outside source. Most commonly, these offices have reviewed the available DNA evidence in older homicide cases from a time when DNA technology was unavailable, or in which an older, less discriminating DNA test was used.

St. Louis Circuit Attorney’s Office, Missouri
Population: 300,000; Number of Prosecutors: 60

In 2001, the Circuit Attorney of St. Louis, Missouri formed the Post-Conviction DNA Review project.³⁶ The Circuit Attorney tasked this unit, which was staffed by area law students under the supervision of an experienced attorney, with reviewing over 1,400 qualifying convictions that had occurred before DNA technology was used in Missouri courts.³⁷ The unit collected existing documentation and evidence to complete its review and retested defendants’ DNA against available evidence from the old crime scenes.

The bulk of this review was proactive and took place within the first year and a half of the project. After that initial round of review was completed, however, the office continued to accept petitions from other defendants asking for reviews of their cases. Such petitions continued to be submitted until the early 2010s. Throughout the life of the project, about five defendants were exonerated due to the Circuit Attorney’s Office’s efforts.³⁸

36 Sam Levin, Rodney Lincoln: Decades After Conviction for Murder, Hearing on DNA Gives Family Hope, Riverfront Times, 09/13/2013, <https://www.riverfronttimes.com/newsblog/2013/09/13/rodney-lincoln-decades-after-conviction-for-murder-hearing-on-dna-gives-family-hope> (last visited 07/08/2020).

37 *Id.*

38 The information in this section is based on a telephone interview with Jennifer Joyce, former Circuit Attorney, City of St. Louis in the State of Missouri. Notes on file with PCE. (02/11/2020) (Ms. Joyce also serves as a Senior Attorney and Communications Director for the Prosecutors’ Center for Excellence). This section is also based on a telephone interview with Ed Postawko, former Assistant Circuit Attorney, St. Louis Circuit Attorney’s Office. Notes on file with PCE. (01/29/2020).

Colorado Attorney General's Office

In 2009, the Colorado Attorney General's Office formed the Colorado Justice Review Project,³⁹ a federally funded initiative that examined felony cases in which DNA analysis could possibly identify wrongfully convicted inmates.⁴⁰ The Colorado Attorney General's Office partnered with the Denver District Attorney's Office, the University of Denver College of Law, the Colorado Bureau of Investigation, and the Colorado Public Defender's Office, to administer the program and select cases for review. In total, the project reviewed almost 5,000 cases and examined approximately 1,400 trial convictions.⁴¹ During the two years that the project ran, DNA re-testing led to the exoneration of one man.⁴²

Beyond providing DNA testing that could lead to possible exonerations, the project's findings also helped to recommend improvement to post-conviction case review, such as refining techniques for assessing the condition of surviving physical evidence and enhancing evidence retention procedures.⁴³ Further, the project informed ways to improve law enforcement techniques for investigating active cases and collecting physical evidence.⁴⁴

Part 2 - Creating Conviction Review in a Prosecutor's Office

³⁹ Press Release, *Attorney General Announces Colorado's Receipt of \$1.2 Million in Federal Funds to Start a DNA-Based Exoneration Program*, 10/01/2009, <https://www.denverda.org/wp-content/uploads/news-release/2009/justice-review-project.pdf> (last visited 07/08/2020); Nancy Petro, *Innovative DNA Initiatives Pay Off*, The Wrongful Convictions Blog, 04/30/2012, <https://wrongfulconvictionsblog.org/2012/04/30/innovative-colorado-dna-initiatives-pay-off/#more-3693> (last visited 07/08/2020).

⁴⁰ Timothy J. Fox, *Seeking Truth: Julie Selsberg Leads Effort Against Wrongful Convictions*, Washington University Law Magazine 20, 2013.

⁴¹ Timothy J. Fox, *Seeking Truth: Julie Selsberg Leads Effort Against Wrongful Convictions*, Wash. U. L. Mag. 20, 2013.

⁴² This Project led to the exoneration of Robert Dewey, who was wrongfully convicted of rape and murder. *See id.*

⁴³ *See* Press Release, *Attorney General Announces Colorado's Receipt of \$1.2 Million in Federal Funds to Start a DNA-Based Exoneration Program*, 10/01/2009, <https://www.denverda.org/wp-content/uploads/news-release/2009/justice-review-project.pdf> (last visited 07/08/2020); Nancy Petro, *Innovative DNA Initiatives Pay Off*, The Wrongful Convictions Blog, 04/30/2012, <https://wrongfulconvictionsblog.org/2012/04/30/innovative-colorado-dna-initiatives-pay-off/#more-3693> (last visited 07/08/2020).

⁴⁴ *See* Press Release, *Attorney General Announces Colorado's Receipt of \$1.2 Million in Federal Funds to Start a DNA-Based Exoneration Program*, 10/01/2009, <https://www.denverda.org/wp-content/uploads/news-release/2009/justice-review-project.pdf> (last visited 07/08/2020).

There is no one way to accomplish meaningful conviction review. The method a jurisdiction employs to develop a CRU or formal review process will vary according to its resources, issues presented, the culture of the prosecutorial office, community involvement and the engagement of the defense bar.

This section provides guidelines for developing or enhancing a CRU or conviction review process, using examples collected from interviews with prosecutors engaged in this work from offices of various sizes. The guidance below can be informative for offices with hundreds of prosecutors or for those with only a few and applies to the development of a CRU, a conviction review process or a hybrid of the two.

How to Start

Gathering Input

A prosecutor embarking on the development of a conviction review process can seek input from a variety of parties, including:

- Members of the prosecutor’s staff
- Prosecutors with an existing conviction review process
- Defense bar
- Local Innocence Project
- Elected officials
- Law enforcement
- Community members
- Previously exonerated persons

Morale

While all prosecutors take pride in doing justice, starting a CRU or conviction review process has the potential to negatively affect office morale. If an office pursues the review of a case in which the original trial lawyers are still in the office, they may disagree with the process or view it as an affront to their integrity. Even line prosecutors without any specific cases at stake may view the program as a challenge to the validity of their work. As a result, prosecutors might feel demoralized by such a unit and view it as a hostile force or as an unsympathetic reviewer looking over their shoulders rather than as a source of beneficial improvement for their office.

For some, by contrast, conviction review may signal that an office is committed to fostering a culture of integrity and rectifying error. As a result, those seeking to enter the profession may be more likely to seek positions in offices that have invested in the practice.

By consulting with staff about the form and purpose of conviction review, as well as explaining the reasons for its creation, the lead prosecutor can forge a renewed sense of partnership and mission in his or her office. When a CRU or conviction review process is created, its leader should outline his or her role and solicit feedback on an ongoing basis. This is particularly true if the head of the unit is new to the office or has been a defense attorney who may have been an adversary to the office in previous cases.

It is encouraging to note that as conviction review becomes a more standard part of an office’s work, prosecutors report that resistance diminishes, and that the work is now often applauded and appreciated by the staff.

Formation and Structure of Conviction Review

When establishing conviction review, a prosecutor office should carefully consider how to structure its conviction review process. The considerations below apply to both a distinct CRU with its own staffing and to a formalized conviction review process.

Decision Maker and Reporting Structure

The chief prosecutor of the jurisdiction in which the conviction in question has occurred should decide the disposition of case. This is the standard practice for prosecutor offices.

Most CRUs or prosecutors assigned as part of a conviction review process report directly to the chief prosecutor or to an executive staff member. This reporting structure avoids any potential conflict with other parts of the office that may have been or continue to be involved in the case.

Conviction Review Leader

The head of the CRU, or the person designated to lead the conviction review process, should be a highly experienced and respected attorney, who has a reputation for integrity and fairness within the legal community.⁴⁵ These qualities will go a long way in helping the conviction review leader to navigate the many difficult issues that can arise in the course of a reinvestigation. CRU leaders have been prosecutors from the same office that houses the unit (New York County, NY), a newly hired prosecutor from another office (Bronx County, NY), or a criminal defense attorney (Wayne County, MI and Clark County, NV). In Dallas County, Texas, the CRU started with a defense attorney as the CRU leader and is now headed by a career prosecutor. Selecting the right person to fit the CRU leader role is a challenge for each office. Some offices find that a seasoned prosecutor will provide the necessary leadership for their CRU, while others may determine that the fresh perspective of a career defense lawyer is desirable. If an outsider is brought into an office as a CRU leader, consideration should be given to designating a seasoned, respected prosecutor from within the office to provide support for his or her work.



⁴⁵ Task Force on Wrongful Convictions, *Report of Task Force on Wrongful Convictions*, New York State Bar Association, 6, 02/08/2019, <https://nysba.org/report-on-the-task-force-on-wrongful-convictions/> (last visited 07/07/2020).

New York County District Attorney’s Office (Manhattan), New York

Population: 1.6 million; Number of Prosecutors: 525

The New York County District Attorney’s Office (DANY) founded its Conviction Integrity Program (CIP) in 2010. Experienced prosecutors from within the office have led DANY’s CIP. This helped to secure buy-in, cooperation and respect from line prosecutors. The CIP is staffed with three senior attorneys and two analysts and can call on other resources in the office as needed. It is a unit independent from the Appeals Bureau. DANY’s CIP receives innocence claims from a variety of sources, including from the Innocence Project, the Office of the Appellate Defender, other defense organizations and pro se defendants. The CIP reviews hundreds of claims of various types per year and reviews claims of innocence in both felony and misdemeanor cases. When a claim is accepted, the investigation is assigned to a prosecutor with no prior involvement in the case. The CIP offers support and supervision for the reinvestigation. Following the investigation, the CIP develops recommendations and presents them to a group of experienced prosecutors for input. Once the recommendations are finalized, the CIP sends them to the district attorney via his general counsel for final approval. The district attorney makes the final decision.⁴⁶

Non-Legal Staffing

Where resources allow, it is beneficial to have a designated paralegal and investigator assigned to assist with conviction review. The paralegal can help with tracking requests and locating old documents, which can be a daunting and time-consuming task. An investigator is invaluable for a CRU as a conviction review case often requires a full reinvestigation, including contacting witnesses and locating evidence.

⁴⁶ The information in this section is based on a Zoom Interview with Consuelo Fernandez, Assistant District Attorney and head of the Conviction Integrity Program, New York County District Attorney’s Office, New York. Notes on file with PCE. (05/27/2020).

Independence from the Appeals Bureau

Where possible, it is best for a CRU to be kept separate from an appeals unit, as the appeals unit is charged with defending cases, and is not equipped to investigate claims of innocence. Unlike an appeals unit, a CRU pursues a fact-finding function that may be different from the legal considerations of an appeals bureau. Conflict may arise if the CRU re-investigates a case that the appeals bureau had previously defended. A separation between the CRU and the appeals unit is recommended in order to ensure the integrity of both processes.⁴⁷ It may be advisable, however, for an appeals unit to have a limited relationship with a CRU in which it may refer cases to the CRU for review.

Training

Training for lawyers, investigators and non-legal staff, particularly those involved in conviction review, in how to re-investigate an old case and the various past causes of wrongful convictions is a helpful way to start a unit or process. This will allow the staff to be mindful of the types of issues that can thwart a just result.

External Advisory Panels

It is always useful to get another point of view about a difficult matter and to receive feedback about conclusions drawn. Prosecutors have developed a variety of ways to seek input from outside their offices about re-investigations. The results of a reinvestigation can be presented for evaluation and critique to other prosecutors in the office (who were not previously involved in the case), other prosecutors in the state, or to an outside panel of experts. Combinations of these reviewers can also be used. An external advisory panel may be particularly useful for smaller prosecutor offices that may need additional expertise to evaluate a case.

⁴⁷ See John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 24-26, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020).

Lake County State's Attorney's Office, Illinois

Population: 700,000; Number of Prosecutors: 70

The Lake County State's Attorney's Office includes both a CRU and an independent review panel. The panel was founded in 2013 and the CRU was added in 2015. In the earliest days of the unit, the investigation was completed on a volunteer basis by members of the office, with the elected state's attorney performing much of the work himself.

The current CRU is staffed by a full-time attorney, an investigator and a paralegal and receives support from the office's staff as needed. All members of the independent review panel are from outside the county, and come from a variety of backgrounds, including civil rights lawyers and retired judges. After the CRU has completed a preliminary review and investigation of a claim and found it to have potential merit, the CRU will make a presentation to the panel. If needed for its review, the panel can request additional publicly available information from the CRU. Each panelist independently reviews the materials and when done, will meet with the panel to finalize a recommendation. While the panel is doing its study, the CRU will continue its parallel investigation, making its own determination. The recommendations from both the panel and the CRU are then submitted to the state's attorney to make the final determination. The CRU has received between 30 and 50 submissions and has exonerated four people.⁴⁸



⁴⁸ The information in this section is based on a telephone interview with Michael G. Nerheim, Lake County State's Attorney, Illinois. Notes on file with PCE. (02/19/2020).

Oneida County District Attorney's Office, New York
Population: 234,000; Number of Prosecutors: 24

Overseen by the chief assistant district attorney, the Oneida County District Attorney's Office's CRU assigns one assistant district attorney, with no involvement in the case, to lead the review and act as the "case-leader." The case-leader and other needed staff are assigned depending on their availability and the volume of work required. The prosecutor from the original case does not play a role in the review aside from disclosing his or her version of the facts to the case-leader. If the case-leader finds there is merit to the claim after performing an investigation, he or she then presents the case to the Oneida County District Attorney's Office CRU's Advisory Committee for its independent review.

The advisory committee consists of nine members: five assistant district attorneys, three law enforcement investigators, and one citizen from the community. The assistant district attorneys have varying levels of experience and play different roles within the office. Because many of the reviews require expertise in processing and analyzing evidence, the law enforcement officers are typically crime scene unit investigators. They offer expertise in reviewing the original police investigative work from the underlying case and analyzing evidence issues that arise in the course of the review. The advisory committee will vote on its recommendation for action and present the recommendation to the elected district attorney. Finally, the district attorney reviews the committee's recommendations and is the ultimate decision maker.⁴⁹

⁴⁹ The information in this section is based on a telephone interview with Michael Coluzza, First Assistant District Attorney, Oneida County's District Attorney's Office, New York. Notes on file with PCE. (02/06/2020).

Putnam County District Attorney's Office, New York
Population: 100,000; Number of Prosecutors: 10

In this small office, the elected district attorney and an investigator constitute the conviction review process. After a claim is accepted for review, the district attorney provides public case information to two defense attorneys who separately and independently review the case. The district attorney then makes the final decision based on his own review, input from the defense attorneys and round table discussions within his own office.⁵⁰

Sources of Conviction Review Requests

Conviction review requests, sometimes referred to as "petitions," begin the process of conviction review.⁵¹ These requests can originate from many sources, but the most typical include:

Defendants or Their Families

Prosecutors will receive letters or requests from defendants, who are often still incarcerated, or members of their families.

Innocence Organizations

Innocence Organizations will usually do a preliminary investigation to identify the cases with credible claims of innocence, rather than merely passing along any request that they have received. This preliminary investigation can provide useful information for the reinvestigation.

Defense Counsel

In some instances, the original defense counsel will seek a reinvestigation, and, in

⁵⁰ The information in this section is based on a telephone interview with Robert Tendy, District Attorney, Putnam County's District Attorney's Office, New York. Notes on file with PCE. (05/26/2020).

⁵¹ This paper uses terminology consistent with other works in this field and distinguishes CRU petitioners from those filing for appellate review. See John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 17 n.20, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020); Barry Scheck, *Conviction Integrity Units Revisited*, 14 Ohio State Journal of Criminal Law 705, 727, 2017, https://kb.osu.edu/bitstream/handle/1811/80789/OSJCL_V14N2_705.pdf (last visited 07/08/2020).

others, a new defense counsel will make the request. Consideration can be given to requesting for defense counsel to make a presentation outlining the basis for a claim of innocence. If a claim of ineffective assistance of counsel is made against the defense attorney on the case underlying the claim, it may complicate the CRU’s ability to work with the defense attorney who is the subject of the claim.

Prosecutor Office Staff

Prosecutors or their staff can raise concerns internally about convictions they think should be reinvestigated. These requests can come from any part of the office, including from the appeals unit. Prosecutors can also trigger systemic, proactive reviews, as discussed in Part 1 of this paper.

Post-Judgment Motions

Post-judgment motions, which can contain claims of innocence, are often sent to and responded to by the original prosecutor, or that attorney’s unit. To ensure that the review of these claims is unbiased, any post-judgment motion with a claim of innocence can be evaluated by someone other than the original attorney to determine whether an independent conviction review is necessary.

Investigative Reporters

Investigative reporters have successfully uncovered wrongful convictions and triggered lengthy and significant re-examinations by prosecutors of prior cases.⁵² However, the reporters may not always be knowledgeable about the relevant facts of a particular case or the applicable law and can sometimes draw incorrect conclusions.⁵³ Prosecutors can consider working with reporters to explain their review process, provide facts, and explain the laws germane to the case.

Intake and Tracking of Conviction Review Requests

Intake Form

In order to streamline the review process, an office can develop a standardized intake form or process for petitions. Many prosecutor offices engaging in conviction

52 See Dareh Gregorian, *Jess Friedman is 100% Guilty of Sexually Abusing Children*, Reinvestigation by Nassau County District Attorney Concludes, New York Daily News, 06/25/2013, <https://www.nydailynews.com/new-york/jess-friedman-100-guilty-child-abuse-article-1.1380786> (last visited 07/08/2020).
53 Kathryn Schulz, *How “Making a Murderer” Goes Wrong*, The New Yorker, 01/18/2016, https://www.newyorker.com/magazine/2016/01/25/dead-certainty?source=search_google_dsa_paid&gclid=EAIaIQobChMI7bO-53Pi-6GIVCL7ACH1oJgKZEAAAYASAAEGKUEvD_BwE (last visited 07/08/2020).

review choose to publish forms through their websites so anyone can make a request for review of a prior conviction. The websites will often include instructions and outline the types of cases that are accepted for conviction review. The on-line process should be as simple as possible and avoid legal terms that may be confusing or off-putting to someone without a legal education.⁵⁴ In order to increase accessibility, offices should accept petitions by mail and email as well as through their websites. Because most inmates lack access to the Internet, their petitions will generally arrive by mail, although other petitioners are more likely to use email.⁵⁵ In the spirit of flexibility and accessibility, hand-delivered petitions could also be accepted.

Pima County Attorney’s Office (Tucson), Arizona
Population: 1 million; Number of Prosecutors: 95

The Pima County Attorney’s Office’s CRU offers a Google Form for its constituents to submit petitions.⁵⁶ Additionally, the CRU accepts petitions for conviction review by email or mail to the CRU chief, thus, providing multiple avenues for petition submissions.⁵⁷ Pima County’s CRU website also outlines what is required for a petition to qualify for preliminary review.⁵⁸

Outreach

Prosecutor offices might further consider partnering with community groups as well as city halls, courts, libraries and other state and local government agencies to promote awareness of the conviction review process.

Tracking and Responding

Ideally, all requests received should be tracked and responded to with an acknowl-

54 See Appendix *infra* for chart containing links to CRU web pages.
55 Monica Anderson et al., *10% of Americans Don’t Use the Internet. Who Are They?*, Pew Research Center, FactTank, 04/22/2019, <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/> (last visited 11/08/2019)
56 See Pima County Attorney’s Office, Conviction Integrity Unit, <https://www.pcao.pima.gov/CIU.aspx> (last visited 08/10/2020).
57 See *id.*
58 See *id.*

edgment of receipt and some information about the process going forward. An office should develop a system to ensure that all claims received are properly recorded and processed for review. Outcomes for each request should be tracked as well.

Clark County District Attorney’s Office (Las Vegas), Nevada
Population 2.3 million; Number of Prosecutors: 170

The Clark County District Attorney’s Office’s CRU accepts requests for conviction review through an online form. In order to balance the conflicting goals of accessibility and wide outreach with efficiency, it responds to non-conforming petitions by sending the petitioner a copy of its intake form to facilitate the proper submission of the claim. The CRU also maintains a policy that every petitioner should receive a response.⁵⁹



⁵⁹ The information in this section is based on a telephone interview with Dan Silverstein, Chief Deputy District Attorney, Clark County District Attorney’s Office of the State of Nevada. Notes on file with PCE. (10/16/2019).

Criteria for Accepting a Claim

A number of different standards exist for accepting a case for conviction review. The availability of resources is an important consideration as even the most well-resourced office may not have the ability to investigate every request. CRUs will typically require a credible claim of innocence, though a variety of additional factors may also be taken into account.⁶⁰ It is interesting to note that some CRUs have reported receiving fewer claims than they expected, or that over time, the number of claims has diminished.⁶¹

The considerations for accepting a claim include:

Credible Claim of Innocence

A credible claim of innocence is a threshold question for accepting a case for conviction review. In assessing this, it is useful to consider the following questions:

- Has the applicant presented a claim of actual innocence?
- Is there newly discovered evidence, or evidence that was insufficiently investigated in the past?
- Is the claim inconsistent with earlier defenses?
- Was the claim known at the time of plea or trial?

Clear Evidence of Injustice

Evidence of clear injustice or a significant due process violation that taints the fairness of the conviction can trigger a review, though most offices require a credible claim of innocence as a first step before these other claims are addressed. In some instances, it is not possible to establish innocence, but the evidence clearly shows that the conviction was unfairly obtained and that a significant injustice was done.

⁶⁰ See John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 39, 04/2016, https://scholarship.law.upenn.edu/cgi/view-content.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020); Telephone interview with Cynthia Garza, Special Fields Bureau Chief, Dallas County’s District Attorney’s Office. Notes on file with PCE. (02/24/2020).

⁶¹ Telephone interview with Dan Silverstein, Chief Deputy District Attorney, Clark County District Attorney’s Office of the State of Nevada. Notes on file with PCE. (10/16/2019); Telephone interview with Michael G. Nerheim, State’s Attorney, Lake County, Illinois. Notes on file with PCE. (02/19/2020).

Nature of the Evidence

Certain types of evidence may heighten concerns about a wrongful conviction, especially in cases in which the conviction rests in large measure on that evidence without significant corroboration. Examples include cases relying on one-witness identification, hair or bite mark evidence, lengthy and coercive interrogations (particularly of juveniles), and the testimony of jailhouse informants. The mere existence of this evidence does not render the conviction invalid, but if there is little other evidence, the case may be worthy of reconsideration.

Type of Crime

Due to limited resources, an office may choose to review only serious felonies, such as homicides and rapes. Alternatively, an office may be open to all claims of innocence, with the understanding that there may be a backlog and that it will take time to review all of the cases.⁶² As resources become available and the CRU becomes more experienced, the CRU may broaden the types of crimes it accepts.

Incarceration Status of a Defendant

If a person seeking review is still in custody, the level of urgency is heightened and is a factor in considering whether to review the conviction and the priority of review.

The Availability of Records and Evidence

Records and evidence related to a case are essential to a review. Hunting for records and evidence is an important and time-consuming aspect of conviction review as a reinvestigation requires the access to original documents, witnesses and evidence. Ultimately, it may be impossible to review cases in which evidence has been destroyed or is missing due to the passage of time.

Trial or Plea

Some offices will only review trial cases and not pleas. Trials produce much more documentation potentially useful to the review process. By contrast, in some plea

62 The Wayne County Prosecutor’s Office’s CRU reviews petitions from any source, accepting claims that allege actual innocence and newly discovered evidence. It reviews petitions from felonies and misdemeanors stemming from both trial verdicts and guilty pleas. This has created a backlog owing to the CRU Director’s adherence to the principle that no case with a potentially valid claim should be turned away, even if it may be a long time before it is reviewed. The CRU prioritizes the cases with the petitioners serving lengthy sentences, and, as a result, misdemeanors tend to be at the rear of queue. Zoom Interview with Valerie Newman, Director, Conviction Integrity Unit, Wayne County Prosecutor’s Office, Michigan. Notes on file with PCE. (05/18/2020).

cases, there are few documents and there is little evidence to review. If pleas are reviewed, the prosecutor may consider what factors in the case may have caused the defendant to plead guilty despite being innocent.

Systemic Error

If there is a known systemic error, such as faulty forensic evidence or a discredited police officer, a prosecutor office can conduct a retrospective review of cases that were impacted by these issues. Examples of such a review can be found in Part 1 of this paper.

Flexibility

Some offices engaging in conviction review exercise flexibility in allowing for reviews of cases of clear injustice, a concept that is broader than actual innocence. The degree of flexibility can depend on available resources. Also, a case may be accepted for review if new credible information of innocence emerges after a re-investigation, after an appeal has upheld the verdict, or after a review was rejected earlier.

Wayne County Prosecutor’s Office (Detroit), Michigan⁶³
Population: 1.8 million; Number of Prosecutors: 200

The Wayne County Prosecutor’s Office considers a credible claim of innocence as a “gateway” to its CRU. Once a case is accepted by the unit on this basis, it may then expand its review to include other matters of injustice. The CRU may grant relief to a petitioner without proving actual innocence if the CRU uncovers error that impacted the fundamental fairness of the conviction. Where possible, these cases may be re-tried. If re-trial is no longer possible due to the unavailability of evidence or witnesses, the case may be dismissed.⁶⁴

63 The Wayne County Prosecutor’s Office’s conviction review program began its work in 2018 and is headed by an accomplished former defense attorney. The staff includes three full-time prosecutors, two part-time prosecutors, a full-time investigator, and one administrative support staffer. A current grant has allowed for an additional investigator and a part-time law student. The CRU has also had a steady stream of law interns supporting its work. Further, the CRU has received close to 1,300 applications in the two years it has been in existence and has granted relief in 19 cases.

64 The information in this section is based on a Zoom Interview with Valerie Newman, Director, Conviction Integrity Unit, Wayne County Prosecutor’s Office, Michigan. Notes on file with PCE. (05/18/2020).

Dallas County District Attorney's Office, Texas
Population: 2.6 million; Number of Prosecutors: 280

Although the Dallas County District Attorney's Office's CRU is primarily dedicated to reviewing cases involving claims of actual innocence, it will review other claims in which there is clear evidence of an injustice such as systematic errors. For example, the CRU discovered that prosecutors in Texas were overcharging on drug offenses based on legislative error. The CRU composed a list of those cases that had been wrongfully charged, advised the court, and sent a letter to those defendants and their last known counsel notifying them of the error, so they could take action to have their criminal records corrected.⁶⁵

Oneida County District Attorney's Office, New York
Population: 234,000; Number of Prosecutors: 24

The CRU accepted a petition from a man long out of prison arguing that he was "over-convicted" of inappropriate charges. Although the request was ultimately denied for lack of merit, the CRU was willing to complete an initial review of this type of claim.⁶⁶

Conviction Review Investigation

Re-investigating a closed case is a challenge. With the passage of time, memories fade, documents can be misplaced, witnesses can move away from a jurisdiction, and evidence can be destroyed. Thus, reinvestigation is a time-consuming process that requires significant resources. A variety of principles can guide a conviction review reinvestigation.

Role of the Original Prosecutor and Investigators

There is a general consensus that the prosecutors or investigators involved in the original conviction under review should not be in charge of the reinvestigation or responsible for the ultimate decision about the case.⁶⁷ Whether in truth or in appearance, these prosecutors and investigators cannot provide the independent and unbiased review that is so crucial to the CRU process. As a matter of professional courtesy, however, the original prosecution team should be notified of the decision before it is made public.

There are two schools of thought on whether the original prosecutor should be consulted during the reinvestigation. According to one view, the original prosecution team should be interviewed about the case, as they may have valuable information not known to others, provide background information about witnesses, or have insights into other avenues of inquiry.⁶⁸ Another view holds that in order to preserve the independence of the conviction review process and prevent any appearance of bias, the original prosecutors and investigators should only be consulted on a case-by-case basis, if there is a specific case-related reason to do so.⁶⁹

⁶⁷ Barry Scheck, *Conviction Integrity Units Revisited*, 14 Ohio State Journal of Criminal Law 705, 738, 2017, https://kb.osu.edu/bitstream/handle/1811/80789/OSJCL_V14N2_705.pdf (last visited 07/08/2020); John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 2, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020).

⁶⁸ Telephone interview with Mark Larson, Former Chief Deputy, Criminal Division, King County Prosecuting Attorney's Office of the State of Washington. Notes on file with PCE. (10/21/2019); Telephone interview with Ryan Couzens, Assistant Chief Deputy District Attorney, Yolo County District Attorney's Office of the State of California. Notes on file with PCE. (10/17/2019).

⁶⁹ Zoom Interview with Valerie Newman, Director, Conviction Integrity Unit, Wayne County Prosecutor's Office, Michigan. Notes on file with PCE. (05/18/2020).



⁶⁵ The information in this section is based on a telephone interview with Cynthia Garza, Special Fields Bureau Chief, Dallas County's District Attorney's Office, Texas. Notes on file with PCE. (02/24/2020).

⁶⁶ The information in this section is based on a telephone interview with Michael Coluzza, First Assistant District Attorney, Oneida County's District Attorney's Office, New York. Notes on file with PCE. (02/06/2020).

Wayne County Prosecutor's Office (Detroit), Michigan
Population: 1.8 million; Number of Prosecutors: 200

The reinvestigation includes no role for the prosecutor who originally handled the case, though, on a case-by-case basis, that prosecutor and others involved in the original investigation may be interviewed, if needed. In the interest of independence, the CRU will inform the original prosecutor of its conclusion after the review is completed and will use the opportunity to engage with the prosecutor to discuss the findings and why relief was granted. The goal is to preserve the impartiality of the CRU's review.⁷⁰

Re-investigating from Scratch

In order to gain a holistic picture of a case, a reinvestigation team can approach the review as if it were investigating from scratch, including re-interviewing witnesses. By re-examining every aspect of a case in this manner, the reviewers may free themselves from any assumptions underlying the original investigation. A conviction review investigation is a search for the truth and can take into account items that may have been excluded from the earlier investigation or trial for various reasons, including improper search and seizure, unavailability of a witness or new forensic techniques.

Finding the Files and Evidence

Locating files from previous cases is a major challenge, especially when these cases are decades old. Developing and maintaining a checklist of places to search for old records and evidence may prove beneficial. The search for old records can be time-consuming and is often a significant part of conviction review work. This task is well-suited for paralegals or interns. Files and evidence to locate include:

- Prosecutor's file
- Police file
- Parole or probation files
- Post-judgment appeals and other litigation

⁷⁰ The information in this section is based on a Zoom Interview with Valerie Newman, Director, Conviction Integrity Unit, Wayne County Prosecutor's Office, Michigan. Notes on file with PCE. (05/18/2020).

- Physical evidence and forensic evidence
- Department of Corrections records, including visitor logs, correspondence and jail calls
- Defense attorney files

Testing of Evidence

In some instances, particularly those in which forensic science techniques have improved since the time of the conviction or in which no testing was originally done, the testing or re-testing of probative evidence can be a fruitful avenue of reinvestigation. Additionally, questions regarding what should be tested, chain of custody, and who should pay for the testing need to be resolved.

Use of a Polygraph

Some prosecutors use a polygraph to interview defendants or witnesses as a means to test their credibility. Though polygraphs are generally not admissible at trial, they have been found to be effective in some re-investigations.⁷¹

Pending Appeals or Post-Judgment Motions

CRU review is one of many avenues by which defendants can challenge various aspects of their convictions. Thus, when an office receives a claim of actual innocence, there may be post-judgment claims such as appeals, post-judgment motions or habeas petitions pending in court regarding the same case. In order to allow the prosecutor to complete a thorough review of a case without the constraint of courtroom deadlines or hearings, the prosecutor may request that the defense stay the proceeding(s).⁷² If the motion is not stayed or if it is initiated while the reinvestigation is ongoing, the prosecutor may agree to resume or commence the reinvestigation after the resolution of a post-conviction motion, regardless of its outcome.

⁷¹ For example, Wayne County CRU uses polygraphs during reviews of cases involving actual innocence claims. A polygraph failure does not end the case, but a pass is considered helpful. See Telephone interview with Valerie Newman, Director of the Conviction Integrity Unit, Wayne County Prosecutor's Office of the State of Michigan. Notes on file with PCE. (05/18/2020).

⁷² Telephone interview with Mark Hale, Assistant District Attorney, Kings County District Attorney's Office, New York. Notes on file with PCE. (02/20/2020). The Kings County District Attorney's Office's CRU in Brooklyn will not commence an investigation if there is pending post-conviction litigation, unless the defendant discontinues the litigation. If the petitioner initiates any post-conviction litigation after the commencement of the CRU investigation, CRU will suspend the investigation without regard to what stage the investigation had reached. Once the post-conviction litigation is concluded, regardless of outcome, the petitioners may request the resumption of the CRU investigation.

Uncovering Ethical Concerns or Wrongdoing

During the course of a reinvestigation it is possible that some wrongdoing, intentional or unintentional, will be uncovered. This can come from almost any source including witness perjury, witness tampering, police misconduct, ethical violations by a prosecutor, improprieties by a judge, forensic irregularities, or ineffective assistance or wrongdoing by defense counsel.

Prosecutor wrongdoing can be a complex question for a CRU. The misconduct can be anything from an unintentional mistake to intentional withholding of evidence. The CRU should evaluate how material the misconduct was to the outcome of the case and whether it undermined the integrity of the proceeding. It is advisable for the CRU to anticipate these possibilities and have a process in place for handling findings of ethical concerns or wrongdoing by any party, but especially for prosecutors.

Prosecution of the Actual Perpetrator

In the event that a reinvestigation not only leads to an exoneration, but also uncovers sufficient evidence to charge someone else with the crime, the prosecution of the actual perpetrator can be handled by prosecutors outside of the conviction review process.

Outreach to the Victim

When re-investigating a case, careful attention must be given to when and how the victim is contacted. Most likely, the victim will believe that the case is behind him or her and that the person responsible for the crime has been properly held accountable. Prosecutors generally agree that the victim need not be contacted about every claim of innocence, but instead that the notification can wait until the investigation proceeds to a point at which there are serious concerns about the viability of the conviction. Prosecutors should be mindful of the devastating impact a reinvestigation and exoneration can have on a victim.⁷³ Needless to say, it is also important that a victim be contacted about the reinvestigation before the information becomes public or appears in the press.

⁷³ Former Assistant Circuit Attorney Ed Postawko, the former head of the St. Louis Circuit Attorney's Office's CRU, reflected that he encountered victims who were forced to reenter therapy from the simple fact of receiving a call about the case in which they were involved coming under review. Telephone interview with Ed Postawko, former Assistant Circuit Attorney, St. Louis Circuit Attorney's Office, Missouri. Notes on file with PCE. (01/29/2020).

How and when to contact the victim will depend on the facts of the case and the needs of the victim, but various factors to consider are:

- If and when does the victim need to be reinterviewed?
- Is there a need for a DNA sample from the victim?
- Will there be press coverage of the reinvestigation prior to a final decision?
- Who is best suited to contacting the victim? Depending on the facts of the case, it could be:
 - The original case detective, if it is someone the victim trusts
 - A victim advocate
 - A family member or friend
 - The prosecutor

Once the victim is contacted, the prosecutor should keep the victim informed as the investigation progresses and offer services to assist the victim with the inevitable trauma that a reinvestigation will cause.⁷⁴

Role of Defense Counsel

When defense counsel or an Innocence Organization requests a reinvestigation by the prosecution, most prosecutors provide them with the opportunity to present the evidence they have gathered in support of an exoneration and thereafter keep them updated on the progress of the reinvestigation. On a case-by-case basis, some re-investigations can be collaborative between the prosecutor and the defense. The degree of collaboration may be influenced by concerns such as the safety of witnesses, potential conflicts of interest (such as pending civil litigation), and the degree of reciprocal collaboration. Protocols for collaboration may vary from case to case.

To avoid conflict, it can be useful at the beginning of the reinvestigation for the prosecutor to develop ground rules with the defense for how the investigation will proceed. Some factors to discuss with the defense include:

⁷⁴ The Healing Justice Project, led by Jennifer Thompson, a well-known victim in a wrongful conviction, and Katie Monroe, formerly of the Innocence Project, provides excellent guidance for helping victims in these cases. See Healing Justice Project, <https://healingjusticeproject.org/> (last visited 07/09/2020).

Timing

As re-investigations can take a long time, it is helpful for the prosecutor to approximate a timeline for the reinvestigation, if possible, and provide regular updates to the defense on its progress.

Yolo County District Attorney’s Office, California
Population 220,500; Number of Prosecutors: 42

In Yolo County, California, the head of the CRU keeps defense counsel abreast of pertinent developments in the investigation. In one instance that resulted in an exoneration, the CRU completed a witness interview alongside the defense attorney. The degree of collaboration on the reinvestigation is decided on a case-by-case basis.⁷⁵

Sharing of Files

The parties should discuss the degree to which investigative files, documents, and evidence will be made available to defense and vice versa.



⁷⁵ The information in this section is based on a telephone interview with Ryan Couzens, Assistant Chief Deputy District Attorney, Yolo County District Attorney’s Office of the State of California. Notes on file with PCE. (10/17/2019).

Wayne County Prosecutor’s Office (Detroit), Michigan
Population: 1.8 million; Number of Prosecutors: 200

The defense counsel has an opportunity to make a presentation about the case and to participate throughout the investigation. The Wayne County Prosecutor’s Office’s CRU has adopted an open-file discovery approach except for documents containing potential safety concerns for witnesses, like the identity of confidential informants. The CRU attempts to review cases without asking petitioners to waive their attorney-client privilege, though on occasion, that request will be made. The CRU does request the petitioner’s file, however, including all potentially inculpatory evidence. The CRU’s director said:

“This is a search for the truth, so whatever they [the petitioners] have—the good, the bad and the ugly—I’m going to find it whether they give it to me or not. And if I find it and they had it and didn’t share it with me, I let them know it’s going to affect how I view their integrity because you shouldn’t be hiding anything”

The CRU director participates in almost every interview, along with an investigator and another attorney. The CRU normally does not include the defense attorney in witness interviews, as adding another attorney to the interview session alongside the CRU staff could be uncomfortable or intimidating for the witness. The interviews are usually recorded and subsequently shared with defense counsel. On occasion, the CRU has allowed defense attorneys to participate in interviews related to the investigation where appropriate.

The CRU involves defense counsel throughout the process and will occasionally invite defense counsel to CRU team meetings to discuss cases. Once the CRU has completed its reinvestigation of a case, which usually takes about a year, it will consult with defense counsel to receive input about its recommendation.⁷⁶

⁷⁶ The information in this section is based on a Zoom Interview with Valerie Newman, Director, Conviction Integrity Unit, Wayne County Prosecutor’s Office, Michigan. Notes on file with PCE. (05/18/2020).

Reinterviewing Witnesses

Reinterviewing witnesses is a particularly sensitive matter. The decision on whether to interview a witness with defense counsel is done on a case-by-case basis. Since prosecutors will speak to witnesses who have already implicated the defendant, the witnesses may be traumatized by the reinterview or concerned about their safety. As a result, many prosecutors opt for interviewing witnesses without the presence of defense counsel. One option is to record the witness interview so that it can be reviewed by defense counsel at a later time. The prosecutor should always inquire whether the defense has already interviewed the witness before bringing the case to the prosecutor and if counsel is willing to share notes or recordings of that interview.

Clark County District Attorney’s Office (Las Vegas), Nevada
Population 2.3 million; Number of Prosecutors 170

The Clark County District Attorney’s Office’s CRU collaborated with the Rocky Mountain Innocence Center (RMIC) in a conviction review that resulted in an exoneration.⁷⁷ In that case, the RMIC was given open-file access to all pertinent records except for office work product and material subject to safety concerns. The CRU also permitted defense counsel to sit with the defendant during the initial defendant interview. Though witness interviews were conducted by the prosecutor alone, the interviews were recorded and subsequently shared with the RMIC. This created a balance between protecting the safety of the witness and the integrity of the investigation, while still allowing the defense access to the information.⁷⁸

⁷⁷ Innocence Project, *Nevada Governor Signs the Strongest Compensation Law in the Country*, 06/15/2019, <https://www.innocenceproject.org/nevada-governor-signs-the-strongest-compensation-law-in-the-country/> (last visited 08/06/2020). Innocence organizations may also be a valuable source of input during the CRU formation process. Clark County District Attorney Wolfson said after a 90-minute meeting with the Rocky Mountain Innocence Center that the group “gave very valuable input” to assist in the formation of his office’s CRU. David Ferrara, *Group Doubts Intentions of Clark County DA’s New Conviction Integrity Unit*, Las Vegas Review-Journal 05/20/2016, <https://www.reviewjournal.com/crime/group-doubts-intentions-of-clark-county-das-new-conviction-integrity-unit/> (last visited 07/09/2020).

⁷⁸ The information in this section is based on a telephone interview with Dan Silverstein, Chief Deputy District Attorney, Clark County District Attorney’s Office of the State of Nevada. Notes on file with PCE. (10/16/2019).

Memorandum of Understanding

Some prosecutors enter into a Memorandum of Understanding (MOU) with the defense to outline the procedure for a reinvestigation.⁷⁹ The MOU can include a provision that requires defense counsel to refrain from discussing the case with the media during the pendency of the reinvestigation.

Kings County District Attorney’s Office (Brooklyn), New York
Population: 2.6 million; Number of Prosecutors: 550

Before the reinvestigation begins, the Kings County District Attorney’s Office’s CRU requests that the defense enter into a disclosure agreement.⁸⁰ This type of agreement facilitates the reciprocal sharing of documents and materials between the CRU and defense counsel.⁸¹ Additionally, it sets the expectations from the outset as to the procedure for the reinvestigation. When defense counsel is willing to sign the document, the reinvestigation will be more collaborative.⁸²

Waiver of Attorney-Client Privilege

Some CRUs require petitioners to sign a waiver of attorney-client privilege regarding documents from the original case at issue.⁸³ A waiver will provide the prosecutor with a full view of the defense file, which may yield valuable information, leads or evidence about the defendant’s guilt or innocence. Some offices only request a waiver of attorney-client privilege in select cases.⁸⁴ Many defense attorneys, however, will not agree to a waiver because they see it as a violation of their obligations to their clients.⁸⁵

⁷⁹ See Appendix *infra* for chart containing links to CRU webpages.
⁸⁰ See Brooklyn District Attorney’s Office, Conviction Review Unit, <http://brooklynda.org/post-conviction-justice-bureau/> (last visited 08/10/2020).
⁸¹ See *id.*
⁸² The information in this section is based on a telephone interview with Mark Hale, Assistant District Attorney, Kings County District Attorney’s Office, New York. Notes on file with PCE. (02/20/2020).
⁸³ Telephone interview with Dan Silverstein, Chief Deputy District Attorney, Clark County District Attorney’s Office of the State of Nevada. Notes on file with PCE. (10/16/2019).
⁸⁴ Telephone interview with Mark Larson, Former Chief Deputy, Criminal Division, King County Prosecuting Attorney’s Office of the State of Washington. Notes on file with PCE. (10/21/2019).
⁸⁵ Barry Scheck, *Conviction Integrity Units Revisited*, 14 Ohio State Journal of Criminal Law 705, 730, 2017, https://kb.osu.edu/bitstream/handle/1811/80789/OSJCL_V14N2_705.pdf (last visited 07/08/2020).

Ensuring Transparency

Policies and Procedures

One important function of a conviction review process is to convey to the public that the prosecutor is committed to doing justice in all cases, past and present. Any prosecutor can develop a policy on how they will address claims of innocence. Smaller offices that do not have the staff to create a CRU can create a mission statement and policy that publicly state their commitments to justice and to ensuring that no one is wrongfully convicted. An office's policy or mission statement can be posted on its website, included in an annual report or newsletter and discussed at community meetings.⁸⁶

Suggestions for what to incorporate in published policies includes:

- Those who can petition for review
- Types of cases eligible for review
- Types of cases not eligible for review
- How to submit a claim
- Information needed to submit a claim
- Timeline for processing claims
- Role of petitioner in case review
- Role of the CRU attorneys
- Requirements such as waiver of attorney-client privilege
- Procedure for petitioners who do not speak English

⁸⁶ See Appendix *infra* for chart containing links to CRU webpages.

Los Angeles County District Attorney's Office, California

Population: 10 million; Number of Prosecutors: almost 1,000

The Los Angeles County District Attorney's Office's CRU has its own section on the office's website that provides an overview of the unit and instructions on how to file a claim for review.⁸⁷ The website provides a frequently asked questions (FAQs) section with information for filing a CRU review claim.⁸⁸ In the FAQs section, the CRU outlines who may petition for review, the types of claims eligible for review, how to submit a claim, and general information regarding the investigation of a claim.⁸⁹ Additionally, the website provides a media link to the district attorney's published commentary titled "Why a Conviction Review Unit is Needed" that describes both the inspiration and mission of the CRU.⁹⁰



⁸⁷ See, e.g., Jackie Lacey, *OPINION: Why A Conviction Review Unit Is Needed*, Los Angeles Daily News, 06/25/2015, <https://www.dailynews.com/2015/06/25/why-a-conviction-review-unit-is-needed-jackie-lacey/> (last visited 07/08/2020) ("They will review claims of actual innocence and newly discovered evidence. These claims may originate from inmates, attorneys or innocence projects. The requests will be made in writing to the District Attorney's Office. This process will not require the filing of any formal court documents.").

⁸⁸ See Los Angeles County District Attorney's Office, Conviction Review Unit, <https://da.lacounty.gov/operations/cru/> (last visited 08/10/2020).

⁸⁹ See *id.*

⁹⁰ District Attorney Jackie Lacey, *Media Resources: Why a Conviction Review Unit Is Needed*, LA News Group, 06/25/2015, <http://da.lacounty.gov/media/media-resources/opinion-why-conviction-review-unit-needed> (last visited 07/09/2020).

Dallas County District Attorney's Office, Texas

Population: 2.6 million; Number of Prosecutors: 284

The Dallas County District Attorney's Office's CRU website page provides a detailed overview of the history and role of the CRU.⁹¹ It states the CRU's primary role is reviewing cases involving claims of actual innocence or cases involving wrongful convictions that result from systematic error.⁹² The page also describes the CRU's other roles including providing training for prosecutors and law enforcement, reporting systematic errors detected throughout the course of its reviews of cases, and implementing policies regarding evidence retention issues.⁹³ The CRU also includes a robust FAQs section that provides further guidance for petitioners seeking review.⁹⁴

Travis County District Attorney's Office, Texas

Population: 1.3 million; Number of Prosecutors: 84

The Travis County District Attorney's Office's CRU website begins by reaffirming a prosecutor's duty to justice and by explaining the CRU's role in carrying out that duty. The website also includes a mission statement as well as a summary of the CRU process.⁹⁵ The website also publishes a summary of the CRU process, eligibility for review and how to file a case review request.⁹⁶ Thus, the website is a useful tool for encouraging case review submissions, as well as, setting expectations for reviews from the outset.

91 See Dallas County District Attorney, *Conviction Integrity Division*, <https://www.dallascounty.org/government/district-attorney/divisions/conviction-integrity.php> (last visited 08/10/2020).

92 See *id.*

93 See *id.*

94 See *id.*

95 See Travis County District Attorney, *Conviction Integrity Unit*, <https://www.traviscountytx.gov/district-attorney/office-divisions/civil-rights/ciu> (last visited 08/10/2020).

96 See *id.*

Reporting CRU Activity

A CRU can use its website to highlight its successful work and provide updates regarding its activities.⁹⁷ It is important to note that neither the number of claims that a CRU receives nor the number of exonerations resulting from a CRU's work necessarily reflect the quality or success of the unit.⁹⁸ As noted earlier, some prosecutors have reported that since their conviction review process began, the number of submitted claims of innocence has dwindled significantly.⁹⁹

Baltimore City State's Attorney's Office, Maryland

Population: 600,000; Number of Prosecutors: 200

The CRU within Baltimore City State's Attorney's Office highlights exonerations that it found in partnership with the Innocence Project on its website.¹⁰⁰ The website provides a picture of each of the exonerated individuals along with a description of each of their cases and how they were vacated.¹⁰¹

97 See Appendix *infra* for chart containing links to CRU webpages.

98 John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 65, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020).

99 Telephone interview with Dan Silverstein, Chief Deputy District Attorney, Clark County District Attorney's Office of the State of Nevada. Notes on file with PCE. (10/16/2019); Zoom Interview with Rod Underhill, Former District Attorney, Multnomah County's District Attorney's Office of the State of Oregon. Notes on file with PCE. (05/15/2020); Telephone interview with Mark Larson, Former Chief Deputy, Criminal Division, King County Prosecuting Attorney's Office of the State of Washington. Notes on file with PCE. (10/21/2019).

100 See Office of the State's Attorney for Baltimore City, *Conviction Integrity*, <https://www.stateattorney.org/conviction-integrity> (last visited 08/10/2020).

101 See *id.*

Kings County District Attorney’s Office (Brooklyn), New York
Population: 2.6 million; Number of Prosecutors: 550

The Kings County District Attorney’s Office’s CRU shares its exonerations by publishing them in the form of a timeline depicting pictures of exonerated individuals with captions that include their time served and their vacated conviction dates.¹⁰² Kings County’s graphic highlights the successful work of the CRU over the years of its operation.

In 2020, the Kings County District Attorney’s Office released a 100- page report entitled *426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, New York*,¹⁰³ which describes the first 25 wrongful convictions identified by the office’s CRU since its 2014 inception. The report explains and analyzes the CRU’s findings, processes, and recommendations in 20 cases that resulted in the exoneration of 25 individuals. Additionally, the report includes the CRU’s internal memoranda that analyzed the cases and the reasons for its ultimate recommendations. Until this report was published, the internal memoranda were not public. The purposes of the report were to provide greater transparency, to identify root causes and common factors leading to wrongful convictions, and, ultimately, to prevent miscarriages of justice from occurring in the future.

Exonerations/Dismissals

Definition of Exoneration

Exoneration means different things to different people. To some, it means that a person has been conclusively found innocent of an earlier conviction. To others, it has a more expansive definition. The National Registry of Exonerations broadly defines exoneration to mean: “when a person who has been convicted of a crime is officially cleared based on new evidence of innocence.”¹⁰⁴ The *Registry* explains

¹⁰² See Brooklyn District Attorney’s Office, *Conviction Review Unit*, [HTTP://BROOKLYNDA.ORG/POST-CONVICTION-JUSTICE-BUREAU/](http://brooklynda.org/post-conviction-justice-bureau/) (last visited 08/10/2020).

¹⁰³ Kings County District Attorney’s Office, *426 Years: An Examination of 25 Wrongful Convictions in Brooklyn, New York*, 07/09/2020, [HTTP://WWW.BROOKLYNDA.ORG/WP-CONTENT/UPLOADS/2020/07/KCDA_CRUREPORT_v4r3-FINAL.PDF](http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUREPORT_v4r3-FINAL.PDF) (last visited 08/06/2020).

¹⁰⁴ National Registry of Exonerations, Glossary, [HTTPS://WWW.LAW.UMICH.EDU/SPECIAL/EXONERATION/PAGES/GLOSSARY.ASPX#:~:text=In%20general%2C%20an%20exoneration%20occurs,on%20new%20evidence%20of%20innocence.](https://www.law.umich.edu/special/exoneration/pages/glossary.aspx#:~:text=In%20general%2C%20an%20exoneration%20occurs,on%20new%20evidence%20of%20innocence.)

its definition further:

“[A] person who either is “(1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or is (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action.”¹⁰⁵ ... [This includes] a dismissal of all charges related to the original conviction.¹⁰⁶ However, evidence of innocence that was either not presented at the original trial or unknown evidence at the time of a guilty plea, must have contributed, at least in part, to the dismissal or acquittal.”¹⁰⁷

Some prosecutors disagree with this definition as they believe it can include people who are actually guilty, but whose cases were dismissed because they could not be re-tried for other unrelated reasons. Though the definition of exoneration can be debated, that discussion is outside of the scope of this paper.

Types of Exonerations

There are a variety of scenarios that support an exoneration or dismissal:

DNA Cases

To date there have been over 375 DNA exonerations in the United States.¹⁰⁸ These DNA cases conclusively proved actual innocence. DNA testing, which continues to improve, is routinely used in a wide variety of investigations. This means that errors are now frequently uncovered in the early stages of cases and that they can be corrected long before a conviction. Thus, there are many fewer DNA post-conviction exonerations resulting from current prosecutions.

Newly Discovered Evidence

Previously unknown evidence, other than DNA, may arise that challenges the validity of a conviction. This can include many things, for example:

[INNOCENCE](http://www.innocenceproject.org/innocence). (last visited 07/09/2020).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Innocence Project, Exonerate the Innocent, [HTTPS://WWW.INNOCENCEPROJECT.ORG/EXONERATE/](https://www.innocenceproject.org/exonerate/) (last visited 07/09/2020).

- Improved forensic testing that sheds new light on evidence that was originally relied upon¹⁰⁹
- Recent discovery that evidence introduced in the past was incorrect¹¹⁰
- Confession by another person¹¹¹

Recantation

Sometimes, exoneration results from a person recanting prior testimony that contributed to a defendant's conviction. These cases are more difficult to substantiate as the witness has given competing and opposing statements. However, with a thorough investigation these cases can sometimes be resolved. Some investigations have revealed the recantation to be accurate,¹¹² while others have uncovered that a recantation was a fabrication.¹¹³

Partial Exoneration Cases

In some cases, reconsideration of new and existing evidence may lead to a partial exoneration, one that results neither in freedom nor in a fully withdrawn sentence. Instead, an office may conclude its review by issuing a recommendation for a reduction of a sentence or the dropping of certain charges and not others.¹¹⁴ Prose-

¹⁰⁹ See National Registry of Exonerations, *Other New York Cases with False or Misleading Forensic Evidence*, <https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=3013> (last visited 08/06/2020).

¹¹⁰ For example, Kirk Odom's DNA exoneration shed light on problems with FBI forensic hair analysis, which contributed to his wrongful conviction. Innocence Project, DNA Exonerations in the United States, <https://www.innocenceproject.org/cases/kirk-odom/> (last visited 07/09/2020); Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, Washington Post, 04/16/2012, https://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/GIQAWTcGMT_story.html (last visited 07/09/2020).

¹¹¹ Jenny Wilson, *Las Vegas Man Exonerated, Released After 22 Years*, Las Vegas Review-Journal, 06/30/2017, <https://www.reviewjournal.com/crime/courts/las-vegas-man-exonerated-released-after-22-years/> (last visited 10/13/2019); see also DeMarlo Berry, *Guest Column: When the Justice System Gets It Wrong*, Nevada Can Do Better to Make Things Right, Las Vegas Sun, 04/11/2019, <https://lasvegassun.com/news/2019/apr/11/when-the-justice-system-gets-it-wrong-nevada-can-do-better/> (last visited 10/13/2019).

¹¹² *Washington v. Nakano*, No. CR81-6280 (Sup. Ct. Wash. 01/06/2020).

¹¹³ The Associated Press, *Wolfe Gets 41 Years in Prison for 2001 Murder*, Virginia Lawyers Weekly, 07/20/2016, <https://valawyersweekly.com/2016/07/20/wolfe-gets-41-years-in-prison-for-2001-murder/> (last visited 07/09/2020).

¹¹⁴ Telephone interview with Mark Larson, Former Chief Deputy, Criminal Division, King County Prosecuting Attorney's Office of the State of Washington. Notes on file with PCE. (10/21/2019); Telephone interview with Ryan Couzens, Assistant Chief Deputy District Attorney, Yolo County District Attorney's Office of the State of California. Notes on file with PCE. (10/17/2019). Ryan Couzens, assistant chief deputy district attorney in the Yolo County District Attorney's Office, noted that his office has overturned seven convictions based on the failure to properly advise the defendant on immigration matters and has recalled two sentences that, though valid, were no longer justified in the interest of justice. Telephone interview with Ryan Couzens, Assistant Chief Deputy District Attorney, Yolo County District Attorney's Office of the State of California. Notes on file with PCE.

cutor offices should be mindful of the potential for such cases and, if they choose to accept them without an actual innocence claim, they can outline procedures for accommodating them.

Interest of Justice Dismissals

Finally, some investigations may lead to ultimately inconclusive results. Without definitive new information like DNA evidence, the reinvestigation may uncover an injustice in the case, yet it may not be possible to determine conclusively if the defendant was innocent. If evidence of guilt still exists, the prosecutor may seek to re-try the case. However, in some cases the witnesses are no longer available, or the evidence is lost, so that it would be extremely difficult or impossible to obtain a conviction. In other instances, re-trial may be unjust in the context of the case, such as where, for example, the defendant has already served a long prison sentence. Under these circumstances, the prosecutor may dismiss the case in the interest of justice without asserting that the defendant is actually innocent.¹¹⁵



(10/17/2019).

¹¹⁵ See Press Release, *WCPO Conviction Integrity Unit Has Dismissed Two Cases*, 01/10/2019, <https://www.wayne-county.com/elected/prosecutor/press-release-january-10-2019-wcpo-conviction-integrity.aspx> (last visited 07/09/2020).

Vacating a Conviction

Standard for Vacating a Conviction

Most prosecutor offices do not have an exact standard for when they will dismiss a case and prefer the flexibility of weighing the many facts and circumstances in their final decision.

However, some groups have suggested various standards, such as these:

- “Vacate each conviction when there is clear and convincing evidence of actual innocence, or where in the interests of justice, the CRU no longer believes that current evidence supports the conviction beyond a reasonable doubt.”¹¹⁶
- “The [CRU] should recommend vacating each conviction where there is clear and convincing evidence of actual innocence or the [CRU] otherwise no longer has confidence in the integrity of the verdict or plea. This may include recommending *vacatur* where the investigation reveals facts, circumstances and/or events which so grossly corrupted the fact-finding process as to deny the petitioner a fair adjudication of his/her guilt or innocence at trial, and/or, if the conviction was obtained by a guilty plea, prevented the petitioner from making a knowing and voluntary. decision to plead guilty.”¹¹⁷

Practical Considerations Prior to Vacating a Conviction

It is important for a prosecutor office to take various practical steps before an exoneration is announced, such as:

- Notifying all relevant parties, including defense counsel, the defendant, the defendant’s family, and the court
- Confirming that steps are in place to release a defendant in custody
- Notifying relevant office staff including prosecutors and investigators involved in the original case

¹¹⁶ John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 3, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020).

¹¹⁷ Task Force on Wrongful Convictions, *Report of Task Force on Wrongful Convictions*, New York State Bar Association, 02/08/2019, <https://nysba.org/report-on-the-task-force-on-wrongful-convictions/> (last visited 07/07/2020).

- Advising victims and witnesses, including police witnesses
- Inquiring whether support is available for the newly released defendant; and
- Preparing for media attention

Vacating a Conviction

Once a prosecutor office has decided to recommend exoneration or dismissal, it has to decide how to do so legally. Consenting to a defense motion to dismiss is the most common form of dismissal. However, in some instances, prosecutors have found that there may not be a procedural mechanism available for the prosecutor to dismiss a case.¹¹⁸ Nevertheless, prosecutors have typically been able to navigate the various procedural challenges so as to obtain a dismissal when needed. The legal issues vary from state to state and are beyond the scope of this paper.

Getting it Right the First Time – A Culture of Integrity

A culture of integrity should define a prosecutor office. It is axiomatic that the best way to prevent a wrongful conviction is to get it right the first time.

This should be the goal of all prosecutors. They are charged with making critical decisions at the earliest stages of a case and must use that opportunity to explore the possibility of actual innocence. In addition to uncovering past errors, an equally important function of a CRU or conviction review process is to proactively prevent error by developing systems for getting the prosecutions right the first time. This function takes many forms and has many benefits. The key elements are training, a commitment to continued improvement, and an openness to internal review and feedback.

¹¹⁸ See, e.g., John M. Loventhal, *A Survey of Federal and State Courts’ Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(1)(G-1)?*, 76 Albany Law Review 1453, 1472-87, 06/11/2013, [http://www.albanylawreview.org/articles/vol76_3/76.3.1453%20LEVENTHAL.EE.SD%20\(DONE\).PDF](http://www.albanylawreview.org/articles/vol76_3/76.3.1453%20LEVENTHAL.EE.SD%20(DONE).PDF) (last visited 07/09/2020) (describing that most states do not recognize a free-standing claim of actual innocence, but that all states, however, accept newly discovered evidence through various post-conviction procedures).

Some improvements can be simple, such as fostering a culture of integrity by praising prosecutors not only for their convictions but for their careful review of cases, including those resulting in dismissals.¹¹⁹ Another idea is to develop a checklist for closing out case files. This can alleviate the problem of disorganized old files that frequently bedevil a conviction review years later. The guiding principle behind this file-close-out system is to preserve files in a manner that will make sense to another attorney with no knowledge of the case.¹²⁰

Though it is beyond the scope of this paper to review all the methods by which prosecutor offices achieve this goal, a few additional examples are illuminating.



119 Telephone interview with Christopher Walsh, Assistant District Attorney, Nevada County District Attorney’s Office, California. Notes on file with PCE. (02/24/2020).

120 Telephone interview with Ed Postawko, former Assistant Circuit Attorney, St. Louis Circuit Attorney’s Office, Missouri. Notes on file with PCE. (01/29/2020).

New York County District Attorney’s Office (Manhattan), New York

Population: 1.6 million; Number of Prosecutors: 525

Checklists: When DANY’s Conviction Integrity Program (CIP) was founded in 2010, it immediately assumed a proactive role in preventing wrongful convictions. An important aspect of the program was to develop various protocols to prevent wrongful convictions from occurring. These included the “Identification Case Checklist,” and checklists regarding *Brady* and *Giglio* obligations, cooperation agreements, and complaint room questions for police officer witnesses. The lists are available to prosecutors and are used to help them evaluate the strengths and weaknesses of a case. These lists can assist with determining during the earliest stage of the process whether there are serious flaws in a case. The lists also help prosecutors to strengthen their cases as they reveal areas where further investigation may be needed.¹²¹

Pre-Trial Exoneration Review Initiative: The proactive approach of the program expanded further in October 2015 with the creation of the Pre-Trial Exoneration Review Initiative. This initiative focuses on cases in which the office has determined, prior to conviction, that a person is factually innocent of all or some of the crimes charged. The initiative does a root cause analysis that examines the cases in which pretrial exonerations have occurred and has critically studied about 50 cases since its inception. The lessons from each case are distilled and evaluated and the findings are presented to a pre-trial exoneration review committee made up of senior members of the office. These prosecutors in turn disseminate the lessons learned to the line prosecutors they supervise to help prevent wrongful convictions from occurring. The valuable lessons learned from the root-cause analysis are also shared in office wide trainings.¹²²

121 The information in this section is based on a Zoom Interview with Consuelo Fernandez, Assistant District Attorney and head of the Conviction Integrity Program, New York County District Attorney’s Office, New York. Notes on file with PCE. (05/27/2020).

122 The information in this section is based on a Zoom Interview with Charles King, Assistant District Attorney in charge of the Pre-Trial Exoneration Review Initiative, New York County District Attorney’s Office, New York. Notes on file with PCE. (05/27/2020).

Baltimore City State's Attorney's Office, Maryland

Population: 600,000; Number of Prosecutors: 200

Root Cause Analysis: Following a recent DNA exoneration,¹²³ the Office of the State's Attorney for Baltimore City partnered with the Baltimore Police Department, the Maryland Office of the Public Defender in Baltimore City, the University of Baltimore Innocence Project, and University of Pennsylvania Law School Quattrone Center for the Fair Administration of Justice to perform a root cause analysis of that wrongful conviction.¹²⁴ This collaboration, called the Baltimore Event Review Team (BERT),¹²⁵ performed a root cause analysis of the case from investigation to exoneration to construct recommendations for improving Baltimore's criminal justice system, and to learn from and prevent the mistakes that led to the wrongful conviction.¹²⁶ The openness and willingness to perform a thorough analysis of the case was key. At the conclusion of the analysis, BERT created a report that identified the contributing factors that led to the wrongful conviction and set forth recommendations to prevent those errors in the future.¹²⁷

¹²³ In 1991, Malcom Bryant was convicted of murder and sentenced to life in prison. After spending 17 years in prison, he was exonerated as a result of a DNA test that proved his innocence. See Report on the Baltimore Event Team on State of Maryland v. Malcolm J. Bryant, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 11/2018, <https://www.law.upenn.edu/live/files/8862-malcolm-bryant-exoneration> (last visited 07/09/2020).

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.* This type of root cause analysis can be difficult if there is pending civil litigation regarding the wrongful conviction.

Conclusion

Since the advent of CRUs in the early 2000s, conviction review by prosecutors has become a new normal. The offices that establish conviction review will follow the earliest adopters into the advancing future of prosecution. In the modern era, a prosecutor office that conducts conviction review acknowledges that the criminal justice system, like all human systems, is not immune from error. In the face of that reality, a prosecutor office that adopts a CRU or a conviction review process demonstrates its dedication to reaching its ultimate aim of achieving justice in every case.



State Prosecutor Offices by Population Served

State Prosecutor Offices by Population Served (2007) ¹²⁸		
Population	Number of Offices	Percent of Offices
1,000,000 or more	43	1.8%
250,000 to 999,999	211	9.1%
100,000 to 249,999	341	14.6%
99,999 or less	1389	59.6%
Part-time offices	346	14.8%
Total	2330	100%

Conviction Review in Local Prosecutor Offices

Below is a chart of offices that PCE has identified as having a CRU or a formal conviction review process. Each program is hyperlinked with the office’s website or the county’s website in cases in which the office does not have an individual website page. These programs can also be seen on an interactive map of prosecutor innovations [here](#).

The asterisks (*) indicates websites with Review Request Forms.

Prosecutor Office	State	Population
1. Pima County *	AZ	1 million
2. Alameda County	CA	1.7 million
3. Contra Costa County *	CA	1.1 million
4. Los Angeles County *	CA	10 million
5. Merced County *	CA	300,000
6. Napa County *	CA	100,000
7. Nevada County *	CA	100,000
8. Orange County *	CA	3.2 million
9. Riverside County *	CA	2.5 million
10. Sacramento County *	CA	1.6 million
11. San Bernardino County *	CA	2.2 million
12. San Diego County *	CA	3.3 million

128 Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 – Statistical Tables*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 1, 12/2011, <https://www.bjs.gov/content/pub/pdf/PSC07ST.PDF> (last visited 07/08/2020).

13. San Francisco County *	CA	900,000
14. San Joaquin County *	CA	800,000
15. Santa Clara County	CA	1.9 million
16. Tulare County	CA	500,000
17. Ventura County	CA	900,000
18. Yolo County	CA	200,000
19. Eighteenth Judicial District *	CO	1.3 million
20. Twentieth Judicial District *	CO	300,000
21. Washington	D.C.	700,000
22. Fourth Judicial Circuit *	FL	1.3 million
23. Ninth Judicial Circuit *	FL	1.4 million
24. Thirteenth Judicial Circuit *	FL	1.3 million
25. Fifteenth Judicial Circuit *	FL	1.5 million
26. Seventeenth Judicial Circuit *	FL	2 million
27. Fulton County *	GA	1.1 million
28. Cook County	IL	5.2 million
29. Lake County	IL	700,000
30. Wyandotte County *	KS	300,000
31. Middlesex County	MA	1.6 million
32. Suffolk County	MA	800,000
33. Anne Arundel County	MD	600,000
34. Baltimore County *	MD	600,000
35. Montgomery County *	MD	600,000
36. Prince George's County	MD	900,000
37. Wayne County *	MI	1.8 million
38. Jackson County *	MO	700,000
39. St. Louis County	MO	200,000
40. St. Louis City	MO	300,000
41. Bronx County	NY	1.4 million
42. Erie County	NY	900,000
43. Kings County	NY	2.6 million
44. Monroe County	NY	700,000
45. Nassau County	NY	1.4 million
46. New York County	NY	1.6 million
47. Oneida County	NY	234,000
48. Orange County	NY	400,000

49. Putnam County	NY	100,000
50. Queens County	NY	2.3 million
51. Richmond County	NY	500,000
52. Ulster County	NY	200,000
53. Suffolk County *	NY	1.5 million
54. Westchester County	NY	1 million
55. Clark County	NV	2.3 million
56. Cuyahoga County *	OH	1.2 million
57. Multnomah County	OR	800,000
58. Philadelphia County	PA	1.6 million
59. Davidson County	TN	700,000
60. Bexar County	TX	2 million
61. Dallas County *	TX	2.6 million
62. Harris County *	TX	4.7 million
63. Tarrant County *	TX	2.1 million
64. Travis County *	TX	1.3 million
65. Salt Lake County *	UT	1.2 million
66. Utah County	UT	600,000
67. KING COUNTY	WA	2.25 million

Statewide Conviction Review

Statewide CRU ¹²⁹	Sponsoring Office
Delaware	Delaware Office of the Attorney General
Michigan	Michigan Office of the Attorney General
New Jersey *	New Jersey Office of the Attorney General
New York	New York Office of the Attorney General
North Carolina	North Carolina General Assembly - Inno- cence Inquiry Commission
Pennsylvania	Pennsylvania Office of the Attorney General

129 PCE is grateful for the support of the New York Attorney General's Office in compiling this chart.

2019 Prosecutor Survey

In 2019, as part of the National Prosecutor Consortium grant, a prosecutor survey was conducted in twenty-one states.¹³⁰ The chart below provides the number of local prosecutor offices in the states that answered “yes” to this question: “Does your office have a Conviction Review Program (a person or unit that reviews claims of post conviction innocence).”?¹³¹

	State	Total # of prosecutor offices in state	# of offices participating in the survey	% of prosecutors responding to the survey	# of surveyed offices that answered “Yes”	% of surveyed offices with a conviction review program
1	Arizona	20	9	45%	3	33%
2	Colorado	22	16	73%	2	13%
3	Connecticut	13	13	100%	6	46%
4	Indiana	91	52	57%	8	15%
5	Iowa	99	41	41%	5	12%
6	Kentucky	57	30	53%	3	10%
7	Louisiana	42	42	100%	13	31%
8	Michigan	42	45	54%	2	4%
9	Minnesota	87	29	33%	1	3%
10	Missouri	115	46	40%	5	11%
11	Montana	56	26	46%	2	8%
12	Nevada	17	11	65%	4	36%
13	New Jersey	21	20	95%	6	30%
14	New Mexico	14	14	100%	1	7%
15	New York	62	41	66%	21	51%
16	South Carolina	16	14	88%	3	21%
17	Tennessee	31	26	84%	8	31%
18	Utah	35	17	49%	1	6%
19	Virginia	120	52	43%	3	6%
20	Washington	39	13	33%	3	23%
	TOTALS	999	557	56%	100	18%

¹³⁰ Delaware is not included in this chart as they only have a statewide CRU.

¹³¹ The scope of the question included all types of conviction review ranging from a Conviction Review Unit to an office with a conviction review process handled by a single person. Further research is needed to identify what type of program exists in each of the offices that responded affirmatively to the survey question. Survey reports are on file with PCE.

Survey Instrument

Prosecutors’ Center for Excellence Conviction Review Unit Survey ¹³²



Introduction

The purpose of this survey is to gather the various approaches to Conviction Review Units (CRU) in prosecutor offices around the country. The survey results may be featured in a PCE paper that will include considerations for developing, implementing, and running a CRU.

SURVEY QUESTIONS

1) OFFICE / UNIT DEMOGRAPHICS

A) OFFICE CHARACTERISTICS:

- i) SIZE OF OFFICE: _____
- ii) NUMBER OF PROSECUTORS: _____
- iii) SIZE OF POPULATION THE OFFICE SERVES: _____
- iv) DOES YOUR OFFICE HAVE AN APPEALS UNIT? YES ____ NO ____
 - (1) IF NOT, WHO DOES YOUR APPEALS? _____
- v) DO YOU HAVE POLICE OR INVESTIGATORS ASSIGNED TO YOUR OFFICE?
YES ____ NO ____
 - (1) IF SO, HOW MANY? _____

B) HOW MANY DIFFERENT POLICE DEPARTMENTS ARE THERE WITHIN YOUR JURISDICTION? _____

2) CRU CHARACTERISTICS

¹³² The survey used in the paper entitled *Conviction Review Units: A National Perspective* served as a foundation for the creation of this survey. See John Hollway, *Conviction Review Units: A National Perspective*, University of Pennsylvania Law School, Quattrone Center for the Fair Administration of Justice, 7, 04/2016, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship (last visited 07/08/2020).

A) WHAT YEAR WAS THE CRU FIRST FORMED? _____

B) WHAT INSPIRED YOUR OFFICE TO CREATE ITS CRU? / WHAT IS THE STORY OF ITS FORMATION?

C) WHAT ARE THE GOALS OF THE CRU?

D) STAFFING OF CRU:

I) NUMBER OF PROSECUTORS
FULL TIME: _____
PART TIME: _____

II) NUMBER OF INVESTIGATORS / POLICE WHO WORK FOR THE CRU
FULL TIME: _____
PART TIME: _____

III) PARALEGALS / ANALYSTS
FULL TIME: _____
PART TIME: _____

IV) CLERICAL SUPPORT
FULL TIME: _____
PART TIME: _____

V) OTHERS (PLEASE EXPLAIN): _____

E) HAS THE CRU CHANGED SINCE IT WAS FIRST FORMED, IF SO HOW? _____

3) PROTOCOLS AND PROCEDURES

A) DOES THE CRU HAVE WRITTEN PROTOCOLS AND PROCEDURES?

B) ARE THEY PUBLIC? YES _____ NO _____

I) CAN WE HAVE A COPY?

4) SOURCES OF CASES

A) WHAT ARE THE SOURCES OF YOUR CASES? (CHECK ALL THAT APPLY):

I) DEFENSE ATTORNEY: _____

II) PRO SE DEFENDANT: _____

III) INNOCENCE PROJECT / NON-PROFIT: _____

IV) REQUEST FROM INSIDE THE OFFICE: _____

V) INTERNAL REVIEW OF POST-CONVICTION MOTIONS: _____

VI) COURT: _____

VII) FORENSIC SCIENCE SERVICE PROVIDERS: _____

VIII) POLICE: _____

IX) INVESTIGATIVE REPORTER / JOURNALIST: _____

X) MEMBER(S) OF THE PUBLIC: _____

B) OTHER (PLEASE EXPLAIN):

5) CASE ACCEPTANCE CRITERIA: WHAT STANDARD DO YOU USE BEFORE DECIDING TO INVESTIGATE OR REVIEW A CLAIM?

A) DO YOU REQUIRE A STATEMENT OF ACTUAL INNOCENCE?
YES _____ NO _____

B) DO YOU RESTRICT YOUR REVIEW TO MATTERS INVOLVING ONLY “NEWLY DISCOVERED EVIDENCE,” I.E., EVIDENCE THAT COULD NOT HAVE BEEN DISCOVERED WITH THE EXERCISE OF DUE DILIGENCE BY COUNSEL?
YES _____ NO _____

C) DO YOU CONSIDER “DUE PROCESS” CLAIMS WHILE CONDUCTING A CRU REVIEW SUCH AS CLAIMS OF UNDISCLOSED *BRADY*/*GIGLIO* MATERIALS OR INEFFECTIVE ASSISTANCE OF COUNSEL?
YES _____ NO _____

6) WHAT CASES WILL THE CRU CONSIDER? (CHECK ALL THAT APPLY):

A) MURDER, KIDNAPPING, RAPE: _____

B) OTHER VIOLENT FELONIES: _____

C) NON-VIOLENT FELONIES: _____

D) MISDEMEANORS: _____

E) TRIAL CONVICTIONS: _____

F) GUILTY PLEAS: _____

7) AUDIT OF CATEGORIES OF CASES: DOES THE CRU REVIEW CASES BASED ON: (CHECK ALL THAT APPLY):

A) A GENERALIZED CLAIM OF UNRELIABLE EVIDENCE?
YES _____ NO _____

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- B) THE PRESENCE OF CERTAIN KINDS OF EVIDENCE, E.G. HAIR AND FIBER?
 YES ____ NO ____
- C) THE INVOLVEMENT OF A PROBLEMATIC POLICE OFFICER AND/OR DETECTIVE OR OTHER RECURRING WITNESS SUCH AS A CRIMINALIST?
 YES ____ NO ____
- ANOTHER FACTOR? (PLEASE EXPLAIN):

8) COLLABORATION WITH DEFENSE COUNSEL OR PETITIONER

- A) WHAT STANDARD BEST DESCRIBES THE SCOPE OF EVIDENCE THAT YOU MAKE AVAILABLE TO PETITIONER’S COUNSEL IN A REVIEW?
- i) OPEN FILE: ____
 - ii) OPEN FILE BUT FOR SAFETY CONCERNS: ____
 - iii) NON-PRIVILEGED: ____
 - iv) ORIGINALLY DISCOVERABLE: ____
 - v) OTHER STANDARD: ____
- B) WHAT IS YOUR PRACTICE ON REQUESTS FOR DISCLOSURE FROM THE PETITIONER SEEKING RELIEF?
- i) REQUEST PETITIONER’S FILE EXCEPT FOR ATTORNEY-CLIENT COMMUNICATIONS? ____
 - ii) REQUEST ONLY DOCUMENTS RELATING TO PETITIONER’S PROFFER? ____
 - iii) CONSENT TO GREATER DISCLOSURE OF YOUR FILE OR POLICE FILES IF THERE IS AN AGREEMENT WITH PETITIONER’S COUNSEL NOT TO DISCLOSE THE INFORMATION UNTIL THE CRU REVIEW PROCESS IS COMPLETE? ____
 - iv) REQUEST WAIVER OF ATTORNEY-CLIENT PRIVILEGE FROM ORIGINAL ATTORNEY? ____
 - v) OTHER PRACTICE (PLEASE EXPLAIN): _____
- C) DOES PETITIONER’S COUNSEL HAVE AN OPPORTUNITY TO (CHECK ALL THAT APPLY):
- i) MAKE A PRESENTATION? ____
 - ii) PARTICIPATE IN THE INVESTIGATION? ____
 - iii) RESPOND TO EVIDENCE DISCOVERED IN THE COURSE OF THE INVESTIGATION? _____
 - iv) ANY OTHER ROLE? _____

9) WHAT IS THE ROLE OF THE PROSECUTORS WHO TRIED THE UNDERLYING CASE IN THE REVIEW PROCESS?

- i) ASSIST IN THE INVESTIGATION?
 YES ____ NO ____
- ii) INTERVIEWED AS A WITNESS?
 YES ____ NO ____
- iii) ANY ROLE IN THE DECISION-MAKING PROCESS?
 YES ____ NO ____
- iv) OTHER (PLEASE EXPLAIN): _____

10) VICTIMS / WITNESSES

- A) DO YOU HAVE A PROCESS FOR DEALING WITH VICTIMS AND WITNESSES IN THE ORIGINAL CASE?
 YES ____ NO ____
- B) WHEN DO YOU LET THEM KNOW ABOUT THE REINVESTIGATION?

11) VETTING OF CONCLUSION : IS THERE ANOTHER PERSON/GROUP THAT REVIEWS THE RECOMMENDATIONS OF THE CRU (OTHER THAN THE ELECTED DISTRICT ATTORNEY / HEAD PROSECUTOR IN YOUR OFFICE)? (SELECT ALL THAT APPLY).

- A) INTERNAL COMMITTEE: ____
- B) OUTSIDE PANEL OF EXPERTS: ____
- C) PETITIONER OR PETITIONER’S ATTORNEY WHO BROUGHT THE CASE TO YOUR ATTENTION: ____
- D) OTHER (PLEASE EXPLAIN): ____

12) CRITERIA FOR GRANTING RELIEF: WHAT IS THE STANDARD FOR CONSENTING TO RELIEF ON INNOCENCE GROUNDS?

- A) CLEAR AND CONVINCING EVIDENCE OF INNOCENCE? ____
- B) A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME? ____
- C) INTERESTS OF JUSTICE? ____
- D) OTHER? ____

13) MIXED EXONERATIONS AND INCONCLUSIVE CASES:

- A) DOES YOUR OFFICE HAVE A PROTOCOL FOR DISMISSING CERTAIN CHARGES AND

- NOT OTHERS WHERE NECESSARY? _____
- _____
- B) DOES YOUR OFFICE HAVE A PROTOCOL FOR DECIDING UNCERTAIN, INCONCLUSIVE CASES IN THE INTERESTS OF JUSTICE? _____
- _____

14)ANNOUNCING CONCLUSION

- A) HOW ARE YOUR CONCLUSIONS ANNOUNCED? _____
- _____
- B) DO YOU EXPLAIN WHY YOU HAVE MADE A DECISION, AND IF SO, HOW AND TO WHOM? _____
- _____

15)CONDUCT OF REVIEW

- A) HOW MANY APPLICATIONS HAS THE CRU RECEIVED? _____
- B) HOW MANY APPLICATIONS WERE ACCEPTED FOR INVESTIGATION OR REVIEW? _____
- C) IN HOW MANY CASES DID YOU CONSENT TO RELIEF? _____
- D) IN HOW MANY CASES DID COURTS GRANT RELIEF WHERE NO AGREEMENT COULD BE REACHED? _____

16)GROUNDS FOR RELIEF

- A) INNOCENCE:
- I) BASED ON DNA: _____
- II) BASED ON OTHER SCIENTIFIC EVIDENCE: _____
- III) RECANTATION: _____
- B) DUE PROCESS VIOLATION: _____
- C) BOTH INNOCENCE AND DUE PROCESS VIOLATIONS: _____

17)LEARNING FROM ERROR

- A) DOES THE CRU CATALOG ERRORS THAT MIGHT HAVE OCCURRED IN CASES IT REVIEWS?
- B) DOES THE CRU COMMUNICATE THOSE ERRORS TO ANYONE INSIDE THE OFFICE?
- C) DOES THE OFFICE PROVIDE TRAINING BASED ON THE ERRORS?
- D) DOES THE CRU COMMUNICATE THOSE ERRORS TO ANYONE OUTSIDE THE OFFICE?

18)OTHER ROLES

- A) DOES THE CRU HAVE ANY OTHER RESPONSIBILITIES BEYOND REVIEWING CASES AND MAKING RECOMMENDATIONS?
- B) IF SO, WHAT DOES IT ENTAIL? (FOR EXAMPLE: WRITING POLICY TO REMEDY SYSTEMIC ERRORS IT HAS LOCATED; PROVIDING GUIDANCE OR TRAINING IN BEST PRACTICES TO OTHER LAW ENFORCEMENT ORGANIZATIONS OR ACTORS IN THE JURISDICTION OR BEYOND; INVESTIGATING POTENTIAL POLICE MISCONDUCT.)

19)GREATEST CHALLENGES (SELECT ALL THAT APPLY)

- A) OFFICE MORALE: _____
- B) RESOURCES: _____
- C) MEDIA: _____
- D) RELATIONS WITH THE PETITIONER: _____
- E) OTHER (PLEASE EXPLAIN): _____

20) DO YOU HAVE ANYTHING ELSE TO ADD?