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CONVICTION REVIEW TODAY: THE ROLE OF PROSECUTORS



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Kristine Hamann

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Conviction Review Today: The Role of Prosecutors

By Kristine Hamann

Kristine Hamann is the Executive Director of Prosecutors' Center for Excellence, a national nonprofit that works with prosecutors to improve the criminal justice system. Prior to that Ms. Hamann was a Visiting Fellow at the Bureau of Justice Assistance/DOJ and a career prosecutor with the Manhattan District Attorney's Office in New York City. She can be reached at khamann@pceinc.org.

On November 7, 2023, voters of Central Harlem in New York City elected Dr. Yusef Salaam to the City Council. Jeffery C. Mays, *Yusef Salaam Is Declared Winner of Harlem City Council Pri-mary Race*, N.Y. Times (July 5, 2023), <https://nyti.ms/3sMCvC3>. Dr. Salaam spent nearly seven years in prison for a crime he did not commit: the 1989 “Central Park Jogger” attack. In 2021, during an interview on NPR, Dr. Salaam reflected on the obligations of those who operate at the most influential levels of society. “We want those people to be the most upstanding. They have to hold that truth in their minds and hearts as they move in the justice system because they’re changing people’s lives.” Dave Davies, *Central Park “Exonerated 5” Member Yusef Salaam Reflects on Freedom, Forgiveness*, NPR (May 26, 2021), <https://n.pr/3SNx40l>. Given the extraordinary discretion they wield, prosecutors are best placed to embody, enforce, and model that standard.

The best way to prevent a wrongful conviction is to get it right the first time. Short of eliminating crime, we can aspire to nothing less. Members of the criminal bar and their teams play a pivotal role in ensuring that the criminal justice system handles every case with integrity. Law enforcement officers make consequential decisions when they make an arrest, and referral for prosecution represents a crucial window of opportunity to evaluate the evidence. In doing so, prosecutors exercise considerable discretion and carry a weighty responsibility that must aim to protect the innocent as much as to pursue the wrongdoers.

While this article focuses on the steps taken within prosecutor offices to establish conviction review procedures, it will address some collaborative initiatives.

Background of Prosecutor Conviction Review

The American Bar Association’s Criminal Justice Standards for the Prosecution Function establishes that “[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”

In 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 program. Task Force on Wrongful Convictions, N.Y. State Bar Ass’n, *Report of Task Force on Wrongful Convictions*, at 6 (Feb. 8, 2019), <https://bit.ly/3MSuFO2>. Though this is a worthy goal, there’s no one-size-fits-all solution for the more than 2,330 prosecutor offices across the United States, 74% of which serve fewer than 100,000 constituents or have only part-time prosecutors. Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007—Statistical Tables*, U.S. Dep’t of Just., Off. of Just. Programs, Bureau of Just. Stat., at 1 (Dec. 2011), <https://bit.ly/3SSu6rl>.

Prosecutors have followed evidence leading to reinvestigation and exoneration of criminal defendants

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before it became common practice to create specialized conviction review units. In what Barry Scheck, founding director of the Innocence Project, described as New York County D.A. Robert Morgenthau's "finest hour," the elected prosecutor took decisive action in response to the news that a man incarcerated for another crime had confessed to the Central Park jogger attack. Robert D. McFadden, *Robert Morgenthau, Longtime Manhattan District Attorney, Dies at 99*, NY Times (July 21, 2019), <https://nyti.ms/40T7qci>. On December 5, 2002, after a meticulous reinvestigation, Morgenthau's office filed affirmations supporting the defendants' motions to vacate their convictions. The exonerations of Dr. Salaam and the other Black and Latino young men wrongfully convicted of the Central Park jogger attack were a watershed moment: There has since been increasing recognition by prosecutors and the public of the importance of conviction review.

According to the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School, the Santa Clara District Attorney's Office in California assembled the nation's first Conviction Review Unit (CRU) in 2004. John Hollway, *Conviction Review Units: A National Perspective* (2016), <http://tinyurl.com/mv5vwhyv>. 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 Conviction Integrity Program in 2010.

The number of CRUs continues to increase as prosecutors embrace the concept. A 2018 20-state study by the Prosecutors' Center for Excellence (PCE) identified 67 prosecutor offices with a designated CRU. By that time, an additional 100 offices also had adopted a formal or case-by-case mechanism for reviewing prior convictions. Attorney general's offices in California, New York, Pennsylvania, and Maryland have also established conviction review units to support the numerous smaller offices in their jurisdiction. Marissa Bluestine, Deputy Director of the Quattrone Center, recently estimated there were now more than 115 CRUs with the authority to reinvestigate convictions. N'Dea Yancey-Bragg, *Conviction Review Units Have Led to Exonerations in Florida, New York, Other States. Here's What They Do.*, USA Today (Mar. 17, 2023), <https://bit.ly/3RbemhG>.

An office's development of a CRU or formal review process will vary according to its resources, the issues presented, the culture of the prosecutorial office, community involvement, and the engagement of the defense bar. Regardless of the method used, key objectives for prosecutors include creating specialized procedures to review claims of innocence and remedy wrongful convictions in the furtherance of justice; enhancing community confidence in the criminal justice system; continuing to foster an office-wide culture of integrity; and developing best practices to reduce the likelihood of future wrongful convictions.

Defining Exoneration

Over time, "exoneration" has taken on a broader meaning and may mean different things to different people. In the early days of conviction review, it meant that a person had been conclusively found innocent of an earlier conviction by DNA analysis. According to the National Registry of Exonerations, there have been more than 400 DNA exonerations in the United States. *Exonerations by Year: DNA and non-DNA*, Nat'l Registry of Exonerations (current as of Nov. 25, 2023), <https://bit.ly/3sWjZXN>. Now DNA testing, which continues to improve, is routinely used in a wide variety of investigations. This means that errors are frequently uncovered in the early stages of cases and that they can be corrected long before a conviction. Thus, there are far fewer DNA post-conviction exonerations resulting from current prosecutions.

However, conviction review has evolved to address many other issues. Previously unknown evidence, other than DNA, may arise that challenges the validity of a conviction. This can include:

- Improved forensic testing techniques. *Steven Barnes: Other New York Cases with False or*

Misleading Forensic Evidence, Nat'l Registry of Exonerations, <https://bit.ly/46xG0ds> (last visited Nov. 25, 2023).

- Failure to disclose exculpatory evidence. *Roy Alvarez: Other California Cases with Mistaken Witness Identifications*, Nat'l Registry of Exonerations, <https://bit.ly/3N1JoGm> (last visited Nov. 25, 2023).
- Confession by another person. Jenny Wilson, *Las Vegas Man Exonerated, Released After 22 Years*, *Las Vegas Rev.-J.* (June 30, 2017), <https://bit.ly/46Bg6FA>.
- A recent discovery that evidence introduced in the past was incorrect. Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, *Wash. Post* (Apr. 16, 2012), <https://wapo.st/49SxuZi>.

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. Jennifer Gonnerman, *When a Witness Recants*, *New Yorker* (Oct. 25, 2021), <https://bit.ly/3SY48mh>. Some investigations have revealed the recantation to be accurate, while others have uncovered that a recantation was a fabrication. Associated Press, *Wolfe Gets 41 Years in Prison for 2001 Murder*, *Va. Law. Wkly.* (July 20, 2016), <https://bit.ly/47rQY5j>.

As a result, the term "exoneration" has taken on a more expansive definition. The National Registry of Exonerations broadly defines exoneration to mean "A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was relieved of all the consequences of the criminal conviction. [...]" *Glossary*, Nat'l Registry of Exonerations, <https://bit.ly/3QTy943> (last visited Nov. 25, 2023). The Registry explains its definition further:

[The person] either: (1) was declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) received (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence, or (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted [...], or (iii) a dismissal of all charges related to the crime for which the person was originally convicted [...]. The pardon, acquittal, or dismissal must have occurred after evidence of innocence became available that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known by the defendant and the defense attorney at the time the plea was entered.

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

Creating a Conviction Review Unit or Process

A prosecutor embarking on the development of a conviction review process can seek input from a variety of parties, including prosecutors with an existing conviction review process, the defense bar, elected officials, law enforcement and community members, and previously exonerated persons.

While outside input is important, it is equally important for the lead prosecutor to fully explain the purpose and scope of this endeavor to the office staff. 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 their office. When a CRU or conviction review process is created, its leader should outline their 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.

CRU Structure

When establishing conviction review, a prosecutor office should carefully consider how to structure its process. The considerations below apply to both a distinct CRU with its own staffing and to a formalized conviction review process that is not part of a separate unit.

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 reinvestigates a case that the appeals bureau had previously defended. A separation between the CRU and the appeals unit is recommended to ensure the integrity of both processes. It may be advisable, however, for an appeals unit to have a limited relationship with a CRU to which it may refer cases for review.

Most CRUs or prosecutors assigned as part of a conviction review process report directly to the chief prosecutor or to an executive staff member. The chief prosecutor of the jurisdiction in which the conviction in question has occurred should decide the disposition of cases. This is the standard practice for prosecutor offices. 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.

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 larger legal community. These qualities will go a long way in helping the conviction review leader to navigate the many difficult issues that may arise. Some offices find that a seasoned prosecutor will provide the necessary leadership for their CRU, while others may value the perspective of a career defense lawyer. If an outsider is brought into an office as a CRU leader, they may be paired with a seasoned, respected prosecutor.

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, and the investigator can assist as conviction review cases often require full reinvestigations, including contacting witnesses and locating evidence.

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 reinvestigations. 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 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, or lack the resources, to evaluate or reinvestigate an old case. In some instances, an independent group assists a prosecutor office with particularly time-consuming reviews. The Prosecutors' Center for Excellence assists prosecutors in this way. *Independent Case Review*, Prosecutors Ctr. for Excellence, <http://tinyurl.com/mr3msep2> (last visited Nov. 25, 2023).

Statewide entities can establish relatively well-funded units specializing in providing support to smaller prosecution offices facing complex conviction review cases; this can be done at the initiative of a state attorney general, for instance, as in New Jersey, Pennsylvania, New York, Delaware, and Michigan. And

although not the focus of this article and existing outside of prosecutor offices, a statewide “innocence commission,” as in North Carolina, provides an alternative, 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. *A Neutral, Fact-Finding State Agency*, N.C. Innocence Inquiry Comm’n, <http://innocencecommission-nc.gov/> (last visited Nov. 25, 2023).)

Criteria for Conviction Review

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. There are review procedures and structures to fit every office: large or small; urban or rural; well-resourced or understaffed. 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 separate unit can create a mission statement and policy that publicly state their commitments to justice and to ensuring that no one is wrongfully convicted.

Requests for Review

An office’s policy for receiving requests or mission statement can be posted on its website, included in an annual report or newsletter, and discussed at community meetings. These conviction review requests, sometimes referred to as “petitions,” launch the process and can originate from many sources, most typically the following:

- **Defendants.** Prosecutors will receive letters or requests from defendants, who are often still incarcerated, or members of their families.
- **Innocence Organizations.** Innocence organizations may conduct a preliminary investigation to identify the cases with credible claims of innocence, rather than merely passing along any request that they have received.
- **Defense Counsel.** Original or newly assigned defense counsel can seek a reinvestigation. Defense counsel may be asked or offer to make a presentation outlining the basis for a claim of innocence. (However, 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.)
- **Prosecutors.** 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 later.
- **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 reexaminations by prosecutors of prior cases. 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. Prosecutors can consider working with reporters to explain their review process, provide facts, and explain the laws germane to the case.

An office can develop a standardized intake form or petition protocol to streamline the process. Many prosecutor offices engaging in conviction review choose to publish instructions and forms through their websites, allowing anyone to request review of a prior conviction. The websites also often outline the types of cases that are accepted for conviction review. The online process should be as simple as possible

and avoid legal terms that may be confusing or off-putting to someone without a legal education. Offices should accept petitions by mail and email as well, to increase accessibility: As most inmates lack access to the internet, their petitions will generally arrive by mail. In the spirit of flexibility and accessibility, hand-delivered petitions could also be accepted.

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.

Ideally, all requests received should be tracked and responded to with an acknowledgment 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.

Accepting Cases for Review

Prosecutors consider several factors before undertaking 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. For this reason, statewide conviction review programs and outside independent experts can assist with conviction review that may otherwise overwhelm an office.

The considerations for accepting a claim include:

- **Credible Claim of Innocence.** As a threshold matter, there must be a credible claim of innocence. A few factors may be useful in this evaluation:
 - o Has the applicant presented a claim of actual innocence?
 - o Is there newly discovered evidence, or evidence that was insufficiently investigated in the past?
 - o Is the claim inconsistent with earlier defenses?
 - o Was the claim known at the time of plea or trial?
- **Evidence of Clear 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.
- **Type of Case Reviewed.** 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 the cases. As resources become available and the CRU becomes more experienced, the CRU may broaden the types of crimes it accepts. Considerations regarding the type of case include:
 - o **Custodial Status:** Ongoing incarceration of the person claiming innocence creates heightened urgency. This is a crucial factor in considering whether and how quickly the review should be conducted.
 - o **Availability of Records:** 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 access to the 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.
 - o **Trials vs. Pleas:** 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 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.

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- **Nature of Evidence.** Reviews also may prioritize convictions that rest in large measure on 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.

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. Error can stem from many sources, including flaws in forensic science, technology, or expert opinions. Such reviews can occur even if an office does not have a formalized CRU or conviction review process. Errors or misconduct by law enforcement, the prosecution, or defense can also trigger the need for a retroactive review. In some instances, this specialized review is handled by the CRU, assigned as a special project within a prosecutor's office, or sent for review by independent experts.

In 2013, the Kings County District Attorney's Office's CRU in Brooklyn, New York, instituted a review of 50 cases involving "legendary" New York Police Department Detective Louis Scarcella. Frances Robles & N.R. Kleinfeld, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. Times (May 11, 2013), <https://nyti.ms/3uzhUSk>. Scarcella's cases have accounted for approximately one-third of the Brooklyn CRU's overturned murder convictions, with many additional cases still under review. Frances Robles, *An Ex-Detective's Overturned Murder Cases Have Cost New York \$110 Million*, N.Y. Times (Nov. 20, 2023), <https://nyti.ms/3uB0QLO>.

Prosecutor-Initiated DNA 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 all their older homicide cases from a time when DNA technology was unavailable, or in which an older, less discriminating DNA test was used.

In 2001, the Circuit Attorney of St. Louis, Missouri, formed the Post-Conviction DNA Review project. 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. The unit collected existing documentation and evidence to complete its review and retested defendants' DNA against available evidence from the old crime scenes. Sam Levin, *Rodney Lincoln: Decades After Conviction for Murder, Hearing on DNA Gives Family Hope*, Riverfront Times (Sept. 13, 2013), <http://tinyurl.com/362rx933>.

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. Five defendants were exonerated due to the Circuit Attorney's Office's efforts. Telephone Interview with Jennifer Joyce, former Circuit Attorney, City of St. Louis, Missouri (Feb. 11, 2020) (notes on file with PCE); Telephone Interview with Ed Postawko, former Assistant Circuit Attorney, St. Louis Circuit Attorney's Office (Jan. 29, 2020) (notes on file with PCE).

In 2009, the Colorado Attorney General's Office formed the Colorado Justice Review Project, a federally funded initiative to examine felony cases in which DNA analysis could possibly identify wrongfully convicted inmates. Press Release, John W. Suthers, Colo. Dep't of Law, Attorney General Announces Colorado's Receipt of \$1.2 Million in Federal Funds to Start a DNA-Based Exoneration Program (Oct. 1, 2009), <https://bit.ly/3uD1d8k>. 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. During the two years that the project ran, DNA retesting led to the exoneration of one man. Nancy Petro, *Innovative Colorado DNA Initiatives Pay Off*, Wrongful Convictions Blog (Apr. 30, 2012), <https://bit.ly/3GiwMam>.

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. Further, the project informed ways to improve law enforcement techniques for investigating active cases and collecting physical evidence.

Conducting the Reinvestigation

Reinvestigating 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.

Scope of Reinvestigation

To gain a holistic picture of a case, a reinvestigation team can approach the review as if it were investigating from scratch, including reinterviewing witnesses. By reexamining 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 include 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.

Working with Defense Counsel

Some reinvestigations requested by defense counsel or innocence organizations can be collaborative. The degree of collaboration may be influenced by concerns including the safety of witnesses, potential conflicts of interest (such as pending civil litigation), and the degree of reciprocal collaboration. 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. For instance, the parties should discuss the degree to which investigative files, documents, and evidence will be made available to defense and vice versa. As reinvestigations 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.

Some CRUs require petitioners to sign a waiver of attorney-client privilege regarding documents from the original case at issue. 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. Many defense attorneys, however, will not agree to a waiver because they see it as a violation of their obligations to their clients.

Involvement of Original Prosecution Team

There is consensus that the prosecutors or investigators involved in the original conviction under review should not oversee the reinvestigation or be responsible for the ultimate decision about the case. 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. Another view holds that 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.

Parallel Actions

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. 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). 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.

Communication with the Victim(s)

Most likely, the victim will believe that the case is behind them 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. It is also important that a victim be contacted about the reinvestigation before the information becomes public or appears in the press. Prosecutors should consider whether there will be press coverage of the reinvestigation prior to a final decision and who is best suited to contact 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; or the prosecutor.

Additionally, prosecutors should determine whether and when the victim needs to be reinterviewed or asked for a DNA sample.

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.

Inconclusive or Disparate 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 retry the case. However, in some cases the witnesses are no longer available, or the evidence is lost, so it would be extremely difficult or impossible to obtain a conviction. In other instances, retrial may be unjust in the context of the case—for example, when the defendant already has 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. Press Release, Kym L. Worthy, Wayne Cnty. (Mich.) Prosecutor, WCPO Conviction Integrity Unit Has Dismissed Two Cases (Jan. 10, 2019), <https://bit.ly/40SFXys>.

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.

Uncovering Ethical Breaches

During 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 a 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.

If 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.

Steps Following an Exoneration

Once a prosecutor office has decided to recommend exoneration or dismissal, it must 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 dismissal mechanism available in the absence of new evidence: Most states do not recognize a free-standing claim of actual innocence. 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 L. Rev. 1453, 1472–87 (2013), <https://bit.ly/49VNbz8>. Nevertheless, prosecutors have typically been able to navigate the various procedural challenges to obtain a dismissal when needed. The legal issues vary from state to state and are beyond the scope of this article.

Practical considerations that must also be considered include advising victims and witnesses, including police witnesses; inquiring whether support is available for the newly released exonerated person; and preparing for media attention.

Preventing Future Error

Just as uncovering actual innocence is an essential part of a prosecutor's work, prosecutors must also develop processes to prevent future errors. The key elements of an error-prevention program are training, a commitment to continued improvement, and an openness to internal review and feedback.

Office culture is key. Supervising prosecutors can praise their staff not only for their convictions but for their careful review of cases, including those resulting in dismissals. Telephone Interview with Christopher Walsh, Assistant Dist. Att'y, Nev. Cnty. Dist. Att'y's Off., California (Feb. 24, 2020) (notes on file with PCE).

Other changes are more concrete. When the New York County District Attorney's Office Conviction Integrity Program (CIP) was founded in 2010, it developed various protocols, including the "Identification Case Checklist," as well as checklists tracking *Brady* and *Giglio* obligations, cooperation agreements, and questions for police officer witnesses. The lists are used to help prosecutors evaluate the strengths and weaknesses of a case, while strengthening viable cases by revealing investigative gaps. Zoom Interview with Consuelo Fernandez, Assistant Dist. Att'y & former head of the Conviction Integrity Program, N.Y. Cnty. Dist. Att'y's Off. (N.Y.) (May 27, 2020) (notes on file with PCE).

Conclusion

In the modern era, a prosecutor's 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's office that adopts a CRU, or conviction review process, or helps another office do so, demonstrates its dedication to achieve justice in every case.

Still, the true measure of integrity is to learn from and build upon experience to prevent wrongful convictions from happening again. More than 20 years since his exoneration, and even after seven years of wrongful imprisonment, Dr. Yusef Salaam demonstrates an inspiring commitment to justice and public service. With an increasing number of elected officials and other persons of influence aware of and working toward best practices, we can hope that conviction review will soon become a standard feature of prosecution—and wrongful conviction a thing of the past.

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Author

Kristine Hamann

Executive Director of Prosecutors' Center for Excellence

Kristine Hamann is the Executive Director of Prosecutors' Center for Excellence, a national nonprofit that works with prosecutors to improve the criminal justice system. Prior to that Ms. Hamann was a Visiting Fellow at the Bureau of Justice Assistance/DOJ and a career prosecutor with the Manhattan District Attorney's Office in New York City. She can be reached at khamann@pceinc.org.

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