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Conviction Review Units: A National Perspective

John Hollway

University of Pennsylvania Law School, jhollway@law.upenn.edu

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Conviction Review Units: A National Perspective

John Hollway

Quattrone Center for the Fair Administration of Justice
University of Pennsylvania Law School

April, 2016



QUATTRONE CENTER

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April, 2016



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Recommendations for Conviction Review Unit (CRU) Policies and Practices

Definition. A Conviction Review Unit (CRU), sometimes called a Conviction Integrity Unit, conducts extrajudicial, fact-based review of secured convictions to investigate plausible allegations of actual innocence. A CRU is typically contained within a local prosecutor's office.

Best Practices. A CRU dedicated to collaborative, good-faith case reviews designed to ensure the factual integrity of a conviction should be **independent, flexible, and transparent** in its work.

INDEPENDENCE

An **independent** CRU should:

1. **Report directly to the District Attorney (DA)** or prosecuting attorney, or head of the prosecutor's office, and should not be contained within the Office's appellate or post-conviction/habeas unit.
2. **Be led by an attorney with firsthand prosecutorial and criminal defense experience**, who is widely respected by attorneys within the DA's Office and throughout the jurisdiction's criminal justice community.
3. **Guard against cognitive or confirmatory biases** by including the perspective of at least one external criminal defense attorney in the process of CRU policy definition, case screening, case investigation, and recommendations for action.
4. **Be appropriately resourced** by attorneys, investigators and staff for whom CRU cases have clear priority above other office matters, with sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations.
5. **Train CRU personnel** on specific topics including:
 - a. Errors in criminal justice known to be factors in inaccurate convictions;
 - b. "Human factors" and emerging issues in forensic science that may impact past convictions secured by the use of older scientific methods; and
 - c. Specific investigative techniques useful for "cold cases;"
6. **Exclude personnel who participated in an underlying case under review** from the CRU's decision-making regarding the case, limiting participation in such cases to the provision of historical information; and
7. **Establish a clear written policy on when and how to refer to appropriate authorities any credible allegations of official misconduct** (e.g., prosecutorial or law enforcement) identified in the course of a case review.

FLEXIBILITY

A flexible CRU should:

8. **Accept any and all cases for review that have a plausible or colorable claim of factual innocence** for the conviction obtained;
9. **Provide procedural support for fact-based case reviews**, tolling any ongoing appellate litigation during active CRU review and minimizing barriers to the Petitioner's collaborative participation in case review process;
10. **Review all petitions on their factual merits**, and not on non-substantive grounds:
 - a. Permit review of petitions in which the Petitioner plead guilty to the charges;
 - b. Permit review of petitions where the sentence has been completed;
 - c. Evaluate claims based on a **current understanding of the totality of the circumstances** now known, rather than what could have been presented or known by defense counsel during the pendency of the original case;
 - d. Review cases where due process claims (ineffective assistance of counsel, newly discovered evidence, official misconduct, etc.) support underlying allegations of innocence, and cases where testimonial evidence is the sole assertion of innocence; and
11. **Allow for resubmission of a petition** whenever additional credible evidence is brought to light.

TRANSPARENCY

A Transparent CRU should:

12. **Vacate each conviction where there is clear and convincing evidence of actual innocence, or where in the interests of justice, the CRU no longer believes that the current evidence supports the conviction beyond a reasonable doubt;**
13. **Refile charges only in cases where there is substantial evidence of guilt** notwithstanding evidence gathered during the investigation of the petition;
14. **Consider time served** when deciding whether to refile charges, even in instances where evidence of guilt remains;
15. **Communicate in an ongoing and timely fashion** to Petitioner or Petitioner's counsel regarding case review, including sharing any evidence gathered, and explaining the actions taken and conclusions drawn from the review;
16. **Encourage an open exchange of information** and ideas regarding the case review between Petitioner and CRU, including open file discovery and contemporaneous disclosure of information discovered in the CRU investigation (other than CRU work product information and information that could endanger third parties);
17. **Outline any information withheld from the petitioner during the review** and establish a process for third-party review of such withheld information;

18. **Make all physical evidence available for testing by either party**, including re-testing of a previously tested object if the proposed method of testing can provide additional information;
19. **Provide testing of evidence that may provide conclusive evidence of innocence at no cost to Petitioner**, and permit other testing at Petitioner's cost;
20. **Publish clear CRU policies and procedures** designed to ensure flexibility of operations and encourage the submission of petitions for review. Suggested areas for published policies and procedures include:
 - i. How to submit a claim
 - ii. Types of cases accepted for review
 - iii. Standards of review for initial case acceptance (screening), case review, and vacating a conviction
 - iv. Role of Petitioner/Petitioner's counsel in case review
 - v. Role of original prosecutor/ investigator in case review
 - vi. Requirements on waiver of attorney/client privilege, or use of a collaboration agreement
 - vii. Sharing of information learned/evidence discovered during case review
 - viii. Conduct and payment for requested forensic testing
 - ix. Procedures for handling allegations of prosecutorial or law enforcement misconduct
 - x. Disclosure of final decision after case review and supporting rationale
 - xi. Ability of Petitioner to revisit process after final decision
19. **Engage a victim's advocate** to liaise with victims or their families during the CRU investigation phase, once the CRU determines that there is a reasonable possibility that the underlying conviction was inaccurate; and
20. **Track and report on CRU activity at least annually**, including but not limited to: number of petitions received, number reviewed, number accepted for additional review, reasons for rejecting reviews, number acted upon, types of issues in cases, final conclusions, etc.

PREVENTION

In addition, a CRU should seek to implement a culture of learning from error within the prosecutor's office, suggesting reforms to prevent the recurrence of errors that resulted in an inaccurate conviction. A CRU seeking to **prevent the recurrence of errors** should:

21. **Conduct a root cause analysis or "Just Culture Event Review," separate and apart from the CRU case review, on each case where a recommendation is made to alter a conviction**, to understand and address the circumstances and environments that allowed one or more errors to occur in the administration of justice;
22. **Identify improved policies and procedures for each stakeholder** that might prevent the recurrence of the error(s) that permitted the flawed conviction to occur; and
23. **Construct a process to implement, publicize and evaluate those modifications** throughout the jurisdiction.



CRU Checklist

As Conviction Review Units have emerged across the United States, community and other observers have sought to evaluate their impact and to identify those CRUs that are sincere about investigating and resolving credible allegations of factual innocence among closed convictions. A skepticism prevails that some CRUs are units conducting “Conviction Review In Name Only,” or “CRINOs.” This skepticism is fueled by CRUs that lack the independence, flexibility, and transparency that is described herein.

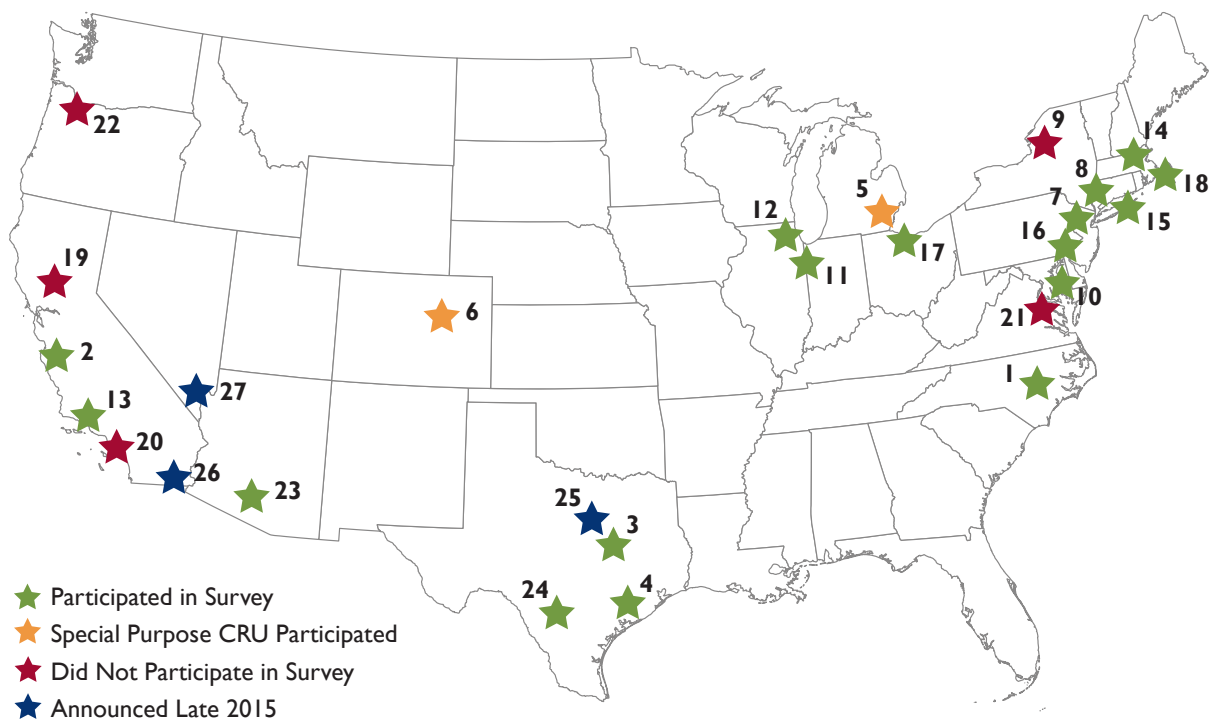
There is no single, conclusive measure that reveals whether a particular unit is a sincere CRU or a callow CRINO. This is true even of the metric that most casual observers focus on – the number of exonerated individuals

whose convictions were vacated by the Unit. Accordingly, observers should not point to any individual “best practice” recommended in this paper as definitive proof that any particular CRU is or is not engaged in the good faith review of cases of error that is at the core of the CRU’s potential to change criminal justice for the better. **In fact, none of the CRUs we interviewed answered all of these questions as we suggest below, and in the opinion of the authors, many (in fact, most) of them are sincere CRUs.** By asking the following questions as a group, however, we believe that an overall profile of sincere CRUs will emerge that can distinguish them from CRINOs, or that will prompt a conversation in offices that have not yet embraced the precepts of other established CRUs.

	Sincere CRU: Indicator of Independence, Flexibility, Transparency	Potential for Conviction Review In Name Only
Does the CRU report to the DA/Head of Office?	Yes	No
Does the CRU exist within the appellate/habeas/post-conviction unit of the Office?	No	Yes
How many attorneys are dedicated to the CRU full-time?	More	Fewer
<ul style="list-style-type: none"> Is the leader of the CRU a senior attorney widely respected in the Office? 	Yes	No
<ul style="list-style-type: none"> Does the leader of the CRU have defense experience? 	Yes	No
Does the CRU include external participants		
<ul style="list-style-type: none"> In policy creation? In case selection? In case investigation/review? In recommendations for action? 	Yes	No
Does the CRU have its own budget?	Yes	No
Is the CRU sufficiently funded to thoroughly review and investigate all credible petitions within a reasonable period of time?	Faster	Slower
Does the Office provide training to personnel conducting CRU case reviews?	Yes	No
Does the CRU provide training to personnel concerning learnings from case reviews?	Yes	No
Does the CRU have written policies and procedures describing its work?		
<ul style="list-style-type: none"> Are the CRU's policies and procedures posted on its web site? Are the CRU's policies and procedures available upon request? 	Yes	No
Does the CRU permit individuals who participated in the underlying case to participate in CRU case reviews?	No	Yes
Does the CRU provide any new evidence gathered during a case review to Petitioner in a timely fashion?	Yes	No
Does the CRU have a policy on when and how to report exculpatory information gathered during a case review?	Yes	No

	Sincere CRU: Indicator of Independence, Flexibility, Transparency	Potential for Conviction Review In Name Only
Does the CRU have a policy on when and how to report credible allegations of official misconduct, either related to the petition or during the case review, from law enforcement, the prosecutors' office, or other sources?	Yes	No
Does the CRU reject petitions of actual innocence on the basis of procedural grounds: <ul style="list-style-type: none"> Guilty pleas Exhausted appeals Sentence status Due process claims 	No	Yes
Does the CRU make physical evidence available to Petitioner or Petitioner's counsel for testing?	Yes	No
Does the CRU voluntarily toll appellate proceedings while conducting a case review?	Yes	No
Does the CRU permit resubmission of a petition if credible factual information supporting innocence is found after a prior CRU review?	Yes	No
Does the CRU communicate with the Petitioner or Petitioner's counsel throughout the assessment and investigation stages of case review?	Yes	No
Does the CRU allow Petitioner or Petitioner's counsel to participate in case investigation?	Yes	No
When making recommendations about a specific petition, does the CRU evaluate the totality of the circumstances as now understood, rather than assessing the reasonableness of the Office's actions at the time of the underlying case?	Yes	No
Does the CRU communicate the rationale for its decisions to Petitioner or Petitioner's counsel before that decision is final? <ul style="list-style-type: none"> Is the rationale provided in writing? 	Yes	No
Does the CRU provide annual reporting on its activities and impact?	Yes	No

Figure I. Conviction Review Units In The United States, December 2015



- | | | |
|--------------------------------------|-----------------------------|-------------------------------------------|
| 1. North Carolina
Inn. Inq. Comm. | 10. Baltimore City, MD | 20. Los Angeles County, CA |
| 2. Santa Clara County, CA | 11. Cook County, IL | 21. Washington, DC |
| 3. Dallas County, TX | 12. Lake County, IL | 22. Multnomah County, OR |
| 4. Harris County, TX | 13. Ventura County, CA | 23. Pima County, AZ |
| 5. Wayne County, MI | 14. Suffolk County, MA | 24. Bexar County, TX |
| 6. Colorado JRP | 15. Nassau County, NY | 25. Tarrant County, TX |
| 7. New York County, NY | 16. Philadelphia County, PA | 26. San Diego County, CA
(ann. 12/15)* |
| 8. Kings County, NY | 17. Cuyahoga County, OH | 27. Clark County, NV
(ann. 12/15) |
| 9. Oneida County, NY | 18. Middlesex County, MA | |
| | 19. Yolo County, CA | |

Offices in **PURPLE TEXT** were initiated after January 2014.

*The San Diego County District Attorney's Office formed a "liaison" with the California Innocence Project in March, 2011 to review cases where actual innocence was alleged; this liaison was announced as a formal Conviction Review Unit in December, 2012.



Introduction

It should be the bedrock that... you're trying to do the correct thing, the just thing and not necessarily doing the thing that just favors your side. This is very contraindicated to people who get into trial work on both sides, because people who get into trial work are highly competitive people... We're not doing this just to correct past mistakes. We're doing this to try to get something out that can be a road map [explaining], here is where you did something wrong, and correct it so that there are not wrongful convictions in the future.

—Conviction Review Unit Lead Prosecutor

Over the past two decades, Americans have grown more and more aware of the number of individuals across our country who have been convicted of crimes they did not commit. As of March 1, 2016, there were 1,747 such exonerated individuals across the United States.¹ While it is typically defense attorneys or prisoners themselves

who first bring these exoneration cases to light, the fate of each individual claiming innocence from behind bars rests (for the most part) with state and local prosecutors employed in the very offices that secured the individual's conviction in the first place.

¹ National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>. The Registry defines an “exoneration” as follows: A person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (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, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence 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 to the defendant, the defense attorney and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person.

Mindful that “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America,”² and aware of the ethical duty “to seek justice, not merely to convict,”³ many prosecutors have responded to the rise of exonerations by acknowledging the potential for mistakes in the criminal justice system, and working to establish an objective process to review cases where mistakes may have been made regarding guilt or innocence, taking any and all appropriate actions to ensure that justice is done, including vacating a previously secured conviction.

While all prosecutors’ offices have a procedure for handling appeals, including habeas corpus or post-conviction appeals, the most prevalent institutional response by prosecutors to address fact-based post-conviction claims of actual innocence is the Conviction Review Unit (CRU), sometimes called the Conviction Integrity Unit.⁴ Since the first CRU was created in the mid-2000s,⁵ more than 25 such units have been announced across the country. See Figure 1.

The creation of a CRU is a public commitment by the DA⁶ to ensure the accuracy, and therefore the legitimacy – that is, the integrity – of all criminal convictions secured by the Office. As Los Angeles (CA) County District Attorney Jackie Lacey said when announcing her Conviction Review Unit in June, 2015:

Just as we are expected to keep pace with advances in forensic science, technology and investigative methods, prosecutorial agencies also must update and formalize the way in which post-conviction claims of innocence are handled. We must respond whenever we receive new substantial and credible information that the evidence used to imprison someone for a serious or violent felony is not trustworthy. We must review that information and determine if we remain confident in the conviction. As prosecutors, we have a legal obligation and an ethical mandate to ensure that the right person is convicted for the crime charged.⁷

The philosophy of a CRU is straightforward, but implementing such a unit in a highly charged political and adversarial environment can be complex and challenging. Furthermore, each jurisdiction that has created a CRU has independently defined its structure, scope, and operations, often in reaction to a limited number of unique cases. Very few CRUs have written protocols, policies, or procedures, and what protocols do exist have rarely been made public. Accordingly, we sought to conduct a national survey of CRU practices and their impact.

² Jackson, Robert H., “The Federal Prosecutor,” Address at the Second Annual Conference of United States Attorneys, Washington, DC, April 1, 1940, p. 1.

³ ABA Model Rule 3.8(a)

⁴ Although the first units called themselves “Conviction Integrity Units,” more units over time have come to favor the label “Conviction Review Units.” The word “Review” is often preferred as a more accurate representation of what the Unit does. In addition, some prosecutors feel that reviewing cases for “integrity” might cause an inference that “integrity” does not exist in all convictions. Because we use the term “conviction integrity” in this paper to refer to an evaluation of a conviction in a case where neither guilt nor innocence have been proven to a certainty, we use the term “Conviction Review Unit” throughout.

⁵ Two offices, Santa Clara (CA) and Dallas (TX) typically vie for the title of “First CRU.” Santa Clara set up a nascent CRU in 2004, but it took a one-term hiatus under a new DA before being reinstated in 2008. Craig Watkins became the DA in Dallas County (TX) in 2007 and started the longest continuously operating CRU at that time; it is the publicity this office garnered that gets most of the credit for leading the wave of CRUs that has followed. It is San Diego, however, that may properly lay claim to the origination of the concept, when Deputy District Attorney Woody Clark started a “DNA Innocence Project” in his office in 2000 to review claims of actual innocence that could be resolved through DNA testing.

⁶ We use the term “District Attorney” and associated abbreviations, etc. herein as a global term for non-federal prosecutors, including jurisdictions where the local prosecutors are referred to as “State’s Attorney.”

There are too few CRUs operating for too short a time to obtain conclusive assessments of the utility of different policies or procedures, or to measure the impact of a CRU on criminal justice outcomes or perceptions. Still, there is value in an empirical attempt to draw observational theories or lessons learned by the first wave of CRUs. Commentary on CRUs has been limited, and for the most part anecdotal, consisting mainly of media accounts of the creation of individual CRUs. The concept of conviction integrity has been discussed with a focus on prosecutorial “best practices” that could prevent errors,⁸ while discussions of CRUs have focused on either their roles in the exoneration of innocent individuals or theoretical suggestions for their application.⁹ Given the rapid increase in the number of CRUs nationwide (fourteen new CRUs have been announced since the start of 2014)¹⁰ and the lack of standards or evaluations of policies, procedures, and impact of CRUs, a more detailed assessment of the actual policies and practices of operating CRUs may be helpful to a variety of audiences.

To date, CRUs have focused on identifying and correcting past errors in convictions. Some are beginning to perceive the additional potential of the CRU to be a driver of quality improvement, learning from errors to propose procedural or environmental reforms throughout a jurisdiction to prevent future errors. But the potential value of a CRU extends even beyond these important goals. Sincere CRUs that conduct open and honest reviews of post-conviction claims of actual innocence stand as a triumph of truth and justice over procedural legal formality, and of collaboration over adversarialism, competitiveness, or bias. As such, they restore faith in our criminal justice system by practicing the highest ideals of truth and justice that are often preached, and often doubted.

This paper seeks to help:

- (a) Prosecutors in offices with established CRUs understand how their peers have approached common challenges that arise in the fact-based, extrajudicial review of convictions to ensure conviction accuracy and integrity;
- (b) Prosecutors in offices without CRUs accelerate the creation of units with maximum positive impact; and
- (c) Communities that have or want CRUs evaluate such units and ensure that CRUs are living up to their aspirations for improvement of the criminal justice system over time.

⁷ “Why A Conviction Review Unit is Needed: Jackie Lacey,” Los Angeles Daily News, June 24, 2015, accessed at <http://www.dailynews.com/opinion/20150625/why-a-conviction-review-unit-is-needed-jackie-lacey>, last visited September 9, 2015.

⁸ Barkow et al., Center of the Administration of Criminal Law, New York University School of Law, “Establishing Conviction Integrity Programs in Prosecutors’ Offices.”

⁹ Gross, Samuel, et al., “The National Registry of Exonerations: Exonerations in 2014,” Published January 27, 2015, available at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>; Scheck, Barry, “Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them,” Cardozo L. Rev. 31:6 (2010), 2216-56.

¹⁰ The Orleans Parish (LA) District Attorney’s Office announced a CRU in collaboration with the Innocence Project New Orleans in late 2014; the collaboration was concluded in January, 2016. <http://www.theneworleansadvocate.com/news/14502358-64/cannizzaro-innocence-project-call-it-quits-on-project-to-unearth-false-convictions>



Creation of the Conviction Review Unit

The very creation of a Conviction Review Unit should be seen as a promising development in the administration of justice, as it highlights the prosecutorial role in ensuring the legitimacy of criminal convictions, and the continuation of that obligation even after a conviction is secured.

While such an ongoing obligation might seem contrary to the mission or motives of a District Attorney, the prosecutors who took part in our research uniformly believe that investigating cases where errors may have occurred is not only desirable, but essential. Our requirement that the criminal justice system function flawlessly does not

ensure its perfection. Errors in criminal justice, as in any human system, persist despite the best efforts of our police, prosecutors, defense attorneys, judges, and juries. Each allegation of wrongful conviction undermines the legitimacy of the prosecutorial role, and an office that refuses to address such allegations openly and honestly adds self-inflicted injury to its reputation. While perhaps such errors cannot be eliminated by the system, its actors **must** work to minimize their occurrence and severity. This can be done most effectively by identifying, evaluating and learning from every error in a system in a culture of relentless and objective self-improvement.¹¹

¹¹ See Generally, *An Organisation With a Memory: Report of an Expert Group on Learning from Adverse Events in the NHS, Chaired by the Chief Medical Officer* (The Stationery Office 2000), available at <https://psnet.abrg.gov/resources/resource/1568> (a major study undertaken by the National Health Service in the United Kingdom, exploring the causes of failure or adverse events, drawing on lessons from other industries, proposing a shift in organizational culture from a culture of blame to open reporting and balanced analysis, and arguing for a systems-centered approach to failure analysis rather than a person-centered approach of “blaming, naming and shaming”); M. V. Williams, *Improving Patient Safety in Radiotherapy by Learning from Near Misses, Incidents and Errors*, 80 BRIT. J. RADIOL. 297 (2007), available at <https://psnet.abrg.gov/resources/resource/5673/improving-patient-safety-in-radiotherapy-by-learning-from-near-misses-incidents-and-errors> (arguing for the implementation of widespread open reporting of near misses, incidents, and errors, with web archiving of the information on publicly available databases in order to insure widespread learning); Qing Yan, Michelle C. Bligh & Jeffrey C. Kohles, *Absence Makes the Errors Go Longer: How Leaders Inhibit Learning from Errors*, 222 ZEITSCHRIFT FÜR PSYCHOLOGIE 233 (2014), available at <http://econtent.bogrefe.com/doi/abs/10.1027/2151-2604/a000190> (original research study exploring the effects

The decision to create a CRU may also arise from a more pragmatic place. Most District Attorneys are elected officials, politicians as well as prosecutors, and many jurisdictions that have created CRUs have received positive coverage in the media for placing accuracy in justice on a higher pedestal than conviction or case closure rates.¹² As in other industries, errors or misconduct provide powerful incentives for procedural change. Wrongful convictions, and the calls for reform they create, are often used by challengers to a sitting District Attorney, and high-profile cases of error are often held up as proof of a DA's lack of competence (if not lack of morals). The creation of a CRU, then, can help a sitting DA respond to allegations of error or incompetence, or a new DA follow through on a campaign promise to improve the Office, each in furtherance of community relations:

It was one of the things I had campaigned on, and this issue was a hot topic during our campaign because [cases of wrongful conviction] were getting a lot of media attention. It was a big issue in terms of wrongful convictions and what's the next [chief prosecutor] going to do to address it.

Such factors led to the creation of the first CRUs. In Santa Clara, DA George Kennedy was confronted by a small number of exonerations in sexual assault cases. Working with Assistant DAs David Angel and Karen Sununu, Kennedy envisioned a unit within the DA's Office that would identify and implement "best practices" to improve the quality of the Office's prosecutions, and ensure the accuracy and legitimacy of its convictions.

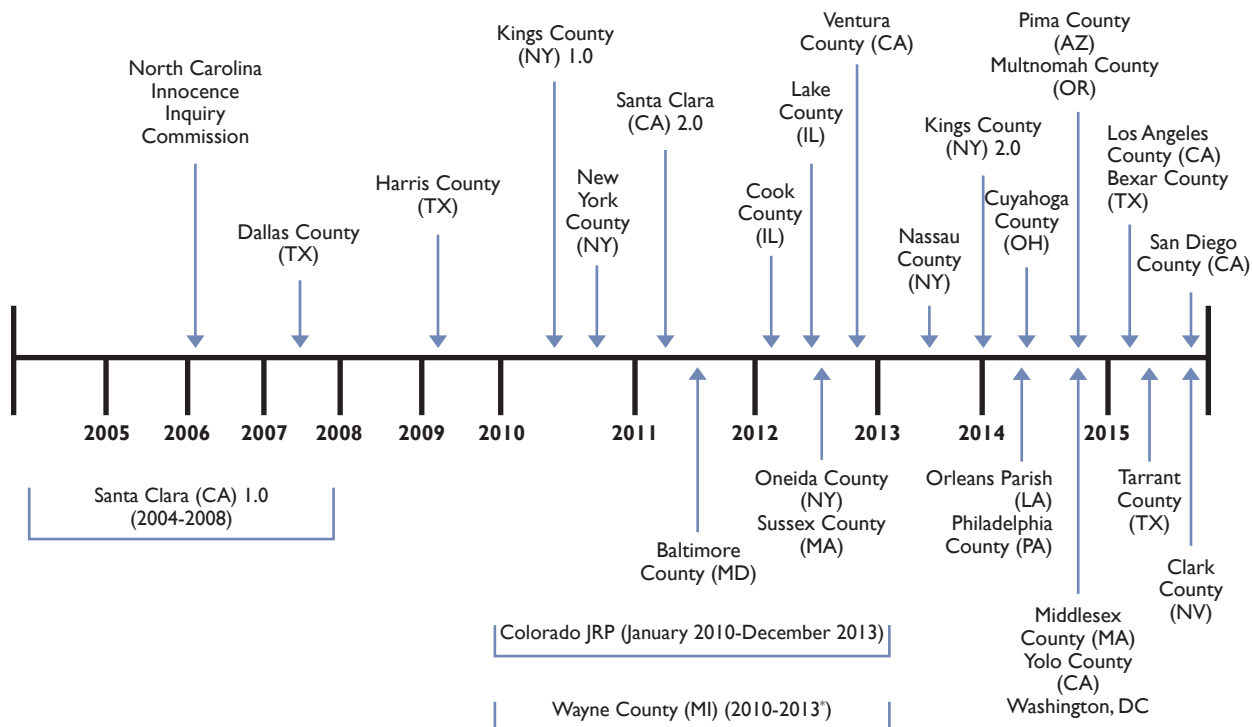
Not long after, in 2006, Craig Watkins became the first African-American District Attorney of Dallas County, supported by a voter base separate from, and disenchanted with, the existing Dallas political establishment. Watkins campaigned on a platform of reform, bolstered by the fact that Dallas had had more post-conviction DNA exonerations (12) in the prior five years than any county in the nation. When another DNA-based exoneration was announced shortly after his inauguration, Watkins met the man at the courthouse and offered a public apology to the man. Watkins had no role in the exoneration itself and has since described his act simply as common courtesy.¹³ The media, however, viewed it as something more, and the story quickly found its way into the national press.¹⁴

Not long after, Watkins was informed of a substantial number of untested rape kits in the possession of the Dallas DA's Office. Taking what he has described as a common sense approach to the problem, he ordered the testing of all untested kits.¹⁵ The result was an increase in cases deserving of review, and the combination of increased cases and public support both within the electoral base and on a national level led Watkins to formally create a Conviction Review Unit in 2007 as a resource to address these and other such cases that might arise.¹⁶ Watkins hired Mike Ware, a law professor at Texas Wesleyan University School of Law and a board member of the Innocence Project of Texas, to oversee the unit and engaged law students to conduct the case screenings to determine eligibility.¹⁷ Importantly, Ware had substantial experience as a defense attorney, and was also respected by the attorneys at the DA's Office for being fair and trustworthy.¹⁸

of five different leadership styles, both positive and negative, on learning from errors); Michael Frese & Nina Keith, *Action Errors, Error Management, and Learning in Organizations*, 66 ANN. REV. PSYCHOL. 661 (2015), available at <http://www.annualreviews.org/doi/abs/10.1146/annurev-psy.2015.01.01.1146> (review of research on error prevention and error management, explaining the difference between the two approaches, and discussing the empirical evidence for the positive effects of error management, emphasizing the importance for successful learning outcomes of a mindset of acceptance of human error); Suzanne M. Wright, *Patient Safety in Anesthesia: Learning from the Culture of High-Reliability Organizations*, 27 CRIT. CARE NURS. CLIN. N. AM. 1 (2015), available online at <http://www.ncbi.nlm.nih.gov/pubmed/25725532> ("In this article the most current understanding of human factors, complex systems, and safety principles borrowed from high-reliability organizations (HRO) is provided as a foundation to examine the dynamic and vulnerable nature of anesthesia practice. HROs—industries that deliver reliable performances in the face of complex working environments—can serve as models of safety for our health care system until plausible explanations for patient harm are better understood.")

¹² See, e.g., Emily, J., "Dallas County conviction integrity unit turns focus to non-DNA cases," Dallas Morning News, March 24, 2010, accessible at <http://www.dallasnews.com/news/community-news/dallas/headlines/20100522-Dallas-County-conviction-integrity-unit-turns-focus-to-non-DNA-cases>; Barber, E., "Dallas targets wrongful convictions, and revolution starts to spread," Christian Science Monitor, May 25, 2014, accessible online at <http://www.csmonitor.com/USA/Justice/2014/0525/Dallas-targets-wrongful-convictions-and-revolution-starts-to-spread>; Meminger, D., "Some DAs Make Effort to Help People Wrongfully Convicted of Crimes," Time Warner NY1 Cable News, July 13, 2015, available online at <http://www.ny1.com/nyc/all-boroughs/criminal-justice/2015/07/13/some-das-make-effort-to-help-people-wrongfully-convicted-of-crimes.html>; Gerber, M., "D.A. creates unit to review claims of innocence," LA Times, June 29, 2015, available online at <http://www.latimes.com/local/california/la-me-0630-conviction-integrity-20150630-story.html>.

Figure 2. Creation of Conviction Review Units Over Time.



Often the impetus for starting a CRU has been one or more specific cases in the jurisdiction, covered in the media and raising concern about the local administration of justice:¹⁹

We had had an exoneration in this county... I would say it was part of the genesis of the idea of a conviction integrity program. I would say it inspired the idea that we wanted... procedures to come up with a way of dealing with it that was a little bit more formalized.

¹³ 2015 Quattrone Center Spring Symposium, "A Systems Approach to Conviction Integrity," University of Pennsylvania Law School, April 4, 2014, Presentation of Craig Watkins.

¹⁴ See, e.g., "New Prosecutor Revisits Justice in Dallas," Sylvia Moreno, Washington Post, March 5, 2007.

¹⁵ Watkins, see footnote 13 above.

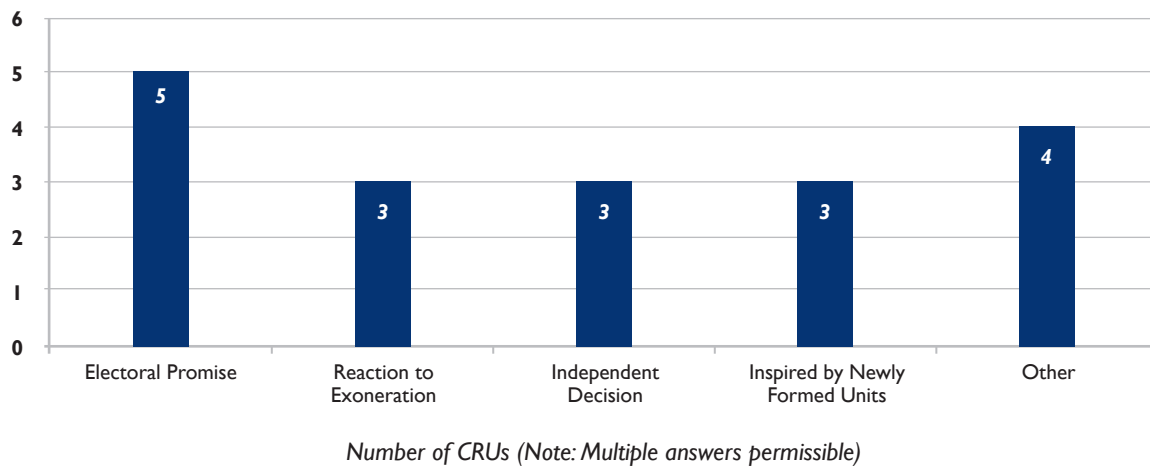
¹⁶ Moore, Terri, "Prosecutors Reinvestigate Questionable Evidence: Dallas Establishes a 'Conviction Integrity Unit,'" *Criminal Justice*, Volume 26, Number 3, Fall 2011

¹⁷ "New Prosecutor Revisits Justice in Dallas," Sylvia Moreno, Washington Post, March 5, 2007.

¹⁸ Scheck, Barry, Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them. *Cardozo L. Rev.* 31:6, 2010, pp. 2215 – 2256, at 2251.

¹⁹ See, e.g., DC Prosecutors Create Unit to Fine Wrongful Convictions," Washington Post, September 11, 2014, available at http://www.washingtonpost.com/local/crime/dc-prosecutors-create-unit-to-fine-wrongful-convictions/2014/09/11/91a3722c-39da-11e4-bdfb-de4104544a37_story.html. The Jesse Friedman case in the Second Circuit, and the exoneration of Daryl Hunt in North Carolina, provided motivation for the creation of the Nassau County Conviction Review Project and the North Carolina Innocence Commission, respectively; in addition, the Wayne County (MI) ballistics review was created to review a group of cases with questionable forensic conclusions.

Figure 3. Impetus for Conviction Review Unit Formation.



The factors that led to the creation of CRUs in Dallas and Santa Clara are not unique to these jurisdictions, and as public awareness of errors in the administration of justice has grown, DAs in other jurisdictions have adopted the CRU model in their jurisdictions, at an accelerating pace (see Figure 2).

Many DAs, in offices with and without established CRUs, have noted that reviews of cases where actual innocence has been alleged have always been a part of a prosecutor's job. Still, DAs have seen actual and promotional value in the creation of a formal unit that is publicly tasked with conducting such case reviews:

We got a new district attorney who came in... and started the unit. It was very much done on the heels of Dallas. Dallas County's Conviction Review Unit was getting quite a lot of attention, they were doing a lot of good work out there and there was a decision to do a separate and distinct unit in our office. Claims of innocence

and post-conviction DNA testing cases had been previously handled by the post-conviction writs division. So it's not that we weren't doing the work, but we did not have a standalone section that had 100% of its time and resources dedicated to that type of work.

There are a number of these units bringing up across the country... They're... being publicized. So there is a ground swell of support for these kinds of things. But if you dig a little deeper I think it's a direct response and a result of the Innocence Project. ... [Our DA] was interested in it. He's been asked to do it by people in and out of the office... We needed to be able to have a unit in our office that would deal with them directly.



Models of Conviction Review

There is a great deal of variety among CRUs in their structure, funding, participants, procedures, cases eligible for review, etc. One area of near-unanimous agreement, however, is the CRU's overarching purpose. **CRUs exist to conduct fact-based reviews of plausible claims of actual innocence²⁰** without regard to the type of error or mindset of the participants involved.

This focus on fact-based case review pushes the CRU into an extrajudicial role, distanced from post-conviction or habeas corpus proceedings that expressly avoid assessing facts and focus on legal and due process concerns. Without reducing the need for those structures in our criminal justice system, CRUs seek to avoid decisions based on legal or procedural grounds, focusing instead on

the injustice that matters most to the typical American – did the convicted individual actually commit the crime for which he or she was convicted?

While all CRUs exist for this stated purpose, they have evolved into several models:

“Standard” CRUs. While no two CRUs are identical, 23 of the units we reviewed share a similar high-level structure: one or more experienced Assistant District Attorneys²¹ are given special responsibility within a prosecutor's office to review cases where (a) a conviction has been achieved; (b) direct appeals have been rejected; and (c) actual innocence is claimed by the convicted individual. As we will see, CRUs vary in size and

²⁰ This paper describes the initial communication to a CRU regarding a case for potential review as a “petition,” and describes the individual claiming innocence as the “Petitioner.” In reality, a “petition” may be a letter from the convicted individual him/herself, or a telephone call to the CRU from the individual, his/her family member, etc. Our use of “petition” or “Petitioner” should therefore be distinguished from any formal, court-required petition for appellate review.

²¹ To date, the United States Attorney's Office for the District of Columbia is the only federal prosecutor's office to publicly announce the formation of a CRU. This may be in part because of the unique caseload of the USAO in Washington, DC, which handles all manner of violent crimes and “blue collar” misdemeanors and felonies that are more typically handled by state or local officials in non-federal jurisdictions.

structure, policies and procedures, structural distance from the post-conviction appellate or habeas processes, and the extent to which external personnel are engaged as advisors or reviewers of case-specific information, but this basic structure describes what we will call the “standard” Conviction Review Unit.

“Special Project” CRUs. In several instances, prosecutors have established case review teams as a targeted response to a specific and identifiable group of cases potentially subject to the same or similar repeatable errors, typically in forensic science. The work of these teams has been funded by specific (federal) grants permitting the deployment of resources to conduct new DNA or ballistic investigations. Such “Special Project CRUs” include the Wayne County (MI) ballistics review project, the Colorado Justice Review Project, and the St. Louis DNA Review Project. In Wayne County, for example, laboratory mistakes in handling gun cases were brought to the attention of the DA by a defense attorney and a crime lab analyst. A resulting audit suggested a potential error rate of 10% in firearms cases, causing the closure of Detroit’s crime lab in 2008, and the DA’s initiation of a process to review firearms cases that might have been affected by the errors. A similar story led to the creation of the state-wide Colorado Justice Review Project (JRP), which began as a joint project of the Colorado Attorney General and the Denver District Attorney to review convictions of certain violent crimes in which post-conviction DNA testing might be used to exonerate an innocent inmate. The JRP received federal funds in 2010 for this purpose, and those funds were renewed and extended to other types of crimes. While the initiative is ongoing, its activities have been significantly curtailed since the expiration of that funding in 2013.

Innocence Commissions. An alternative to the standard CRU is the North Carolina Innocence Inquiry Commission (NCIIC). Created and funded by the North Carolina state legislature in 2006 “to investigate and

evaluate post-conviction claims of factual innocence” throughout the state,²² the goals of the NCIIC are the same as the standard CRU, though it acts as a statewide independent clearing house for the investigation of actual innocence claims rather than leaving the administration of actual innocence claims to each local jurisdiction. This potentially expands the cases eligible for fact-based conviction review, particularly in jurisdictions that have fewer than 5 prosecutors. In such jurisdictions, which account for roughly three-fourths of all prosecutor’s offices nationwide,²³ resource constraints are likely to limit the ability of the office to create and sustain a formal CRU.

On the other hand, as explored more fully below, the NCIIC has no structural ties to any prosecutor’s office, and its investigation into cases may be received less than enthusiastically from prosecutors in the jurisdictions where the cases originated. Furthermore, while the NCIIC has subpoena power to aid in its investigations, its recommendations themselves lack the power of law. Instead, the NCIIC presents its findings, along with the participation of the relevant DA’s Office, in a hearing to a judge. Thus, the NCIIC is a step removed from traditional CRUs in its ability to affect change in individual cases, and it has no authority to implement reforms that might prevent such errors from reoccurring.

North Carolina’s use of the term “Innocence Commission” should be differentiated from other states, including New York, Pennsylvania, California, and most recently Texas, where legislatures have appointed Innocence Commissions staffed by criminal justice experts to review issues related to wrongful convictions and generate recommendations to minimize their occurrence. These organizations share the title of “Innocence Commission” with the NCIIC, but use the term differently. While they may review past cases of wrongful conviction, only North Carolina’s Innocence Commission participates in the review of active cases currently under appeal. The other states using the term assemble a broad group of stakeholders including

²² North Carolina Innocence Inquiry Commission website, available at <http://www.innocencecommission-nc.gov/statute.html>, downloaded August 17, 2015; North Carolina G.S. §§ 15A-1460 - 1475.

²³ Prosecutors in State Courts, 2007, United States Bureau of Justice Statistics, December 2011.

prosecutors, defense attorneys, judges, victims' advocates, exonerees, and others, and review confirmed exoneration cases from the jurisdiction and elsewhere, with the goal being a set of recommendations for reform intended to reduce wrongful convictions throughout the state. In some states (e.g., California, Pennsylvania), the authoring of the report completes the work of the commission, while in others (e.g., New York State Justice Task Force), the group's agenda and recommendations are ongoing. Such commissions are engaged in a valuable inquiry, but their observations are inherently limited by time and cases reviewed. They miss the opportunity created by the traditional CRU model to implement an ongoing and increasingly sophisticated culture of learning from error that matures over time.

“Course of Business” Offices – There are roughly 3,000 counties, 50 states and 94 federal jurisdictions in the U.S. criminal justice system. Of these, fewer than 30 have established CRUs. One reason for this is the belief held by many conscientious DAs that the cases suitable for CRU review already are being handled as part of the office's existing caseload; if so, these DAs believe, there is no need to create a separate structure for them. As one DA who has not created a CRU in her district explained,

It's not as formal as what I think people do in what they call their Conviction Review Units, but I think our office has always done that. We always have an open mind and we'll look at it. And I can't give you statistical information on anything like that, but it's been a part of the culture of the office since the day I started.

A number of prosecutors in offices with newer CRUs have also hastened to make this point. For them, the CRU is an explicit effort to address community skepticism about

prosecutorial motives and to make plain to laymen what the prosecutors have believed their whole careers: that no prosecutor wants to convict an innocent person. If a mistake has been made, or is being made, the prosecutor should be open and objective about the information available, and work hard to ensure that a fair and just result is achieved at any and all times. As Clackamas County (OR) DA John Foote said, “I think every lawyer in our office is responsible for conviction integrity... It's not some specialty. To me, it goes with the job.”²⁴

Whether the CRU is local or state-wide, the specific model of the CRU is less relevant than how the office chooses to embrace and communicate the philosophy of conviction integrity over time. The sincere CRU's philosophy of objective and open investigation should be our aspiration in every criminal case. At the same time, the CRU is re-investigating cases that have been seen as “victories,” both for the prosecutors that secured them and for the Office as a whole. Thus, a new CRU often starts with a headwind of suspicion, both from within (e.g., other prosecutors in the Office who don't want their cases reviewed for error) and without (e.g., defense attorneys who doubt the true motives of the CRU and view it as a publicity stunt). Those supporting the initiative point out that the creation of a CRU is entirely voluntary on the part of the District Attorney, and ask for the benefit of the doubt; skeptics reply that DAs are motivated to appease both the general population and the line prosecutors within the office, and worry that the unit conducts “Conviction Review In Name Only (CRINO),”²⁵ while making no real provision for the sort of extrajudicial analysis described above.²⁶ A CRINO is arguably worse than no CRU at all, since it not only retards the progress of criminal justice accuracy and reform, it makes the operation of sincere CRUs more difficult in other jurisdictions.

²⁴ “Multnomah County DA assigns veteran prosecutor to guard against wrongful convictions,” *The Oregonian*, Oct. 26, 2014, available at http://www.oregonlive.com/portland/index.ssf/2014/10/multnomah_county_da_assigns_ve.html.

²⁵ The CRINO acronym is the creation of Professor Ron Sullivan of Harvard Law School. Others have referred to similar organizations that pay lip service to conviction review but act solely to affirm existing convictions as “conviction *preservation* units.”

²⁶ One CRU head who participated in this research expressed a deeply felt concern that “to label [a CRU] as insincere, bad-faith, and ‘in name only’ ... is disrespectful to prosecutors who, at this early stage of the conviction integrity movement, are in good faith attempting to develop conviction review programs.”

To address these concerns, and to signify to all stakeholders that the CRU is a good faith attempt to accomplish the wide variety of system benefits described above, *sincere* CRUs should emphasize:

- (1) the *independence* of the CRU and actively support its broad-based mission that elevates truth and accuracy above judicial decisions and procedure;
- (2) the *flexibility* and freedom of the CRU to investigate broadly and deeply across allegations of actual innocence in its own discretion; and
- (3) efforts by the CRU to provide *transparency* with regard to its activities and impact.

These concepts of independence, flexibility and transparency are part of any high-quality public agency, and should already be the foundation of daily operations throughout a DA's Office. Applying them specifically to the operations of the CRU, however, will allow it to engage more collaboratively and effectively with others in the system, to the benefit of all.



A Note for Jurisdictions with Fewer Attorneys

The majority of jurisdictions with CRUs are large, urban or suburban jurisdictions with more than 50 prosecutors, and most of the observations in this paper come from offices with greater than 30 attorneys. That does not mean that the philosophies and practices of a strong CRU don't apply to smaller prosecutors' offices. Errors may occur in jurisdictions large or small, and there is no data to suggest that a rural DA in a 1-2 attorney office is any more or less able to avoid, detect, or remedy error than prosecutors working in the larger offices.

It should be noted, though, that many smaller state or local prosecutors' offices may lack the resources to separately staff a CRU. It would be impossible, for example, to create a formal independent CRU in a DA's Office that has one prosecutor. This does not mean that smaller DA's Offices are free from an obligation to conduct good faith independent reviews of colorable post-conviction claims of actual innocence, and smaller offices should ensure that their communities are provided with a clear path to submit such claims. This could be done by sharing

responsibility for case reviews with larger offices within the jurisdiction, by engaging a volunteer panel on an ad hoc basis and contracting out leadership of case reviews as needed, or through a statewide organization, as has been done in North Carolina.²⁷ The important thing is to ensure that size and resources not impose a limitation on the ability of the DA's Office to provide justice to all of its citizens.

²⁷ Only one jurisdiction, Colorado, has attempted to manage a CRU through the state Attorney General, and that was done for a limited "Special Purpose CRU" model involving cases where guilt or innocence could be conclusively proven through DNA. This model ran into some jurisdictional challenges as not all District Attorneys welcomed the AG's participation, but it could be useful as a way to ensure that plausible claims of actual innocence do not get overlooked or fall between the cracks in smaller jurisdictions with fewer resources for CRU-type investigations.



CRU Independence

While CRUs investigate and make recommendations about cases, virtually every office we spoke to reserved for the District Attorney the sole discretion to make final decisions about CRU petitions.²⁸ Given the potential political ramifications of moving to vacate a secured conviction, this is not surprising. At the same time, in order for the CRU to be effective, the CRU must convey an ability to make difficult decisions that may seem to be in opposition to the Office or its line attorneys, without penalty or second-guessing. The CRU must be open to the possibility that mistakes have been made in the Office over time, and it must have the support of the DA and Office leadership to conduct full investigations that may dredge up unpleasant facts for the DA or his or her colleagues. In short, the CRU must be independent in its

decision making, focused only on the assessment of guilt or innocence and supported in full by the DA without thought to the political ramifications of its actions.

A CRU's independence can be measured in multiple ways. We can look to its place within the organizational structure, the ability of resources to conduct its work, or the number of people who can influence or approve its recommendations or actions on specific cases, for example. These issues can and should be viewed in aggregation to evaluate the extent to which the CRU is operating free from the control or bias of others and is empowered to conduct and act upon the extrajudicial, fact-based case review that should be the CRU's main objective.

²⁸ One office permitted the CRU head to make independent decisions about lower-level or nonviolent cases, but reserved the DA's ability to decide on all violent felonies.

CRU Chain of Command

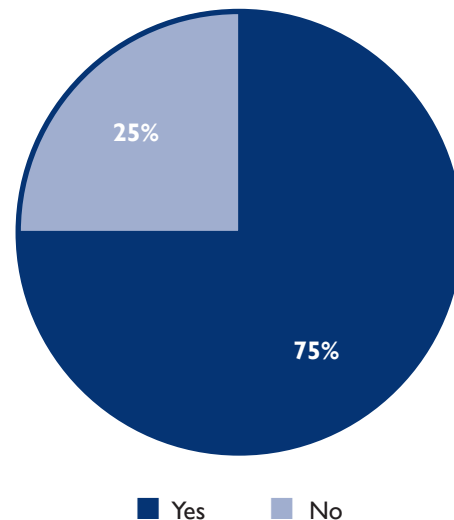
The ultimate question facing a CRU is whether the DA's Office should act to vacate a conviction. While offices we interviewed had multiple different processes, all agreed that the role of the CRU is to advise the DA on *how* to answer this important question, and not to actually answer the question itself. The CRU is expected to conduct a thorough investigation and give a recommendation to the District Attorney, who retains the sole discretion on whether to vacate or reverse a conviction.²⁹

The district attorney of course is free to do whatever he pleases on these cases despite what recommendation the CRU may have and what recommendation the [external committee] may have. It is always going to be ultimately his decision.

In part because the DA has the final word on all CRU activities, it is important that the DA signify strong support for the undertaking. This reduces efforts to circumvent or ignore the CRU's requests for information or assistance.

While DAs have found various ways to communicate their strong support for a sincere CRU, one common method is to have the CRU report directly to the DA. The DA's personal involvement and awareness of day-to-day activities makes clear his or her commitment to the unit and provides more freedom to the CRU to conduct investigations free of potential conflicts, while minimizing the impact of others who may be less enthusiastic about the work of the CRU. Most CRUs have been implemented as direct reports to the DA him/herself; those that have not typically report to the First Assistant DA or to the Chief of the Appellate Unit, who then reports to the DA.

Figure 4. CRU Reports Directly to DA (n=20)



Separating the CRU from the Appellate or Habeas Unit

A more subtle, but very important reason to have the CRU report directly to the DA involves the interplay between the CRU and an office's existing structure for handling appeals, including post-conviction appeals.

In organizations where no CRU exists, questions of inaccurate convictions typically arise as part of the appellate process, whether the basis for the appeal is legal or factual. Placing a CRU in the office's appellate or habeas unit therefore makes intuitive sense. Appellate attorneys within the DA's Office will have considerable experience with the different types of arguments made by individuals protesting their convictions, and most of the challenges will proceed through the post-conviction appeals process in the court. Placing the CRU within the appellate unit thus makes for an efficient use of resources, providing a pool of attorneys who can be deployed as necessary to

²⁹ Presumably, a DA who repeatedly overturns or ignores recommendations from his CRU to vacate convictions will be subject to public skepticism about, if not accountability for, his or her sincerity in the conviction review process.

handle credible allegations of factual innocence and does not require a restructuring of the senior management team in the office.

On the other hand, many attorneys – both defense and prosecutors – view the role of an appellate attorney within a DA's Office as fundamentally different from the underlying goal of a CRU. As one veteran prosecutor stated,

[The Office Appeals Bureau] has a different interest than what we have. They, beginning with the appeal through the post-conviction process, are trained and tasked to defend the conviction.

These observers worry that the core purpose of a typical appeals unit within a DA's Office is the **preservation**, rather than the **review** of properly achieved convictions. Put differently, the prosecutorial mindset of an appellate lawyer presupposes guilt and relies on the appellate court to review the conviction and identify any potential errors. Where it exists, this mindset may undermine the ability of the appellate prosecutor to consider innocence objectively.

Well, here's a good example: we had a rape case that had been sitting in the office for a year or two when I got it. Arrested in 1992. Convicted in 1994. It was a gang rape case and evidence not revealed to the defense at the time of trial showed that the complaining witness, a 13-year old girl, had all kinds of psychological disorders and an IQ of 71. A defense expert now says that would lead to confabulation, that she would perceive injustice where none existed, and try to get even for it. Which is exactly what she said she had done after the trial. After the trial back

in 1994 she immediately recanted and said she had done exactly that, that she was mad at two of these defendants because she thought they were friends of hers and they hadn't helped her. And she made up their involvement. For some reason the trial judge didn't believe her recantation and some years went by. And here's [where the mindset comes in.] A couple of lawyers in our appeals section said, maybe we can make a claim on latches because they could have brought this title, they could have brought this claim years ago. And I said, it's called conviction integrity. I'm not gonna use some technical defense to keep from addressing the merits of this case. And I'm afraid that's what would have happened if someone in [the CRU leadership] job had that sort of prosecutorial mindset of how can we defend this?

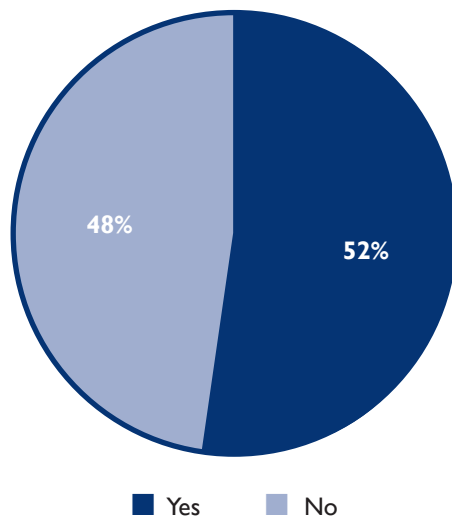
Prosecutors who make this observation are not criticizing their appellate colleagues. In the vast majority of cases, the DA's Office has no reason to believe that a mistake has been made, and every reason to believe that an individual has been properly convicted of criminal conduct. Litigating such cases in the appellate courts with the goal of maintaining the conviction is exactly what prosecutors are supposed to do in our adversarial system. At the same time, a review process based on a pre-established and unreviewable definition of fact, except in cases based on allegations of "newly discovered evidence" that was "not available to the defendant at the time of trial" is not the same as the extrajudicial, outcome-neutral review of factual innocence that is at the core of the CRU's mission. Asking Assistant District Attorneys inculcated in the former to suddenly start engaging in the latter may not always be immediately successful.

Structurally and philosophically, then, sincere CRUs define their mission as separate and apart from the mission of the Office's appellate unit. In fact, as many have commented, a case of actual innocence may actually be suffocated by formalized due process or habeas corpus rules, which are focused more on the need for judicial efficiency, finality, and speculative discourse on what "could" have been available to a defendant at time of trial as opposed to a candid and open review of whether the individual actually committed the crime charged.³⁰

The belief that a CRU and an appellate unit should not coexist is not a universal view. Some actively encourage the use of appellate attorneys for case reviews:

I almost invariably pull out of our [appellate] unit, since they're used to doing the post-conviction type of inquiries. And this is work that is analogous to a habeas petition. So it's a pretty [important] skill set.

Figure 5. CRU Separate From Habeas/ Appellate Unit (n=21)



Others believe that adding the fact-based reviews of a CRU is actually a benefit to the appellate unit, precisely because it shows the appellate attorneys a different mindset and approach to appellate litigation. Philadelphia's Conviction Review Unit, for example, consciously placed its CRU within the Appellate Unit, in part because the DA wanted the CRU head to educate the appellate attorneys on how fact-based reviews might lead to different appellate reviews.³¹ Under this view, CRUs might have a liberating effect on appellate units that view their job as "conviction preservation," rather than muffling the independence of the CRU's fact-based investigations. Similarly, the Washington, D.C. CRU has been created as part of its Special Proceedings Division, the unit that handles post-conviction appeals.³² Further evaluation of these structures and the impact of the CRUs in offices that take each view will be useful.

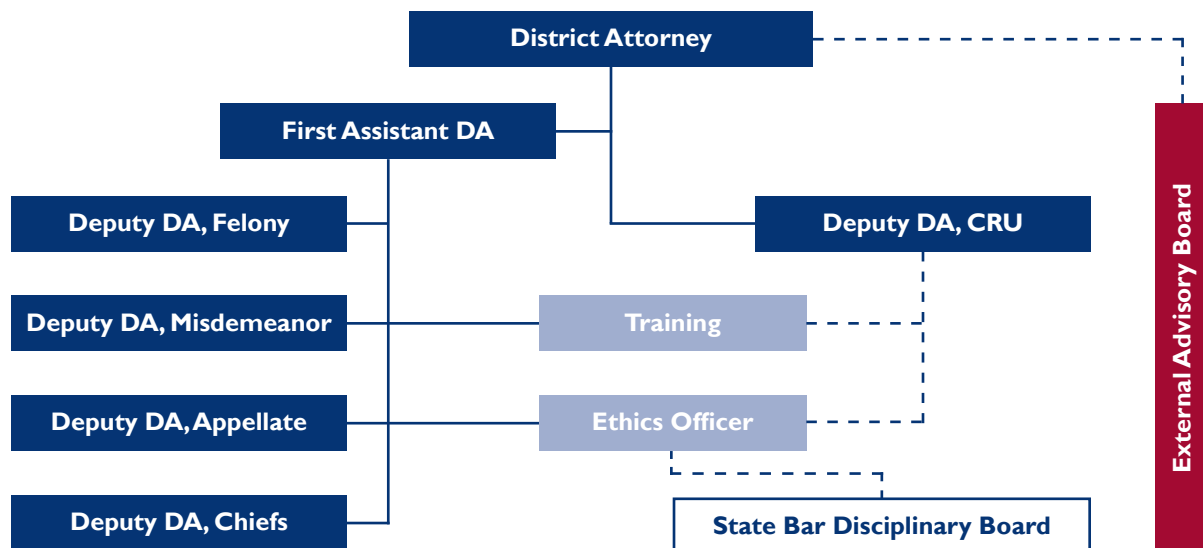
It is for this reason that several DAs have separated their CRU and its fact-based assessments from their appellate/post-conviction review unit and its due process-driven advocacy (See Figure 5). A sample organizational structure is depicted in Figure 6.

³⁰ See, e.g., Seaman, Julie, "When Innocence is No Defense," New York Times, August 12, 2015, Bookman, Marc, "Does an Innocent Man Have the Right to Be Exonerated?," The Atlantic, December 6, 2014.

³¹ Personal Communication with Mark Gilson, Philadelphia DA's Office, December 11, 2014.

³² Part of the rationale for placing the CRU in Washington, DC in the appellate unit was results-oriented and not indicative of a particular mindset regarding the underlying cases. As a political and economic matter, the creation of the CRU required new resources, and those resources could not be created without going up a long chain of command. Thus, institutional and/or budgetary factors may also control the location of the CRU in a particular office.

Figure 6. Potential Organizational Chart Including a Conviction Review Unit



Selecting CRU Leadership

DAs who have established CRUs are mindful that the individual in charge of the CRU will have a significant impact not just on the Unit's effectiveness, but on its perception both inside and outside the office. One DA put it this way:

We all know the people in any group that are not “yes men,” so to speak. I hire people that are going to keep an open mind, that are always saying “yeah, but what about this?” Those are the type of people that I look for. You need people that are going to be strong willed, especially for a Conviction Review Unit model because they may be in a situation where their co-worker's case is going to be dismissed. That [co-worker] may not agree with the decision, so you certainly can't be a pushover. It takes a certain personality, I think, to be in these units.

The choice of leadership for a CRU sends a variety of important messages to all stakeholders and external observers. Sensitive to this, DAs have without exception appointed experienced, veteran prosecutors to lead the “traditional” CRU.³³ First and foremost, this is sensible in terms of the highly technical work that needs to be done. Appointing a CRU head with a wide range of trial experiences should enable the CRU to identify the hallmarks of a questionable conviction and to review effectively an emotionally charged case where the facts may have happened decades prior.

For internal stakeholders within the office, the appointment of a veteran prosecutor who has risen through the ranks in the DA's Office signifies the DA's commitment to the Unit and provides it with the credibility to advocate for overturning a conviction where appropriate, even when such advocacy could result in the criticism (perceived or real) of a valued colleague.

³³ See pages 67-70 for the view of the NCIIC, which uses a different model.

Finally, the choice of a leader for the CRU conveys volumes to external observers about the likely approach that the CRU will take. Installing as the CRU leader an individual with broad experience in prosecuting “tough cases” within the office signifies a belief that conviction reviews are important enough to warrant the focus of a seasoned trial attorney, whose skills could be effectively used on important contemporary felony prosecutions. At the same time, a CRU head should not simply be a talented prosecutor. Appointing an individual who can listen to opposing viewpoints and assess claims of prosecutorial error calmly, openly and objectively, and who is capable of building relationships with defense counsel, will convey to the community that the CRU – and by extension, the DA – has intellectual independence, with the ability and the will to review cases on their substantive merits even if the ultimate result may not support the prior conviction. Both the perception and the reality of this independence are important to the CRU’s effectiveness going forward.

Participation of External Stakeholders.

An important question about CRU operations is whether and how to involve external voices in the CRU’s planning or day-to-day activities. Many observers of criminal justice, both within and outside DA’s offices, express concern about the potential for confirmation³⁴ or other cognitive³⁵ biases to arise within a prosecutor’s office (or, of course, in any criminal justice agency, including defense offices or courts) given the repetition of the cases and the need for constant advocacy for criminal accountability. These biases can lead to a “prosecutorial mindset” that rejects claims of actual innocence out of hand, even while acknowledging their potential for existence.

Believing that CRU independence means intellectual freedom from such biases, many DAs have designed various structures to ensure that an independent, defense-oriented perspective is available to assist and inform the CRU’s views, either for specific cases or by influencing the unit’s policies and procedures.

The CRU that has most aggressively embraced third-party participation in the activities of its CRU is in Brooklyn, NY, where Kings County District Attorney DA Kenneth Thompson asked Ron Sullivan, a Harvard Law Professor and former Federal Public Defender and Director of the Public Defender Service for Washington, D.C., to coordinate the establishment of the office’s CRU with a veteran ADA appointed from within as its operational leader. Bringing in third-party participants, especially those with first-hand criminal defense experience, can impact the entire CRU’s approach to cases of actual innocence:

[What] we are trying to create [is] an ethos. It’s an attitude, it’s a perception. It should be the bedrock that... you’re trying to do the correct thing, the just thing and not necessarily doing the thing just that just favors your side. Now this is very contraindicated to people who get in to trial work on both sides, because people who get into trial work are highly competitive people... That is a sea change that we’re trying to get in terms of attitude among prosecutors.

External participation may be integrated in the CRU’s process as individuals or by committee, and at various points throughout the case review process. Third parties may assist CRUs in developing policy and procedures, helping to think through operational hurdles and generating political support for the unit within the office and across the jurisdiction. They may also participate in or review the work and recommendations of the CRU, to minimize the risk of unintentional or unobserved confirmation bias or other cognitive bias on the part of the case reviewers.

A majority of offices, however, have not yet embraced third-party participation in their CRUs. While the

³⁴ Confirmation bias is a type of cognitive bias defined as “the tendency to interpret new evidence as confirmation of one’s existing beliefs or theories.” Oxford English Dictionary Online, accessed Nov. 27, 2015.

³⁵ Cognitive bias is “the common tendency to acquire and process information by filtering it through one’s own likes, dislikes, and experiences.” *Businessdictionary.com*, accessed Nov. 27, 2015. Subtypes of cognitive bias include confirmation bias, fundamental attribution error (FAE), belief bias, framing, or hindsight bias, among others. Wikipedia, “cognitive bias,” accessed Nov. 27, 2015.

obvious reason for this is a disinterest in sharing errors with external individuals, there are other rationales for an internal case review process. Some DAs view the CRU case review process as identical to the review of any other criminal prosecution; since a typical case review is handled entirely within the DA's Office, the thinking goes, so should the CRU case review. For others, the exclusion of third parties is more political in nature. The mere creation of a CRU can be viewed by some as revolutionary. To add to that the ability of external individuals to second-guess the office's decisions would simply be too much change at once, and several prosecutors have decided to assess this carefully before adding external participants:

It's all within the office. We've discussed some and I'm interested in these outside panels that some of the units have around the country. We're not real sure what we want to do with that right now. We're looking at potentially outside panels working more in the training aspect than an oversight sort of outside folks.

Whatever the reason for not including external participants, it is seized upon by skeptics of the CRU as proof that the inherent conflict of a CRU reviewing its own office's cases is not being conducted in good faith. This is discussed in greater depth in the "transparency" section of this paper.

Where third-party participation is permitted, CRUs deploy them in a variety of ways:

- **External Advisors in Policy, Not in Case Review.**

The CRU established by New York County (NY) includes a Policy Advisory Panel "comprised of leading criminal justice experts, including legal scholars and former prosecutors, who advise the Office on national best practices and evolving issues in the area of wrongful convictions."³⁶ These

advisors assist the DA and CRU in structural and procedural issues, but participation in the investigation of, or recommendations about specific cases is limited to individuals within the DA's Office.

- **Blend of External and Internal Personnel for Case Review.**

In Oneida County (NY), a panel called the Conviction Integrity Program (CIP) Committee is convened to review the CRU's recommendation to initiate a formal investigation into a case.³⁷ The panel consists of the CRU coordinator, three Assistant DAs, three forensic experts, and one community representative. A second seven-member committee – four assistant prosecutors, two police officers and one civilian – receives and reviews the final recommendation for action from the CRU before it is sent to the District Attorney.

The US Attorney's Office for the District of Columbia has announced a similar approach, and plans to send completed case review recommendations to a review panel that includes two attorneys, one a career prosecutor and one a former attorney with the NAACP Legal Defense Fund.³⁸

Another approach has been taken by Middlesex County (MA), which hired a veteran of the Pennsylvania Innocence Project as the screening attorney for its CRU, to ensure that the initial review of petitions for review are at once internal and informed by a defense-oriented and potentially innocence-oriented perspective.

- **External Case Review Committee.**

The CRU in Lake County (IL) is staffed with volunteers of varied criminal justice backgrounds,

³⁶ <http://manhattanda.org/preventing-wrongful-convictions>, accessed August 18, 2015.

³⁷ Oneida County District Attorney's Office Conviction Integrity Program.

³⁸ United States Department of Justice Press Release, "U.S. Attorney Machen Announces Selection of Consultants To Work With Office's New Conviction Integrity Unit," Jan. 12, 2015, available at https://www.bja.gov/Publications/ConvictionIntegrityUnit_PR.pdf.

each of whom lives and works *outside* of Lake County. The goal is to ensure that no case reviewer has any particular history with, pre-existing opinion about, or stake in the outcome of an individual case, and to separate the panel's advice from other political influences related to the potential for civil settlements, etc.

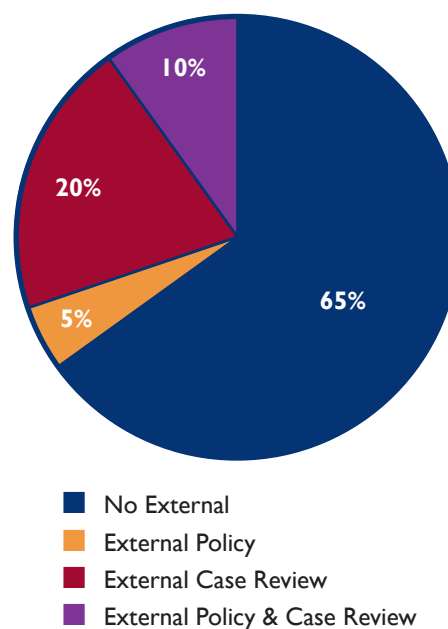
In Kings County (NY) the CRU meets regularly with an independent panel consisting of external participants as a way of shaping case reviews in process. The leadership of the office explains the benefits of engaging with external participants as follows:

We have this independent review panel which looks over everything we've done, looks at our recommendation and gives us a direction, or asks for additional materials so that they can continue to investigate the cases and then make their recommendation to the district attorney. The independent review panel is a check on the good faith that... hopefully can be ratified by these distinguished attorneys in the community who have no connection to district attorney's office, aren't paid by the district attorney, are doing this completely voluntarily and frankly they don't have a dog in the fight. I think that is a very important perceptual element about what we're doing, that everything that we do as prosecutors is being reviewed by this independent review panel and that they make their own recommendation independent of what we do. The independent review panel makes its own rules. They discuss it among themselves, [and] make various requests if they

find it necessary for more information. Ultimately, they come back and say thumbs up or thumbs down on the case. Again, that is a recommendation that goes to the district attorney, along with our recommendation. The DA makes the ultimate decision.

As with any cross-disciplinary group, these external advisory or review boards can run into challenges. One CRU chose to disband its external review board after the group, which consisted of a former federal prosecutor, an experienced former police officer, and representatives from the defense bar and civil rights groups, could not reach a consensus on the merits of a particular case. Whether this sort of action reflects a "CRINO" or is simply a failure of consensus-building will be a case by case determination.

Figure 7. CRUs with External Participants (n=15)



The impact of external participants on CRUs is impossible to measure at this time – and of course, no structure guarantees the optimal process. An objective, unbiased, thoughtful case review may occur in a closed, internal-only process just as a subjective, biased, shallow review may occur in a process that involves only external reviewers. What is more clear is that many DAs and CRU heads see value in enlisting the views of thoughtful individuals who bring open minds to the idea of what a CRU ought to do, how it should operate, the mechanics of case reviews, and the validity of its conclusions and recommendations. These advantages are both substantive, in that they minimize opportunities for bias, and perceptual, in that they respond to concerns of bias or favoritism towards the DA's Office in the review.

Participation of Personnel from Underlying Case in Case Review

Another aspect of CRU independence is ensuring that the CRU's case investigations are not being led by the same prosecutors who participated in the underlying conviction that is currently being called into question. CRUs are unanimous that prosecutor(s) or investigator(s) who participated in the original case and conviction may not lead the CRU's case review. Most offices also require the recusal of the original prosecutor from panels or committees reviewing CRU recommendations:

I personally don't tell [the original prosecutors] much... First of all, I don't really care what they have to say because they are going to have opinions and I don't want opinions, I want facts. I also don't want to get them involved in it because I have to keep a clear mind myself.

Part of the concern is a sensitivity to the emotions of the original prosecutor, who is likely to suffer from substantial regret or guilt if he prosecuted and convicted someone of a crime in error.³⁹

I'll come in and they'll be like, "[o]hh, what did I do?" Certain officers do the same thing... And you know what? Sometimes they want to know. They are like, "Did I make a mistake?" They really want to know, did I do something wrong, because nobody I've talked to, wants [to convict] the wrong person.

While the sensitivity of prosecutors to having their work criticized is a potential barrier to gathering accurate information about the case, it must also be recognized that the original prosecutor or investigator is likely to be the individual in the office most familiar not only with the facts of the case, but with surrounding circumstances that add context and meaning to the investigation and the actions taken by the DA's Office in the underlying case. Accordingly, most CRUs agree that the original prosecutor(s) should be interviewed about the case, but not involved in any substantive decision regarding the case review.

³⁹ In this sense, the prosecutor or investigator in a conviction that ultimately is proven to be mistaken can be termed a "second victim," with the first victim being the individual who has been exonerated. See Dekker, Sydney, *Second Victim: Error, Guilt, Trauma, and Resilience*, CRC Press, 2013. See also Stroud, Marty, Keynote Address, "Defining Quality in Criminal Justice," Quattrone Center for the Fair Administration of Justice Spring Symposium, May, 2015, available at <https://www.law.upenn.edu/institutes/quattronecenter/conference/springsymposium2015/videos.php>.

Staffing and Resources Necessary for the CRU

Another key factor in the independence of the CRU is the amount of dedicated resources available to it. As Vice President Joseph Biden is fond of saying, “Don’t show me your values. Show me your budget, and I will tell you what you value.”⁴⁰ A CRU without dedicated resources must compete for resources within the DA’s Office that are conducting more traditional prosecutorial work; this enables supervisors and managers who may not appreciate the goals of the CRU to exert negative pressure on the Unit. Even managers who support the CRU may find it difficult and counterproductive to volunteer prosecutor/investigator resources to the CRU if that means creating an additional burden on the entire office.

DAs, and in some instances the federal government⁴¹ have provided widely varying amounts of manpower and money to CRUs. Occasionally, a CRU will be funded through an additional line item in a DA’s budget, supported by a Mayor or county executive with control over the DA’s budget. More frequently, however, DAs who wish to establish and maintain CRUs must do so without additional budget dollars, and operate within the existing budget for the office.

Whether the office has specifically created a CRU or not, many prosecutors we spoke to believe that identifying and resolving inaccurate convictions is an important part of the prosecutorial role, and thus should be part of the day to day operations of the office. It is the DA’s responsibility to secure necessary funds to properly investigate cases with alleged errors, without compromising the ability to process new criminal cases. This can be a challenge:

[Erroneous convictions are] a problem [my county executives don’t] see the benefit of. [My] belief in its utility is strong, but hard to translate to those who control the county budget. [My] in-house attorneys do work on this above their caseload, since there can be no reduction in caseload to handle CRU work, and our external board is all volunteer.

While it is easy to point out that CRUs must be appropriately staffed, budgeting in most DA’s Offices is a zero-sum game. Every dollar committed to a CRU to review potentially erroneous convictions is a dollar not available to promote the DA’s other initiatives, and while the office should receive a benefit from the transparency, accountability, and justice principles exemplified by the CRU, there is also some risk of the public perception that tax dollars are going to fix mistakes rather than to improve community safety and justice moving forward.⁴² The decision of how to staff the CRU, then, occurs within the context of the Office’s overall goals and obligations, and depends upon the availability of resources, the expected funnel of petitions for case review, and the number of actual investigations that will need to be conducted in the coming year – inquiries that require data collection and analysis for accuracy.⁴³ Such data, which is rarely collected by CRUs, could also be used to secure additional funding for the DA’s Office, but will still be competing with other policy initiatives for a limited “pot” of city or county resources.

⁴⁰ <http://www.goodreads.com/quotes/10478-don-t-tell-me-what-you-value-show-me-your-budget>

⁴¹ The “Special Project” CRUs in Colorado and Wayne County (MI) were supported by federal grants supporting forensic testing. These groups conducted testing as permitted by the funding, then largely stopped working upon the expiration of the federal funds.

⁴² Some enterprising DAs use their civil forfeiture fund to pay for the additional costs of their CRUs, though recent public focus on the potential for conflict of interest when a DA’s annual budget is supplemented through forfeiture may limit this option in the future.

⁴³ Some DAs, when defending their decision not to create a CRU, state that the number of cases ripe for review in the jurisdiction are minimal, simultaneously underscoring the Office’s quality and deferring the case review process. Whether such a belief is accurate or merely politically expedient can be difficult to prove in most jurisdictions.

Table 1. Dedicated Resources for Conviction Review Units.

Jurisdiction	Attorneys Fully Dedicated CRU ^a	Attorneys Partially Dedicated to CRU ^a	Investigators Dedicated to CRU	CRU Staff	Jurisdiction Population (in millions) ⁴⁴
Los Angeles County (CA)	3	0	1	1	10
N. Carolina Inn. Inquiry Comm.	3	0		8	10
Cook County (IL)	3 ^b	2	6 on call	5 in pool	5.2
Harris County (TX)	2		1	1	4.3
San Diego Cty (CA)	2	0	0	0	3.3
Kings Cty (NY)	10	0	3	3	2.6
Dallas County (TX)	2	0	0.5	1	2.5
Santa Clara County (CA)		5	1		1.9
Bexar County (TX)	3	0	As needed	0	1.8
Wayne County (MI)	3		1	2	1.8
New York County (NY)	2	As needed		2	1.6
Philadelphia County (PA)		1			1.6
Nassau County (NY)	1				1.4
Cuyahoga County (OH)				1	1.3
Pima County (AZ)	0	1	As needed	0	1.0
Ventura County (CA)	0	4			0.84
Middlesex County (MA)	1	2 per case	As needed	1	0.83
Baltimore (MD)	3	0	As needed	2.5	0.82
Suffolk County (MA)		1	>1	>1	0.77
Lake County (IL)		3	1		0.70
Oneida County (NY)	3		3	1	0.23

^a Case Review only; does not include review committees or policy committees

^b One FTE funded by federal grant, not by office

⁴⁴ U.S. Census figures, 2010.

The resources needed to properly staff a CRU varies both office to office and year to year. Los Angeles County's announcement of its new CRU was accompanied by an ongoing budget allotment of \$1 million. The Dallas CRU was created after a public hearing with County Commissioners in 2007 and secured almost \$400,000 in additional funding to dedicate two assistant district attorneys, the chief prosecutor, an additional investigator, and a paralegal; presumably these individuals have continued to work on the County payroll in these capacities.⁴⁵ Bexar County (TX), whose CRU was started in 2015, has assigned three FTEs to its CRU; while these are currently funded by existing operations funds, the DA hopes to change this to line item support in the next fiscal year.

The North Carolina State legislature, in creating the NCIIC for a state with roughly the same population (~10 million people) as Los Angeles County, budgeted \$550,000 per year to the NCIIC, a sum almost completely expended on the six full-time staff of the Commission that are needed to keep up with incoming petitions and ongoing case investigations. The Commission's state-funded budget also provides \$8,500 per year for DNA and forensic testing and \$6,421 per year for consulting with experts. This budget leaves the Commission without sufficient funding to conduct all of the DNA or other forensic testing it deems necessary to thoroughly investigate the cases in its pipeline. The Commission spends an average of \$85,000 on DNA testing and an additional \$7,750 on scientific experts each year, which does not include the costs of prosecutors or judges who participate in hearings to adjudicate cases where the NCIIC believes there is sufficient evidence to overturn a conviction.

Grant money designed to help law enforcement deal with testing backlogs can ameliorate funding pressures somewhat, and has been helpful in Cook County (IL), North Carolina, and other jurisdictions, providing human resources and money for evidence testing. For example, the NCIIC has in the past secured funding from the National Institute of Justice, the research arm of the Department of Justice. The money, in the form of a "Bloodsworth Grant" from NIJ (three years at \$250,000 per year), provided an additional 2 FTEs and funds to be used for DNA testing, other forensic testing, and expert witnesses in cases where DNA could be used to provide conclusive evidence of the innocence or guilt of the petitioner. Even with this additional funding, however, the Commission has found it impossible to pay for all the testing it seeks, and its request to the North Carolina Legislature for an additional \$100,000 for this purpose was denied.

⁴⁵ Moore, Terri, "Prosecutors Reinvestigate Questionable Evidence: Dallas Establishes a 'Conviction Integrity Unit,'" *Criminal Justice*, Volume 26, Number 3, Fall 2011.

CRU Flexibility

Prosecutors conducting the extrajudicial fact-based assessments of actual innocence at the core of the CRU's mission are confronted with a limitless variety of circumstances, rationales, and scenarios supporting allegations of actual innocence. Each case presents prosecutors with unique challenges in deciding which cases to accept for review, how those reviews should be conducted, and what actions to take at the conclusion of the review to ensure justice is done. The questions confronting CRUs include both the aspirational and the practical; attorneys we spoke to struggle with finding an optimal balance between the need for flexibility in case acceptance and the need to prioritize limited resources. Attorneys also struggle with a consistent definition of "conviction integrity." While some cases of guilt or

innocence are clear (or can become clear with some investigation), many investigations conducted by CRUs result in the conclusion that while there are definite weaknesses in the state's case, there is also evidence linking the petitioner to the crime. In such cases, how can the CRU draw an acceptable balance between ensuring that all of its convictions have "integrity," as opposed to becoming, in the words of one CRU head, a "13th juror" overturning appropriate convictions?

CRUs are not uniform in their answers to these questions, but the Units that (1) maximize their flexibility in case intake, investigation, review and recommendation; (2) minimize their restrictions on cases eligible for review; and (3) take advantage of external participants are

more effective at realizing the core mission of accurate evaluations of claims of actual innocence. Ensuring the flexibility necessary for the CRU to achieve its mission is the focus of our next section.

The Conviction Review Case Funnel

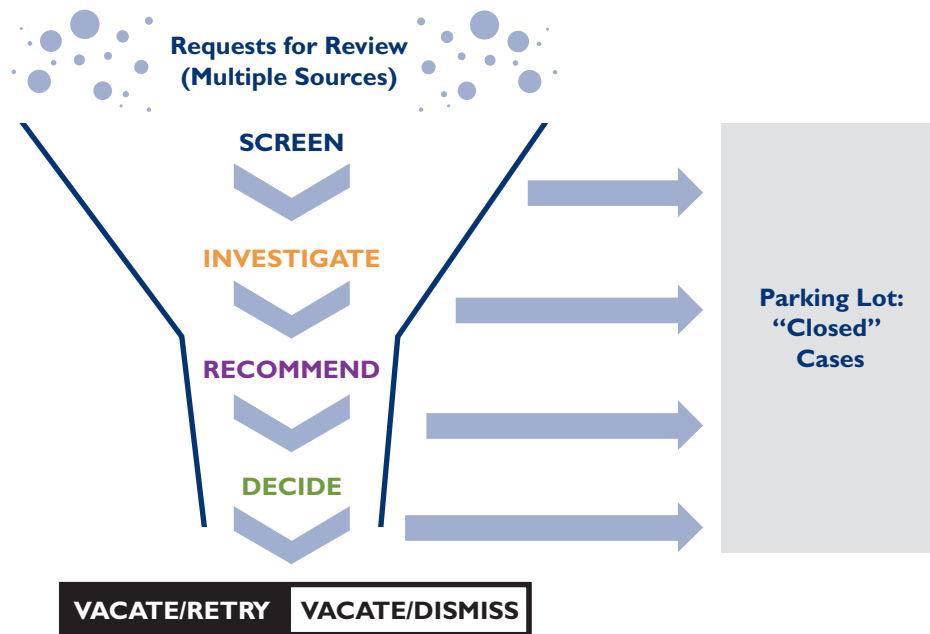
Leaders of CRUs agree that their willingness to vacate a previously secured conviction outside the existing appeals process is dependent on a finding of actual innocence – that is, either the petitioner did not commit the crime charged, or no crime was committed under the facts as now understood. None of the CRUs we spoke to felt that their role was to review a case where actual innocence was not the core of the rationale for why a petitioner’s case should be reviewed.

From this agreed upon baseline, however, there is some deviation among offices regarding the cases a CRU will

accept. The fundamental question that is asked by the CRU from its initial receipt of petitioner’s request for review to the DA’s ultimate decision on the case remains the same: are there sufficient facts reviewable by the CRU in support of the actual innocence of the petitioner to justify continuing an investigation? The answer varies by the stage of the process and is conducted differently by each CRU.

Each CRU has unique requirements or standards of proof for deciding which petitions will be accepted, reviewed, and investigated, but the process that a petition must go through within the CRU is uniform. A graphic representation of this “case funnel” from the submission to the CRU of a claim of innocence through the DA’s action to vacate or reverse a conviction that is now believed to have been reached in error is shown in Figure 8, below.

Figure 8. Case Funnel for CRU Review.

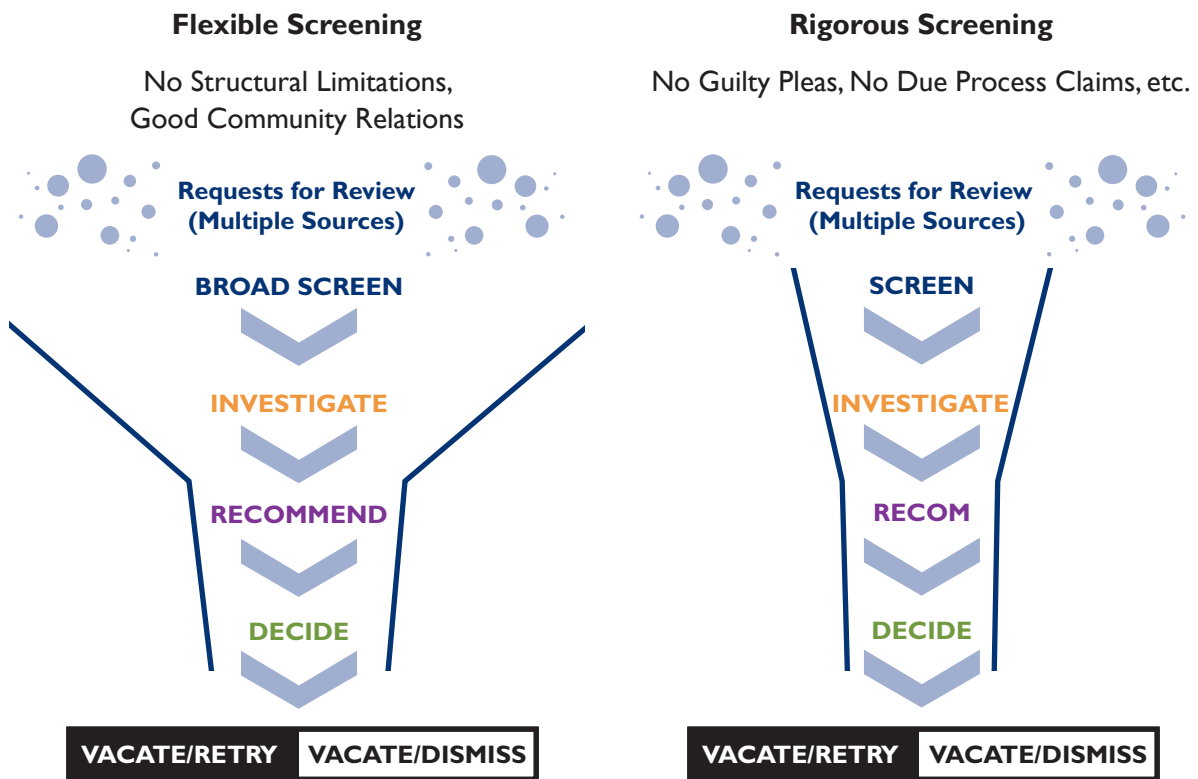


Petitions submitted to CRUs for review will proceed through the following stages:

- **Intake.** Intake policies or procedures are focused on the CRU's response to the initial request that the CRU review a case.
- **Screening.** If a case meets the baseline criteria for consideration by the office, it will be reviewed by an individual within the CRU for a minimum requisite level of credibility.
- **Investigation.** At this stage, the CRU devotes more substantial resources to the review, typically a lead prosecutor and perhaps an investigator at a minimum. The goal is to reach a definitive conclusion about the appropriate resolution of the case.
- **Recommendation.** The conclusions of the investigation are provided to the District Attorney with a recommendation for action. For many CRUs, the recommendation phase occurs in conjunction with a review board of one type or another.
- **Action.** The DA decides what action should be taken in the case. If the petitioner's assertions of innocence have prevailed, the DA approaches the court with a proposal to either exonerate and release the defendant or drop the charges and lay the groundwork for a new trial.

The precise shape of the funnel will vary office by office based on the CRU's criteria for case advancement and on the way it conducts its reviews. Offices with broad policies for case intake and screening, and those perceived to conduct good-faith investigations, are more likely to receive a large number of petitions and thus a wide "top" of the funnel, with the funnel narrowing based on the amount of rigor applied at each downstream phase. Other offices that employ strict criteria or high standards of proof at the recommendation phase may find fewer petitions, but a higher percentage of completed investigations after case acceptance, and very few cases that proceed to the DA with a recommendation to set aside the conviction.

Figure 9. Impact of Screening Policies on Case Review Funnels.



While the shape of a CRU’s case funnel is not conclusive evidence of the sincerity of the CRU in the conviction review process, it is worth noting that the CRU case funnel is affected not just by the facts of the cases submitted to the CRU, but by the fact that petitions are submitted at all. The funnel of cases available for CRU review is smaller than it could be in a number of jurisdictions with CRUs, as defense counsel who lack faith in the CRU (in other words, who believe that the CRU is a CRINO) simply do not submit their cases to the CRU for review. As one defense attorney put it, “Why would I provide the DA’s Office with an opportunity to learn more about my case outside of appellate litigation if the case review conducted by the CRU is not sincere? I’m just giving up leverage and not getting anything useful for my client.”

Thus, an underfunded CRU or a CRU not engaged in good faith case review may find it has fewer cases to review not because the cases of error do not exist in the jurisdiction, but because the CRU’s relationship with the defense bar (and vice versa) convinces innocent individuals to pursue litigation rather than trust in a collaborative process. In such situations, the CRU (or perhaps CRINO) actually is doing more harm than good on several levels: (1) it has created a false sense of security in the DA’s Office; (2) it does not assist in necessary case reviews; and (3) it adds to a cynicism and lack of trust between the DA’s Office and the community that limits opportunities for system improvement.

Standards for Acceptance of Petitions for Review

Decisions about the types of cases eligible for review (i.e., cases at the top of the funnel) reflect the CRU's underlying philosophy toward its role and have significant downstream implications on the operations of the CRU.

It seems reasonable to expect that the criteria for case acceptance for sincere CRUs will, on balance, favor the claims of petitioners at early stages of the process, trusting in case investigations to make clear the best result and wanting to err on the side of catching an error rather than excluding it. This appears to be the philosophy in most, but not all CRUs. The Cook County (IL) CRU, for example, accepts *all* petitions for review, gathering case documents and conducting a preliminary review and group assessment of the merits of the claim before deciding whether a full investigation is warranted.

Most CRUs agree on the standard for a case to get through the initial intake phase: the petitioner must assert a claim of innocence, supported by something testable or objectively credible in the eyes of the CRU. As one prosecutor put it, “We don’t just review closed cases – we need the petitioner to tell us *why* he’s innocent.”

Other offices used words ranging from “obvious evidence” of innocence to “plausible” or “reasonable” evidence. “You have to show me *something*,” said one prosecutor:

At the initial review, there has to be a plausible claim. There has to essentially be a logical nexus between the claim and what the requested action is. If it’s meritless on its face then it might be summarily denied. There has to be a reasonable nexus between the claim... of innocence and the requested action that they’re asking for.

The amount and types of evidence necessary to meet this threshold can vary from office to office. Testable physical evidence tends to be the most persuasive, though some CRUs refuse to test items that have been previously tested, while others will retest material that has been previously tested if the method of testing has gotten more advanced or sensitive and thus might yield more informative data. In any event, summarizes one prosecutor, “[i]t needs to be enough that I believe that at trial, with this information, we’d probably get a different result.”

For some, the credibility of the request for review comes in part from the source of the initial inquiry, which may originate from the inmate, but may also come from the inmate’s family members or counsel, other prisoners, confidential informants, the media, and others, often without the inmate’s involvement and sometimes even against his or her wishes.

The source of the referral can be an important factors in assessing the underlying credibility of a request for a CRU review. Most CRUs believe that petitions from an attorney have more credibility than those that come from other sources, and many view referrals from the media with skepticism, feeling that some other agenda may be in play. Some prosecutors noted that claims from family members of an inmate are often misguided, caused by more gullible family members accepting baseless assertions of innocence made by the perpetrator of the crime.

A number of CRU heads specifically praised requests for review coming from innocence organizations across the country. The Innocence Network has shared principles of conducting fact-based investigations into cases, and provides a great deal of information along with their request for review.⁴⁶ As a result, requests for review made by an innocence organization to a CRU are viewed as

⁴⁶ In fact, the philosophical goal and role of the Innocence Project and Innocence Network Member Organizations is very similar to the stated purpose of a Conviction Review Unit. To the extent there is a difference, it would seem to stem from the historical mindset of the typical attorney participant, since most lawyers within the Innocence Network tend to be defense-oriented while employees of CRUs are obviously more experienced in the prosecutorial role. We have not attempted to compare and contrast case acceptance policies and procedures used by Innocence Network Member Organizations with those of CRUs, though we note that the standards and techniques for a fact-based inquiry into actual innocence should not differ based on the pro-prosecutor or pro-defense advocacy label attached to the individual conducting the inquiry.

more reliable and credible. In fact, one CRU stated that it will only review cases that have been vetted in advance by the Innocence Project in its jurisdiction.

Most CRUs find the case review process used by innocence organizations to be informative and useful; while there is not always agreement with the IP's conclusions about a specific case, the cases referred by members of the Innocence Network generally pass the "straight face" test and are initially reviewable:

[The excellence of the innocence network] is something I didn't realize until I worked with some of ours and I appreciate it. I think more prosecutors should know that that's the case. I get letters all the time from angry defendants or from family members where their cases have been denied review from innocence groups. I do know that they screen those cases and it does mean a lot. I don't know that that's common knowledge among prosecutors, but it should be.

CRUs differ in terms of the "degree" of innocence that must be alleged at the initial phase to warrant further review by the CRU. Some offices look not to an absolute standard of "actual innocence" but rather to a more subjective standard about whether a reasonable person might have a reasonable doubt that the conviction is accurate and legitimate. For those offices that have a strict "actual innocence" view, a letter from a petitioner that simply says that the conviction was inappropriate, as opposed to stating that the petitioner did not commit the crime, is likely insufficient to warrant further review.

Other CRUs adopt a more restrictive standard that is linked to their jurisdiction's post-conviction review rules, based on a two-pronged belief that (a) the DA cannot simply remove charges without judicial approval and

(b) the judge will require a showing of proof that would satisfy the post-conviction rules. As one prosecutor from a jurisdiction that requires "strong indicia of actual innocence" to conduct a more thorough case review stated:

Ultimately there's a criminal conviction in place that in the case of a trial the jury has put in place. We have to have a legal footing that is recognized by the state... in order to undo that conviction. We can't just undo that conviction because we feel a person may be innocent. We have to [meet] the appropriate legal standard.

Other offices concur:

We won't take a case where the defense is "I'm innocent," without something more, something objective. We have to abide by the Court of Appeals standard, which is clear and convincing, because that's what we're going to go up against.

Still, not all offices adhere to a rigid legal standard. The NCIIC, for example, says:

It was specifically on purpose when they created the Commission, the framers... wanted it not to be a legal standard because the Commission is not about technicalities and about much of the things that people think of with lawyers. It's really about facts and evidence and new evidence. And purposefully not everyone is a lawyer on the Commission.

Many offices have declined to create an express standard for accepting cases, preferring instead what one called an “I know it when I see it” approach to colorable claims of actual innocence: “If there’s anything credible that looks like we should review it, we review it,” said one. “It’s a case by case decision; I’m less likely to review a case that appears that it has been fairly litigated. This is not supposed to be a second bite at the apple.”

CRUs without an articulated standard for case acceptance often argue that the lack of a standard is actually a benefit for petitioners, providing necessary freedom and flexibility for CRUs to work in good faith to review a wide variety of cases:

You can’t really have [strict rules] on something like this. If... in your heart it meets it, in your head it doesn’t, sometimes you have to go with that. I know it sounds terrible because we are lawyers and we have rules and protocols. [This is] too dangerous an area to have too many rules, because rules then define each one.

On the other hand, members of the defense bar have pointed out the opportunity for abuse of discretion (or, more precisely, for an anti-review philosophy) to lurk undetected behind the unstructured “I know it when I see it” standard, and CRUs operating without externally announced standards are subject to criticism that their acceptance criteria are subjective and limited to the (potentially arbitrary) perspective of the individual case screener. Some level of definition regarding which cases should proceed will likely be needed to convince all stakeholders that a clear and fair process is taking place.

Legal Standards for Case Review

Newly Discovered Evidence. Drawing a precise line between the desire to review cases where errors may have led to the misidentification of a guilty person, and the need to avoid simply rehearing closed criminal cases, is a challenging and non-scientific inquiry for most CRUs. Virtually all CRUs require some new evidence that has not been previously disclosed to accept a case for further review:

Some new evidence is needed so we aren’t just rehashing cases that have already been decided closer in time and with more manpower.

We want to be respectful of the jury, their verdict, and generally we’re not going to look at a case where there’s nothing new.

In a departure from appellate litigation requirements, however, many CRUs take a more flexible view of what it means for the newly discovered evidence to have been “available” at the original trial. This is a key difference. A sincere CRU focuses on actual innocence, unencumbered by the availability of potentially successful due process legal/procedural arguments that could preserve the conviction, but which may not address the underlying factual allegation of innocence. Thus, from the outset, sincere CRUs will review the petition in light of what could have been used by defense counsel, effectively putting themselves in the role of defense counsel as part of their validation of the merits of petitioner’s claim:

We look [at original defense counsel’s actions] and say, “Well, you have all this stuff and you did this poor job of utilizing it.” If you take all of those circumstances... and you say, “Well, because these were exploited or not revealed to the jury or revealed in

such a fashion that was ineffective to the jury,” and you look and you say, “well, the jury’s fact-finding process was so corrupted by that that you can’t consider that verdict or you can’t have confidence in that verdict,” therefore it should be a nullity.

One way the balancing can be done is by sidestepping the question of whether “newly discovered evidence” is needed at all to justify CRU review. Rather than discussing when the evidence was discovered, for example, the NCIIC can hear cases with “[c]redible, verifiable evidence of the applicant’s innocence” even if that evidence was previously available, so long as the evidence was not previously heard in court.

Charging Errors. Another question for CRUs is whether they will review cases in which the petitioner acknowledges a role in the events in question, but argues that the wrong assessment of criminal accountability was reached. Most CRUs view the reassessment of certain charges to be a usurpation of the role of the original trier of fact. Those original participants made their own assessments of appropriate assessments of guilt, innocence, and charges, and most CRUs are hesitant to circumvent the will of a jury or a judge-approved plea bargain.

We look for cases where it’s the wrong person, where the petitioner wasn’t even there and has a claim focused on absolute vindication. The only other kind of vindication is when there wasn’t a crime committed.

One CRU in our survey, however, consciously reviews cases for “count by count” innocence, meaning that the Unit will agree to vacate a single charge that is inaccurate even if other charges related to the same set of facts were accurately charged and should be sustained. For example, a woman convicted of armed robbery in a situation where

she was unarmed and the facts of the case did not allege robbery would be eligible for review in such a scenario, even if the woman could have been convicted of a lesser offense for her conduct in the situation.

Procedural vs. Substantive Case Reviews

The criteria for when a CRU will conduct a thorough case investigation varies across different CRUs. Not surprisingly, the more restrictive a CRU is in agreeing to investigate cases, the more the unit will be viewed as a CRINO by external observers. One CRU in our survey, for example, has unpublished criteria refusing cases where any of the following questions is answered in the negative:

- Is there a “qualifying conviction” (for specific violent felonies)?
- Is the defendant still incarcerated?
- Is the primary defense not predicated on defendant’s factual involvement (e.g., not guilty by reason of insanity or another voluntary affirmative defense)?
- Did the inmate maintain his innocence continually throughout all proceedings?
- Is identity an issue in the case?
- Is there valid, testable biological evidence?
- Has the biological evidence not previously been tested in the modern era of DNA testing?
- Would a finding excluding the inmate as the source of DNA be material to the guilty party?
- Did the inmate decline or not want to participate?

Such restrictions on cases available for review seem more focused on excluding cases than on sincerely identifying and addressing cases where errors have occurred. Refusing to review cases where actual innocence is alleged because the sentence has been completed, or where an individual has plead guilty to the crime, for example, convey a focus

on procedural form over the substance of actual innocence. While seizing upon procedural grounds may be necessary for the CRU to prioritize limited resources, such a lack of resources for the review of cases with plausible claims of actual innocence is, of course, its own problem.

Other offices, including the NCIIC, have established more explicit criteria for case acceptance:⁴⁷

- The conviction must be for a felony imposed in a North Carolina state court;
- The applicant must be a living person;
- The applicant must be claiming complete factual innocence for any criminal responsibility for the crime;
- Credible, verifiable evidence of the applicant's innocence must exist;
- The basis of petitioner's claim must not have been previously heard at trial or in a post-conviction hearing;
- The applicant must sign an agreement in which he waives his procedural safeguards and privileges, agrees to cooperate with the Commission, and agrees to provide full disclosure regarding all inquiry requirements of the Commission.⁴⁸

While different jurisdictions may draw different lines, these requirements make clear to all that the NCIIC is an agency dedicated to hearing substantial claims of complete factual innocence not previously heard in a North Carolina court. While some of the NCIIC's requirements, most notably the requirement for petitioner to waive all procedural safeguards, are not embraced by all CRUs, this core philosophy is shared by the majority of jurisdictions with CRUs.

Cases Resolved by Guilty Plea

Another instance where CRUs may prize form above substance is in the decision not to accept cases originally resolved by a guilty plea. There is a wealth of scientific literature, as well as common sense reasoning, indicating that individuals sometimes plead guilty to crimes they have not committed, for rational and irrational reasons. Some pleas are knowing and free, while others may be given under compulsion or trickery – but there can be no doubt that pleading guilty to a crime and actually committing the crime are not the same thing. Rejecting petitions for innocence in cases resolved by guilty plea is particularly ill-advised in cases where DNA or other scientific evidence is available for testing that could (a) conclusively exclude the petitioner and/or (b) conclusively identify one or more participants in the underlying crime.

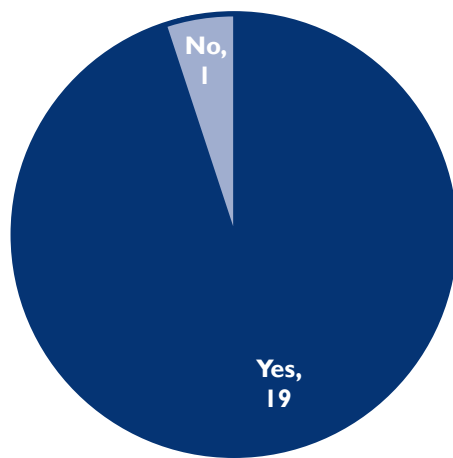
Recognizing that there is a difference between a formal admission of guilt to a court and an actual admission “in one's heart” about committing the crime charged, most CRUs are willing to review cases in which the petitioner had entered a guilty plea. Those who use the guilty plea as a tool to exclude cases from the CRU typically do so as a way to prioritize scarce case review resources, rather than attempting to justify the procedural rejection of such cases on grounds of factual accuracy. Others, however, view a guilty plea as a knowing decision of the petitioner to “cut a deal” during the adjudication of the underlying case, and are loath to revisit that agreement. Accordingly, some CRUs require a “heightened showing” of innocence before agreeing to review guilty pleas. The Manhattan DA's policy, for example, “will agree to DNA testing in cases in which the results will be informative as to any question strongly related to the issue of guilt or innocence,” while acknowledging that “claims made on behalf of defendants who pleaded guilty... will require a higher standard to garner [CRU] review.”⁴⁹

⁴⁷ N.C. G.S. 15A-1460(1)

⁴⁸ N.C. G.S. §15A-1467.

⁴⁹ New York County DA's Office, “Post-Conviction Case Review and Re-Investigation of Cases.” These requirements are similar to those of the Innocence Project at Cardozo Law School in New York, NY. “The Innocence Project represents clients seeking post-conviction DNA testing to prove their innocence. We also consult on a number of cases on appeal in which the defendant is represented by primary counsel and we provide information and background on DNA testing litigation.” <http://www.innocenceproject.org/free-innocent/exonerating-the-innocent>, accessed August 24, 2015.

Figure 10. CIUs that Accept Cases Originally Resolved by Guilty Plea.



The precise nature of this “heightened showing” varies from office to office. One prosecutor noted that a compelling factor in deciding whether to pursue a case resolved by a guilty plea was the acceptance of a sentence far lower than the crime charged would otherwise have been. This, to her, suggested that the guilty plea was a strategic move by defendant as opposed to one driven by prosecutorial coercion. Other prosecutors might say that such a plea means that the petitioner got the benefit of his bargain, and there is no further need to review the case, while defense attorneys point out that to the extent the question of innocence and guilt is affected at all by this assessment of the plea bargain, a large disparity between crimes charged and the crimes to which the petitioner plead might suggest that the prosecutor’s claims were weak and/or outlandish to begin with.

Other offices (e.g., the NCIIC) ignore the question of whether the plea deal was coercive, and simply require a higher standard of evidence if the petitioner’s position that he is innocent has ever wavered. The NCIIC requires credible, verifiable evidence of innocence to outweigh a guilty plea and initiate an investigation. In addition, cases

decided originally by a guilty plea can only move from the Commission to a court hearing upon the unanimous agreement of the Commission members, whereas cases with other resolutions can advance to a hearing on a majority vote.

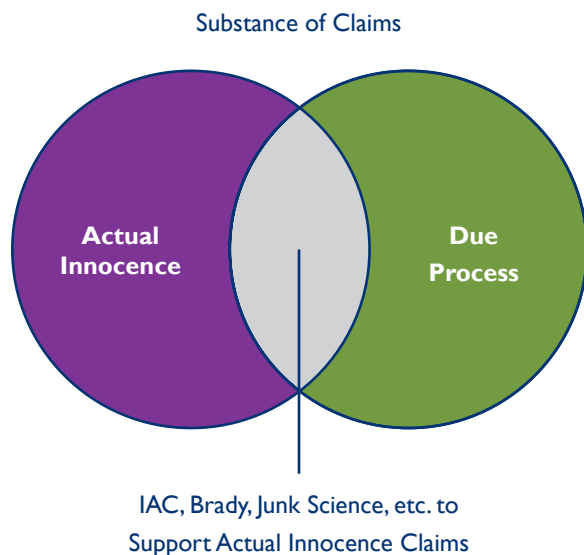
If the goal is to find cases of actual innocence and address them, the existence of a guilty plea should not bar the case from review. At the same time, a CRU looking to maximize efficiency and impact is entitled to understand why someone who at one time stood before a judge and admitted his or her participation in a crime is now offering a different, and far more self-interested statement of the case.

Cases Alleging Both Factual Innocence and Due Process Violations.

CRUs embracing a “totality of the circumstances” standard in assessing factual innocence must often evaluate claims that are justified by, or overlap with, claims of violations of due process. An ineffective assistance of counsel claim, for example, does not necessarily incorporate a claim of actual innocence, though the two are often interconnected. Due process claims are also the vehicle for discussing a claim of factual innocence in convictions based on scientific testimony where the scientific literature has evolved since the underlying conviction (e.g., arson, shaken baby syndrome, bite mark or hair follicle comparisons). In cases like these, it has not been uncommon for appellate attorneys within DA’s Offices to point to one or more scientific papers published prior to the trial. Such papers, whether or not they were actually known to petitioner’s defense counsel (or, for that matter to the prosecutors) at the time of trial, can be used to argue against the admission of any new fire science knowledge on the grounds that it could have been used by defense counsel at trial. This is a perfectly legitimate legal defense of the conviction, but it is not an independent, fact-based assessment of actual innocence.⁵⁰

⁵⁰ Of course, the claim that science has evolved over time does not automatically mean that a fact-based assessment would find the individual innocent either; there may well be other fact-based indicia of guilt. The point is merely to showcase the difference between a fact-based analysis and a legitimate defense based on legal grounds.

Figure 11. Overlap of Actual Innocence and Due Process Claims.



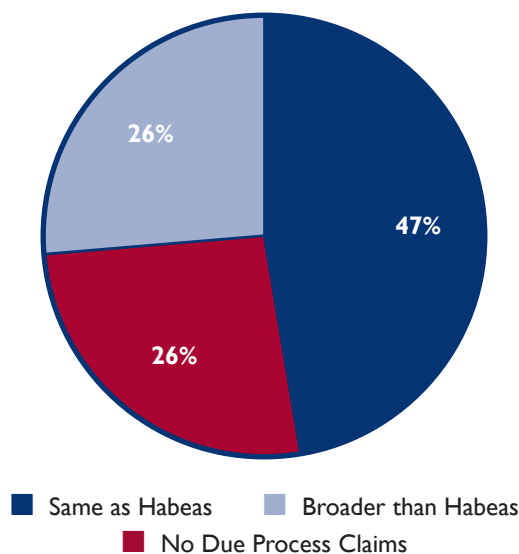
Consider an arson case submitted to a CRU. The petitioner for review may argue actual innocence (“I did not set the fire”), or may claim that forensic arguments supporting his innocence should have been presented in his defense, and the absence of those arguments is evidence of a viable ineffective assistance of counsel claim. Or he may not claim innocence, instead remaining silent on the point and asserting solely the ineffective assistance of counsel claim. Similar situations arise in other due process claims, such as illegal search/seizure, police or prosecutorial misconduct, etc.

CRUs vary in their reactions to these three types of claims. More restrictive CRUs simply refer the latter two categories – what we will call here due process claims – to the standard post-conviction appellate review process, feeling that the claims are fundamentally legal in nature and are not true claims of actual innocence. More often, however, sincere CRUs are willing to review cases that implicate due process concerns, so long as the underlying allegation continues to be based upon a claim of actual

innocence. This is based in part on the recognition that a judicial declaration of actual innocence may actually be harder to secure than a judicial declaration of a procedural violation that achieves the higher purpose of vacating the conviction:

In a perfect world what we are searching for is some objectively, some objective evidence of innocence. But if you can’t reach the actual innocence legal standard, it’s where you see those kind of “default” due process standards, [then] that’s where you get the new trial. Then we just dismiss it. You may not get that actual innocence binding effect because we can’t reach that standard, but we will find a way to get relief on some other ground. [In our jurisdiction,] it’s a lot easier to get relief on a due process ground than it is actual innocence because the standard is higher.

Figure 12. Standard for Review: Due Process Claims (n=20)



The assessment of how to address primarily legal claims that may bear on innocence is an important and emerging area for most CRUs:

There's two classes of cases. One is there's a case where there's actual innocence, where there's evidence that you have the wrong person. That's obviously the worst case scenario. The second type of case is where there's new evidence... or new information that has come forward that may or may not show that this person is innocent or we may never know. I think the days of DNA coming back saying you have the wrong person, those days are over. From now on we're going to see cases where it's not going to be that black and white. That's fine, it doesn't mean we shouldn't look at these cases. In fact, we should look at them more because these are cases where there's a lot more to look at.

Ineffective Assistance of Counsel Claims for Factual Innocence.

Most CRUs deploy a slightly different standard for handling blended actual innocence/due process claims based on ineffective assistance of counsel claims reviewed by CRUs. The real question for the CRU is whether legal standards of “acceptable” defense ineptitude should be used to justify not investigating an otherwise credible claim of innocence:

We're looking at new evidence, and we're trying to figure out, well did the defense attorney know about it and choose not to present it, or did they not even know about it? And so it helps us understand why it wasn't presented and hence its credibility and reliability.

If the goal is the truth, if the defense attorney could have figured it out and didn't, I'm not sure the defendant should have to pay for that.

At the same time, many offices are unwilling to reverse a conviction that was otherwise fairly attained simply because the defense attorney may not have been operating at the height of the profession:

If I'm looking at a case and I'm reading a transcript and like, oh my gosh. This guy fell asleep at the wheel... it certainly plays in but I'm not going to be in a position where I'm going to be conceding or rolling over on ineffective assistance. Unless the claim is right, I'm going to try to find something else.

Ultimately, CRUs viewed as sincere will be willing to review due process claims using a “totality of the circumstances” standard for case review, focusing on what actually happened to end in a just result. This is true even if, or perhaps especially if, a rigid judicial process might have led to a different result.

“Conviction Integrity” and Cases That Lack Conclusive Evidence of Guilt.

Perhaps the truest measure distinguishing a sincere CRU from a CRINO is its approach to cases that lack both conclusive evidence of guilt, and clear-cut evidence of innocence. In such cases, the CRU finds itself in an uncomfortable middle ground, conceding that the conviction lacks strength and may not add up to conclusive guilt, but recognizing that the facts are far from establishing actual innocence. In such a situation, should the CRU move to vacate the conviction?

Many CRUs refused to comment on such a scenario in the absence of case specifics, but most agreed on two important points: first, that it is possible to lose faith in

a conviction's accuracy without being convinced of an individual's innocence; and second, that in such instances, the appropriate action for the CRU is to seek to vacate the conviction and work with petitioner or petitioner's counsel to renegotiate, or potentially retry the case.

Cases where... you're going to have new evidence that may not point to actual innocence, but there's so many problems with the conviction. I guess the best way to put it is I don't want to put the good name of my office on that conviction. We may agree to just say look, we're not necessarily saying this person's innocent, but we're going to set aside the conviction in the interest of justice because X,Y, and Z.

As we look in the future, we're not going to necessarily see those black and white "oh my gosh we thought it was him, but it was actually him" [cases]. It's going to be a lot more muddy than that, but that doesn't mean that we shouldn't act. If there's a case where it's not black and white and this person's actually innocent, but the water's so muddy so to speak that we wouldn't want to put our name on that case, we would still act.

A prosecutor from another large CRU agrees:

Other cases are not necessarily going to get to that actual innocence finally, but you've now learned enough that it just undermines your confidence in the outcome. What happens in those cases, most of the time, you may not get an actual innocence finding, but relief is going to be granted and so the

case is going to come back for retrial and it's going to get dismissed because nobody wants to touch it with a 10-foot pole.

Jackie Lacey, District Attorney for Los Angeles County, espoused a similar view during her announcement of the Los Angeles CRU, suggesting the potential emergence of this view as a majority view: "[i]f the committee decides the office has lost faith in the conviction, my office will seek to have the conviction vacated."

The decision of when to dismiss all charges and when to retry the petitioner is challenging, and is made on a potentially confusing, case-by-case basis:

Sometimes, we are sorry, we just don't have the answers. We are going to have old cases, old memories, old files, different times, different everything. It's not as easy as you think to say, this person is innocent. It's so difficult.

Let's say we've got some pretty strong evidence that this person is entitled to a new trial, just based on retesting; we retested the evidence and... it's enough reasonable doubt that... this [conviction] should have been prevented. It's newly discovered and should have been presented at trial, because it could be outcome-determinative. That's when we send back for a new trial. We can't tell. It's not clear enough for us to say total vindication, but it's clear enough for us to say, it's entitled to a trial... [But] in some cases, we looked at it and said it was just so screwed up that justice demands we release them.

It is reasonable to expect that prosecutors and defense attorneys may not agree on the appropriate resolution to be reached in cases where neither guilt nor innocence has been proven conclusively. It is precisely for this reason that these cases are the true marks of “conviction integrity.” CRU heads and DAs should know that the way in which they assess and act upon these cases will be a deciding factor in how their CRU, and their approach to conviction integrity is ultimately judged by thoughtful observers. A CRINO will be seen in offices that reflexively uphold convictions in all but the most extreme cases of innocence, while a sincere CRU will examine the case with fresh eyes, considering (a) the likelihood of guilt and (b) the likely sentence for the case if tried today along with (c) the sentence already served by the convicted individual, before deciding upon the best course of action, and communicating his or her decision to defense counsel along with its rationale. Such decision-making need not result in a decision to vacate the conviction but must treat the defendant as part of the very community the prosecutor is trying to protect.

Collaborative Case Review

CRUs have reached widely varying conclusions about whether to include petitioner or petitioner’s counsel in the conduct of a case review. On one extreme are the jurisdictions that simply take a petition and conduct an internal investigation, reach a conclusion, and inform petitioner of the result. On the other, a few CRUs will conduct joint witness interviews with petitioner’s counsel under certain circumstances. Most CRUs fall somewhere between these two extremes.

Criminal prosecutions are inherently adversarial, and the collaborative navigation of a post-conviction review is tricky, particularly while the petitioner to the CRU has ongoing appeals. Given this, it is no surprise that a CRU

might give the petitioner no role other than initiating a request for the CRU’s review. As one CRU head put it:

We would absolutely follow the rules of discovery. [Petitioners] want more of a collaborative effort. I’m not so sure we’re ready for that. And I’m not so sure that that’s necessarily the best way to go.

Offices that have not embraced petitioner’s participation in the CRU’s review of the case point out that the role of investigating a case to determine actual innocence is no different than what prosecutors typically do at the start of criminal cases, and the CRU can conduct its investigation in the same way. If so, it is no more necessary to engage external participation or petitioner’s input than it would be to engage external participation during the investigational phase of any other case, and there can be objectivity without the specific addition of a defense-oriented voice. These CRUs often also point out that engaging outsiders in the process might waive privileges, etc. that could affect pending appeals:

[Our] process of review was a confidential one, in which [the CRU] did not share information with anyone but initiated the gathering of information. In particular, [the CRU] did not reach out to prosecutors [of the underlying cases], because they did not want to risk tainting any pending appeals. Few defense attorneys were interested or involved; most had moved on to other cases and didn’t even share information about their former clients’ cases.

More flexible CRUs will permit petitioner's counsel to act as a participant in the case investigation, since counsel can help locate, interview, and/or discuss issues around evidence presented by potential witnesses or items of evidence:

[W]hen we do open a full investigation... what we're trying to do is establish a proper investigation where they tell us what they have or we tell them what we have. If they are part of it, everything that we have, we will do interviews jointly with them. We will give them the substance of whatever interview that we've done. We will disclose to them all of the paper that we're able to garner to make comparisons to see whether trial counsel got all the same paperwork that we now have in our possession. We are obligated if we find anything that is exculpatory in nature during our investigations to report it immediately to the court and we will give it to them simultaneously.

Other CRUs are willing to hear from the petitioner, but do not allow an external voice in the CRU's deliberations or assessments of the case. For example, in both New York County and Middlesex County (MA), petitioner's counsel is invited to present to the CRU's investigation team, and petitioner's communication with the investigators is encouraged throughout the process. The petitioner may assist the investigation team in responding to follow-up questions from that committee and may present multiple times to the review committee. Their review committees, however, are made up entirely of internal members of the DA's Office and make the final recommendation for action by the DA.

The willingness to include external participants in the case review is not limited to petitioner or petitioner's counsel. It extends also to other agencies that may have information relevant to the CRU's investigation. CRUs all agree that they would consult external agencies or individuals as necessary to get information, though most described the typical response as standoffish at best from the other agencies, who "hate" the process and see little potential upside in the time investment necessary to help investigate a possible error.

Many CRUs will conduct their own independent investigation but will confer with petitioner or counsel before making a formal recommendation to the DA or an external panel. This helps inform the CRU with regard to the identification, location, and interpretation of pieces of evidence into the creation of an accurate and nuanced narrative of the case.

Another benefit seen by CRUs that involve petitioner's counsel in investigations is a reduction of defense counsel impulses to tell petitioner's story to the media. And any concern that an adversarial "mini-trial" might result if petitioner's counsel is involved seems to be largely unfulfilled in practice:

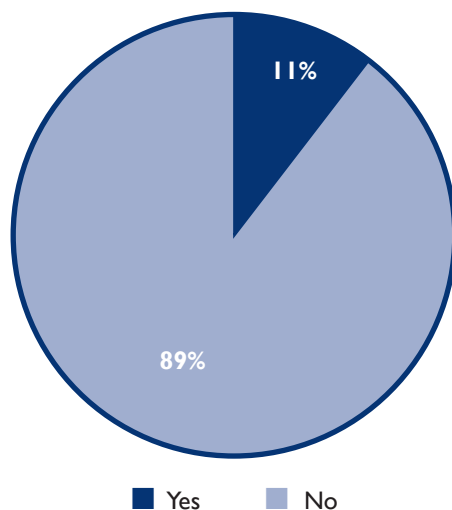
That's something that I changed my mind on that. I went 180 [degrees]. Initially I had determined that I wasn't going to do that just because I thought I'd be opening up the flood gates. All these attorneys coming in and putting on mini-trials, but that hasn't happened. We've done it a couple of times where I think it's actually been healthy. I'm certainly open to that. If it got to the point where it was becoming... The people were coming in putting on mini trials, then we'd have to revisit it. Right now, it seems to work well so I'm open to doing that.

CRU Requirements for Waiver of Petitioner's Rights Under Appeal

Tolling Agreements. Whether one views the CRU's investigative role as collaborative or independent, it would be counterintuitive and counterproductive for a CRU review to penalize the legitimate claims of a petitioner in any way. Accordingly, the CRU's case review should be separate and apart from any ongoing habeas petition activities, and CRUs should be willing to appear before the appropriate courts of record and request a tolling order from the judge that will ensure that the petitioner's participation in the CRU process will not jeopardize any other rights he or she might have in a habeas/post-conviction review process.

Attorney-Client Privilege. One of the more contentious policies adopted by a small group of CRUs (see Figure 13) is the requirement that petitioner waive his or her attorney/client privilege as a prerequisite to CRU review.

Figure 13: Does CRU Require Defense Waiver of Attorney/Client Privilege? (n=19)



Offices requiring a waiver see a fundamental fairness directed to ascertaining the truth that corresponds well to the stated goal of the CRU, since the waiver is requested in the service of allowing the CRU investigators to speak to anyone, including petitioner's attorneys, who can help in the search for the truth – which may be different than a search to prove the petitioner's innocence. One CRU head whose jurisdiction requires a waiver of attorney/client privilege explained their position this way:

We [ask for] a waiver to make it easier for us to look into it, because it would be unlikely that a trial defense attorney would talk to us unless the attorney-client privilege is waived. The waiver is not for the purpose of investigating more crimes. The purpose is to help us look into the claim presented by that person. So it's a combination. I think it works well... [to get] a notarized document from [petitioner] consenting to the waiver of privilege."

Other offices frame the question as one of equality and objectivity. If prosecutors are going to dedicate resources to a fact-based investigation of a closed conviction, and if they are required to share all exculpatory information, the logic goes, it is reasonable to ensure that the petitioner is operating in good faith too, and is not hiding inculpatory information behind attorney/client privilege:

I think if we're truly undertaking a fact finding effort to find out the truth about something, it should be open on both sides. And I know the law doesn't mandate that, but I would expect that sort of fairness on the other side. I would hope that somebody would not be bringing me a particular piece of evidence to try to suggest that somebody is innocent but then hiding other evidence.

Not surprisingly, requiring a petitioner claiming actual innocence to waive a constitutional protection as an entry fee for a factual review of his case does not please defense counsel, who are hesitant to waive privilege beyond the CRU review and who worry that the petitioners' waiver might lead to the disclosure of incriminatory information regarding other, unrelated criminal acts.

These concerns are valid, and some CRUs have shown a willingness to meet defense counsel halfway on the issue. The protocols of Oneida County (NY), for example, state:

Where the need arises, a defendant may be required by the Committee to waive attorney/client privilege in writing in order that the defense attorney(s) who originally represented the defendant may be interviewed as to any admissions or other disclosures made by the defendant during the pendency of the original case. Failure of a defendant to consent to such a waiver may result in a discontinuation of the re-investigation where such information is reasonably necessary to resolve the claim.

With this language, Oneida effectively limits the extent of the waiver to specific instances where it may be useful to the petitioner's case review.

Other offices take a more aggressive approach. The NCIIC, for example, requires "[t]he waiver of procedural safeguards and privileges... for all matters relating to the claimant's innocence claim," though the Commission notes that petitioner's waiver "does not create an affirmative duty on the part of the attorney to disclose." The situation is more pronounced when the full Commission meets to review a recommendation from the investigators:

The Commission may compel the testimony of any witness. If a witness asserts his or her privilege against self-incrimination in a proceeding under this Article, the Commission chair... may order the witness to testify or produce other information if the chair first determines that the witness's testimony will likely be material to reach a correct factual determination in the case at hand.

This language may be helpful in getting information from witnesses to the underlying case, though it can easily run afoul of petitioner's 5th Amendment rights. On the other hand, the NCIIC's scope is limited only to the case at hand and is not intended to punish the petitioner in other (or previous) settings. It includes a limited grant of immunity for the individual taking part in the Commission's proceedings:

The order shall prevent a prosecutor from using the compelled testimony, or evidence derived therefrom, to prosecute the witness for previous false statements made under oath by the witness in prior proceedings. Once granted, the immunity shall apply throughout all proceedings conducted pursuant to this Article.

A third approach, embraced by multiple CRUs, is to request but not require a waiver of attorney/client privilege, while noting that the petitioner's refusal to waive the privilege may be viewed by the CRU as a negative factor when reviewing petitioner's case for actual innocence.

Whatever the rationale, requiring a waiver of attorney/client privilege is likely to have a chilling effect on the willingness of some petitioners to engage with the CRU.

Defense attorneys in jurisdictions requiring the waivers will often actively counsel potential petitioners *not* to apply to their CRUs, preferring post-conviction appeals to the waiver. Thus, the practical effect of requiring petitioners to waive attorney/client privilege as a condition of conducting a case review is to return to the adversarial system, undercutting the value of the CRU as a driver towards a collaborative search for truth.

Petitioner/CRU Collaboration Agreements

Given the new challenges created – for all parties – by the extrajudicial CRU investigatory process, some CRUs have begun experimenting with collaborative confidentiality agreements that outline the roles and limitations of various stakeholders in the CRU process. Such agreements could address areas of potential conflict (such as the waiver of privilege described above) and provide other mutual assurances of good faith that can enhance the CRU process. For example, some offices use written agreements with defense counsel to restrict the ability of either party to discuss the case with CRU investigators or the media or other external participants. Such agreements have been considered by only a few offices to date, but they are promising:

I have had cases where the defense attorney would call and ask me to look at a case. I'd agree to look at it and at the same time he would call the newspaper who would then write an article about our review and put it on the front page of the paper. They have a victim calling me screaming what's going on, before I've even had a chance to look at the case. That's a problem. I think the [confidentiality agreement] is a better way to handle it.

Confidentiality agreements are not necessarily without their concerns in a CRU context. Some DAs worry that

a written contract between the parties on the conduct of a CRU investigation simply creates a new obligation between the DA's Office and the petitioner that could conceivably lead to a new course of action, this time in civil court, between the parties. On the other side, defense counsel may react poorly when their request for moral justice and an honest case review is greeted by a legal document seeking to put further limitations on their ability to advocate for their client. Done properly, however, collaboration agreements may act to provide the parties with a framework for building a mutual trust that allows the case review to flourish, to the benefit of all.

The CRU that has given the most thought to the use of confidentiality agreements with petitioner's counsel is the Kings County (NY) District Attorney's Office, which covers Brooklyn. Like other offices, the Brooklyn CRU is cognizant of the potential imbalance that can result in an investigation when petitioner refuses to allow the CRU to speak with his original defense counsel. At the same time, the CRU does not believe that it is appropriate to ask a petitioner who is claiming actual innocence to waive constitutional protections as an "entry fee" to search for the truth.

Their solution is a thoughtful example of the benefit of flexibility that the CRU enables. Rather than adopt a strict rule requiring waiver of privilege, or allowing a withholding of privilege to interfere with a full investigation where warranted, Brooklyn presents a "cooperation agreement" to the petitioner as a choice:

When we do open a full investigation... we seek a cooperative agreement with defense counsel. That includes a limited waiver as to the defendant's privilege with their former attorneys, which they have no reason not to sign – particularly if they're accusing their former defense attorney of misconduct... What we're

trying to do is establish a proper investigation where they tell us what they have or we tell them what we have. Now, **they don't have to enter into that**. If they don't enter into that, it doesn't mean that we're not going to do a full investigation on the case. It just means that they won't be part of it... If they are part of it, everything that we have, we will do interviews jointly with them. We will give them the substance of whatever interview that we've done. We will disclose to them all of the paper that we're able to garner to make comparisons to see whether trial counsel got all the same paperwork that we now have in our possession. We are obligated if we find anything that is exculpatory in nature during our investigations to report it immediately to the court and we will give it to them simultaneously. There's all kinds of advantages for them to do that. We hope that everybody plays by the rules. We tell them that if they withhold things or if they go... to the press about the progress of our investigation, that all bets are off and then they're out, but we want it to be as open as we can with them and let them know every stage of the game. One caveat to that is, and it happens on occasion, that we won't share with them things that will endanger a particular individual's life. That situation does arise on occasion, but for all other purposes, we want them to be a partner in the investigation as opposed to an adversary.

The conditional cooperative agreement model used in Brooklyn underscores the advantages to both sides of articulating a relationship structure that might feel unfamiliar to two historically adversarial parties. The CRU gets additional information to aid in its totality of the circumstances review, as well as freedom from headline-driven advocacy and media involvement. On the other side, the petitioner benefits from improved and active participation in the investigation, which may provide a material benefit to the search, and receives any investigational information generated for use in a later appeals process, if necessary.

Training for CRU Personnel

Most CRUs handle the re-investigation of cases in the same way that they handle the investigation of cases pre-indictment. The CRU appoints a lead prosecutor to direct the investigation and provides access to one or more investigators to assist with the process. A CRU case review can be meaningfully different from a pre-indictment or pre-trial case investigation, however. First, cases under CRU review are inherently cases where errors are being alleged. Thus, it is useful for the individuals participating in the case review to be familiar with the types of errors that have been known to occur in criminal cases, and to receive training on the situations in which those errors have occurred, to help them identify potential “weak spots” in the underlying case that might have contributed to a mistaken finding of guilt.

A second difference between a case review conducted by a CRU and an open case investigation is one of contemporaneousness. The CRU review can be thought of as the inverse of a “cold case,” often occurring years, and perhaps even decades after conviction. Thus, an essential preliminary hurdle of CRU investigations is the identification and location of all case-related information, including documents, potential witnesses, biological

materials or information, etc. Interestingly, it is the non-prosecutorial NCIIC that sees this most clearly:

We have a whole process by which we ask an agency to search now. That has developed over time. We begin with asking them to search themselves, and having them report back the details of the search. And along with that, we need their evidence storage policies and we need to know if they have any unaccounted-for evidence, and that's what we're really looking for. So if an agency, for example, searches and we can see how their evidence is stored and how their evidence logs are, (and we might tour the facility to find that out), and they have no unaccounted-for evidence, then we have to trust that search. But if they search and then we find out that they have evidence that's just unaccounted for, you know, unlabeled boxes, or things that they don't know where they are, or missing evidence, then we're going to have to search ourselves. So we're asking them to do affidavits throughout that process... If they can't give us complete confirmation of all of those things, we'll ask them to go back. We start with them, but if they ultimately can't do that, we're going to do our request to search ourselves. But we're going to do it very nicely, and we're going to send them proposed procedures to search, work with them on how that want that to be changed or how they want that to be done. Whoever they want to be there with us. If they don't want us touching evidence... All of those things, we'll iron out those proposed procedures with them.

Gathering such information can be quite challenging, and training its members on techniques to locate the information has had a substantial impact on many investigations:

The [NCIIC] has successfully located physical evidence and/or files in 18 cases when previous efforts by other agencies had resulted in conclusions that the evidence or files had been destroyed or lost. In some of those cases, the prior searches had been court ordered with findings of fact made regarding the missing evidence. In 2014, the Commission successfully located missing evidence in four cases. Of those cases, two resulted in exonerations, one is pending as a federal habeas corpus motion, and another case continues to be actively investigated.

While several of the employees of the NCIIC have graduated from law school, none has prosecutorial or investigational experience, suggesting that the skills necessary to fully investigate CRU cases are (a) trainable and (b) not typically taught by DA's Offices to the attorneys participating in CRU reviews. Providing the training necessary to ensure that a person knowledgeable about the precise type of investigation that is necessary in a CRU setting is something that each CRU should consider for every investigation.

None of the CRUs we spoke to have a formal training program to assist prosecutors or investigators participating in the CRU with the conduct of case reviews. This information would likely be helpful for all attorneys within an office, but it should be mandatory for individuals involved in CRU case reviews.

Revisiting “Completed” CRU Reviews

Another area of flexibility in CRUs is the ability to “reopen” a CRU case that the Unit has previously reviewed. Those CRUs that have considered the question are uniform that a decision not to proceed with a specific petition is not a one-time, permanent refusal “with prejudice” that bars a future review. Rather, rejection places the petition into a “parking lot” of sorts. No additional work is anticipated by the CRU, but if at any later date the petitioner were to gather additional evidence sufficient to meet the CRU’s investigational standard, the petition could be reopened.

Some CRUs mentioned a slight caveat to this policy, designed to minimize repeated requests for unproductive additional reviews: while the Unit’s standard for its first acceptance of the case for review is very broad, permitting the review of facts known but not used by petitioner’s counsel at the time of trial, subsequent reviews would require a more traditional definition of “newly discovered” that requires evidence not previously known to the petitioner as of the time of the most recent CRU review. So long as the totality of the circumstances standard is employed by the CRU, such a rule should not materially damage a good faith petitioner.

CRUs and Forensic Science

For the most part, questions regarding the scientific testing of biological or other evidence in a CRU context are handled in the same manner as cases outside the CRU. Prosecutors will test evidence that they feel will conclusively resolve questions of guilt or innocence, while defense attorneys and petitioners often seek to test much more broadly. In addition, the parties often disagree about the probative value of the evidence yielded by one test or another. Budget and utilization constraints are as real in the CRU setting as in day-to-day practice, making policies for the use of forensic science in CRU investigations a very subjective one for the CRU as well as for the petitioner.

Sincere CRUs are typically willing to test evidence if (a) the evidence has been newly discovered; (b) the evidence has not previously been tested; and/or (c) the testing technique proposed is a material advance in specificity or sensitivity to prior testing methods used. Beyond that, whether and how to test specific pieces of evidence is a more subjective inquiry. Some CRUs are very willing to conduct tests requested by the petitioner:

I know there’s financial concerns there and the people out at the crime lab probably don’t like me, but my position is if somebody wants to have something tested or re-tested, we’re going to do it. We have done [the testing] on every single occasion because it’s either going to tell you nothing, or it’ll confirm the conviction, or God forbid it tells you you have the wrong person. Either way, you want to know.

Another CRU leader also explained why the office might *not* test forensic evidence:

The only time we don’t test is (a) there is nothing to test. If the evidence that is destroyed, sorry we can’t test it. We’d love to, we can’t. Or (b) where it’s really not giving you this positive, like in a rape allegation where he didn’t actually physically penetrate her, he just held her wrist. He’s still guilty of rape. He doesn’t like that because he didn’t do it, if you will. Well, okay, I’m not going to do DNA testing. There is nothing to test that’s going to be probative. We are going to object only in situations like that. Otherwise, we are testing.

In another example of the potential benefit from involving external participants, at least one CRU has a process in place that allows its investigators to discuss the benefits of various tests with an independent (i.e., external) forensic expert. If the expert suggests that testing would be valuable, then the CRU approves the test.

Several offices take an economically pragmatic view: the DA's Office will pay for testing that meets the prosecutor's bar of bearing on innocence, and it permits additional testing at the request of the petitioner, at petitioner's expense. As one prosecutor succinctly stated, "I'll let the defendant test anything he/she wants, if he pays for it."

Allegations of Prosecutorial or Law Enforcement Misconduct

One concern often raised in the context of a CRU investigation is whether allegations of official misconduct will be reviewed fairly and in good faith by the DA's Office. It is difficult to know whether the "epidemic of Brady violations" seen by some observers of the criminal justice system⁵¹ is caused by an increase in prosecutorial misconduct, an increase in allegations of prosecutorial misconduct, or an improvement in our ability to detect such violations. It is also difficult to tell in many contexts whether the failure of the prosecution to turn over exculpatory evidence is a failure of record-keeping, a failure of interpretation of the subjective "materiality" standard, or a deliberate attempt to gain advantage in a criminal case, though all of these situations are currently lumped together as "prosecutorial misconduct."

Cases progressing through the post-conviction appeals process often involve newly discovered evidence, and the defense by necessity focuses on what was "known" by police or prosecutors during the underlying investigation and prosecution.⁵² Thus, it is predictable that a CRU will be confronted with questions and allegations regarding the actions of the original investigator(s) and prosecutor(s).

DAs and CRU leaders can be sure that petitioners and the defense bar, as well as the media, will watch carefully to see how such situations are handled, and will use these situations as a benchmark for the independence and transparency of the CRU and the Office as a whole.

While very few CRUs admitted to identifying an intentional case of prosecutorial misconduct in any of their investigations to date, all were uniform in how they proposed to handle such an issue. The CRU would refer information about the potential misconduct to an appropriate official as set forth by the DA's policies on misconduct, and would continue its fact-based review of the case in question. None, however, have a written policy supporting this process, or any process for handling cases involving official misconduct.⁵³

Despite broad public skepticism, prosecutors were uniformly confident that their objectivity in case review would be unaffected in a case where, for example, a prosecutorial violation of the requirement of Brady by one of their current co-workers was alleged. Interestingly, given that all Brady violations occur despite an ethical obligation, several prosecutors referenced their ethical obligation to disclose any Brady information as proof that such disclosures would be made:

If there was a claim that Brady material had been withheld, we would certainly investigate that to know whether or not that was in fact that case. If it were in fact the case, we would divulge the Brady material. We would involve the judiciary and determine what the next appropriate step was.

While the CRU may identify instances of prosecutorial or police misconduct, the ability to administer discipline for such actions does not rest within the CRU. Rather, the CRU is limited to communicating the evidence

⁵¹ *U.S. v. Olsen*, 737 F.3d 625 (9th Cir. 2013).

⁵² In some sense, this is the reverse of the inquiry conducted by many CRUs in looking at ineffective assistance of counsel claims – the question is not whether the information was available to law enforcement or the prosecutor, but whether the individual was actually aware of and influenced by the information in the adjudication of the case.

⁵³ The NCIIC enabling statute does provide that the underlying case may be removed from its original jurisdiction as a court reviews how best to address the error identified in the case. North Carolina General Statutes §15A-1469(a1).

of misconduct to the DA, the appropriate executive committee or the office's General Counsel for review and further action. This is true even within the NCIIC, which is required to disclose information about potential prosecutorial misconduct to "the appropriate authority" for such matters.

For offices that only review cases for factual accuracy (as opposed to cases where actual innocence is predicated on the due process argument of withholding evidence known at the time of trial), Brady presents an interesting conundrum. While the conviction may have been secured in part because of the office's own error or misconduct, the later CRU review may still conclude that the conviction is factually accurate. A few offices go a step farther, suggesting that evidence of Brady violations might increase their willingness to vacate convictions with prejudice given the Office's more direct role in depriving the defendant of rights.

While some view the inability to enforce disciplinary action for official misconduct as evidence that the CRU is in fact a CRINO, it should be pointed out that the separation of discipline for reckless or intentional misconduct from the fact-based event review is actually a best practice in many industries, including healthcare and aviation,⁵⁴ and is expressly recommended in the "Just Culture Event Review" procedures recommended to the U.S. Attorney General by the National Commission on Forensic Science.⁵⁵ Separating issues of discipline and blame from the investigation of what actually happened during the commission of a crime encourages the participation of knowledgeable participants in the events. Conversely, prosecutors, police officers and witnesses with knowledge of the case might be more reticent if their participation would cause another to be punished. In this way, ensuring that the CRU is not a disciplinary body actually furthers the goals of the case review,⁵⁶

without limiting the ability of appropriate entities (e.g., the DA or State Bar for prosecutors, or an internal affairs or disciplinary board, for police) to ensure accountability for intentional misconduct. At the same time, DAs and CRU heads who take the process seriously would be well advised to have clearly stated policies not just for the handling of Brady material discovered during a case review, but for the separate investigative process to assess the culpability of the prosecutors or investigators in the underlying case.

⁵⁴ See footnote 11 above.

⁵⁵ National Commission on Forensic Science, Directive Recommendation: Root Cause Analysis (RCA) In Forensic Science, referred to United States Attorney General on August 11, 2015. Available at <https://www.justice.gov/nfs/work-products-adopted-commission>, and attached as Appendix C.

⁵⁶ See generally *id.* and articles cited in footnote 11.

CRU Transparency

The evaluation of a CRU has both a direct and an indirect component. The direct evaluation looks at the freedom that a CRU is given by the DA to review cases previously adjudicated by the DA's Office where errors are alleged, and the policies and procedures that it has developed to conduct and act upon those case reviews. The indirect evaluation takes a wider lens and considers the inherent skepticism of the CRU enterprise from the defense bar, the political currency of the CRU to the current DA and his/her potential challengers, and the utility of the CRU to the community as a whole.

Independence and flexibility are important factors in each of these assessments, providing insight into how

the CRU conducts its activities and how those activities are perceived by external stakeholders. The third category on which governmental actors reviewing their own past actions for error can and will be judged is transparency. The ability of those outside the DA's Office to see what actions a CRU is taking and to understand the rationales behind those actions is what enables communities to verify the good faith of their CRUs – or validate their worst suspicions. The CRU's decisions on what to publicize and what to shield from the public eye impact the willingness of petitioners to use the CRU, and inform the public's judgment of whether the CRU is engaging in good faith reviews of allegations of error, or is simply an effort to curry public favor that lacks legitimacy and

integrity. Finally, and assuming that the CRU is sincere, transparency should allow DAs to make more powerful arguments to their County Commissioners about the need to prioritize funds to the CRU over time.

For all of these reasons, while due deference should be given to the need for confidentiality of case records, safety for potential witnesses, and the emotional needs of victims of crime and their families and friends, it is also important for DAs and CRU leaders to maximize the reasonable transparency of CRU activity and to publicize the CRU's impact within the Office and within the larger community.

Publishing CRU Policies and Procedures

Jurisdictions with CRUs have wrestled with a two-tier threshold question regarding transparency: should the policies and practices of the CRU be in writing, and should they be publicly available? Several of the most active and established CRUs (e.g., Brooklyn, Dallas, Santa Clara) have very few, if any written policies and procedures, while other offices (e.g., Cuyahoga, Manhattan, Oneida) have detailed and public protocols and procedures available for all to review.

Having policies and procedures makes it easy for everyone to know what to expect from the CRU process, and provides concrete information for CRU assessment and accountability. On the other hand, written policies and procedures create two potential downsides for a CRU.

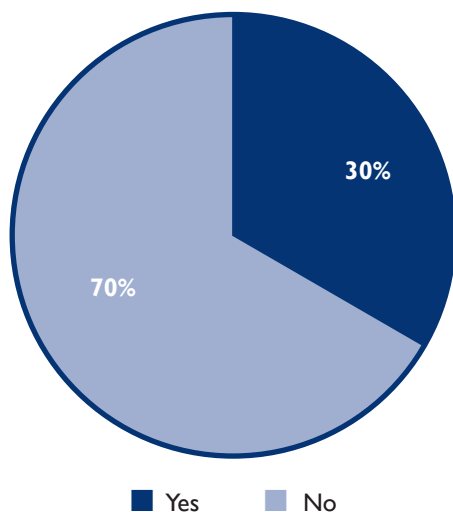
First, several prosecutors expressed concern that written policies and procedures might paradoxically limit their flexibility in handling case reviews. Each case reviewed presents a unique fact pattern and underlying scenario that led to the erroneous conviction. It is reasonable to assume that written policies, no matter how well written, will not account for every situation that arises, and poorly

written protocols or protocols may actually *constrain* the prosecutor's ability to use his or her full discretion to advocate for the best result based on a totality of the circumstances at the time of the review:

The post-conviction courts and the appeals courts have to set standards in an adversarial [setting]. You cross this line or you're below this line and it's either good or it's not good. That, to us, limits tremendously our flexibility, because what we talk about is not really the legalities of things, we're talking about the use of prosecutorial discretion. That takes us outside the realm of what... the judicial process does, why in an extrajudicial fashion we can form our own standards, which again are not bright line standards. It has to be to the extent where this is all going to be subjective.

[We are] in the process of making written goals, directives and policies. Necessarily, those have to be somewhat amorphous because the second you put in bright line stuff then you create another layer of litigation which is something that we just don't want to get into because it doesn't help us. Sure, it's great for defense litigants but we don't want [petitioners] to be defense litigants, we want them to be investigatory partners.

Figure 14. CRUs with Written Protocols (n=20)



The concern for maximum flexibility can be taken as sincere coming from such established CRUs as Brooklyn and Dallas. At the same time, for experienced prosecutors and legal writers to claim that written protocols constrain their activities seems disingenuous to some. Drafting protocols with non-absolute language and exception clauses for special circumstances that protect the flexibility of the CRU is easily done, and would provide myriad benefits to the CRU. One example of this drafting can be seen in the written policies of Oneida County (NY) with regard to the scope of the CRU's review. The protocol is clear without limiting the flexibility of the DA or the Unit:

While the scope of the review of the CIP⁵⁷ is ordinarily limited to claims of actual innocence, the CIP reserves the right in extraordinary circumstances, to conduct its review in cases where it is claimed that the level of offense for which the defendant stands convicted is overwhelmingly disproportionate

to the criminal conduct that actually occurred. The Committee serving under the District Attorney, shall have complete discretion as to whether, and in what instances, any such non-innocence claims of over-conviction shall be reviewed.

The transparency and accountability inherent in publishing written policies and procedures for conviction reviews should help a DA convince petitioners, defense counsel, judges, and the community that the CRU is an honest, good faith endeavor. Written policies and procedures also provide an opportunity for feedback from external stakeholders and the community, which will both improve the policies and increase the goodwill generated by the CRU while bringing some who were skeptical over to support the CRU.

The benefit of transparency may be most beneficial to newer CRUs, which are likely to be more vulnerable in the court of public opinion. One of the CRUs that participated in this review lacks a direct reporting line to the DA, lacks dedicated personnel (including the head of the CRU, whose responsibilities exist on top of an active and high-profile caseload), and has not yet recommended any exonerations, including for individuals who have subsequently been exonerated in habeas proceedings. This office may be articulating a sincerely held view supporting conviction review for cases of actual innocence, but without more, the growing claims that have begun throughout the jurisdiction and elsewhere that the unit is actually a CRINO will continue unabated, reducing the unit's utility for the DA's Office in question.

What Protocols Should be Committed to Writing? In general, offices should commit protocols to writing that will assist participants in case submission and review, and what to expect in terms of the activities of the CRU. While different offices have handled this in different

⁵⁷ Oneida County calls its unit a Conviction Integrity Program, or CIP.

ways, examples of areas that could benefit from written policies and procedures include:

- Process for claim submission
- Types of cases CRU will/will not accept for review
- Standard of review for initial case acceptance (screening)
- Standard of review for case review
- Standard of review for vacating a conviction
- Who will/will not conduct a case review
- Role of petitioner and petitioner's counsel in case review
- Role of original prosecutor and/or investigator in case review
- Requirements on waiver of attorney/client privilege, or use of a collaboration agreement
- Sharing of documents, including potential reciprocity, with petitioner/petitioner's attorney
- Sharing of information learned/ evidence discovered during case review
- Conduct, payment for forensic testing
- Procedures for allegations of government misconduct
- Disclosure of final decision after case review and supporting rationale
- Ability of petitioner to revisit process after final decision
- Ability of CRU/DA's Office to use information obtained during investigation in future litigation

The NCIC has developed a more extensive set of policies and procedures, going beyond case-related issues into structural and operational concerns:

The human resources policies, all of those that you think of you need for an office, we have all of those. We have office policies on interviews, and that includes safety on an interview... How do we check in? We're going out in the field to lots of different places and we have rules that I need staff to follow when they're doing that. What are the things you can and can't say when you're doing an interview? How are you going to record it? Who are you going to bring with you? We have a policy on evidence collection that everyone has to follow, all the forms that they have to fill out, the things that they have to do. We have policies we've adopted like the hazardous workplace policies for when we are collecting evidence and things like that. We have what are then, what we call sort of more "go-bys," less formal, these are the best practices that we've seen [in certain situations]. Those types of things, and that's a lot that, again, has been just developed over time and those are things that we're eager to share.

The NCIC's policies, procedures and protocols – many of which are not published – make clear that while drafting protocols can be a tedious and time-consuming task, carefully written protocols can give clarity, transparency, and legitimacy to the CRU effort, while protecting flexibility and prosecutorial discretion at all times.

Transparency to Victims of Crime

One of the most challenging and difficult parts of a prosecutor's job is managing each criminal case in a way that considers the complex emotional needs of victims of crime and their families. In the CRU context, the victims'

emotions are even more sympathetic. The CRU case review re-examines a tragedy – often a violent trauma – that befell the victims and their families. Opening the case for re-investigation due to a potential error of guilt or innocence forces victims to relive this trauma while reducing the victim’s trust in the system. In some cases it may even add to the anguish of a victim or witnesses, who may have unwittingly aided in a mistaken identification or bolstered a shaky (and ultimately inaccurate) case.

At the same time, victims’ sense of ownership over the crime – that it is *their* crime, it happened to *them* – and the need to provide justice to them can generate an emotional need to participate in decisions regarding the outcome, especially in a situation where it now appears that the DA’s Office may have mishandled it from the start.

In an effort to be mindful of and sensitive to these emotional complexities, many CRUs wait to inform victims of their work until there is something substantial to discuss:

We try to keep [victims] informed... The problem is that when you engage them at an early point of our investigation, they invariably become advocates to not release the person, and sometimes engage counsel to press that. If they have information that is germane in terms of the guilt or innocence of the defendant, as opposed to their belief or what they’ve been told or what the jury had, we generally will not contact them until we are at the end part of our investigation, where pretty much we know which direction we’re going. There again, we don’t want them tampering with the process... [T]his isn’t about victim impact. This is about whether the person has done it or not.

Other CRUs find their obligations with regard to victims controlled by statute. In California, for example, the issue is governed by the California Victims’ Bill of Rights Act of 2008, also known as Marsy’s Law. Marsy’s Law requires prosecutors’ offices to give victims reasonable notice of any court proceeding involving the case(s) in which they were victims, and the opportunity for the victim to reasonably confer with the prosecuting attorney and to be heard at any proceedings related to the case.

The NCIC has a policy of informing victims upon entry into the “formal inquiry” phase, and permitting the victim (or his/her next of kin if the victim is deceased) the ability to share his/her views throughout the formal inquiry process. In addition, the Commission will notify victims 30 days prior to the official hearing on the case. Victims are invited to attend with 10 days’ notice, and they are immediately informed of the result of the hearing in any event.

The Middlesex County DA has constructed a middle ground between the emotional response of the victim of the underlying crime and the reality that victims and their emotions matter in addressing errors in the system. Middlesex CRU protocols state that the prosecutor leading the investigation should confer with a Victim Witness Advocate prior to presenting the case to the Committee to determine if, and when, any victim(s) should be notified of review. It is then the responsibility of the Victim Witness Advocate to discuss the case to the specific victims involved in the underlying crime, and give the victims their opportunity to present their views and concerns to the Committee. In this way, the risk that the victims of the underlying crime will have undue influence on the CRU process is minimized, and the presentation of a very difficult emotional issue for the victims is done compassionately by an expert in such conversations.

Transparency of Case Review Process, Decision and Rationale

Even a well-resourced CRU must balance realities of limited resources and the likelihood of success with the unquenchable thirst of a petitioner, almost always incarcerated, to keep pushing for additional testing, investigation, etc. to prove his/her innocence and secure his freedom. Add to that the challenges of finding evidence and witnesses from a case that may be years or decades old, individuals who may not want to acknowledge that the case could have been decided in error, and general skepticism surrounding the fact that the DA is investigating a closed conviction, and the challenge of how, and when, to end an investigation where the conclusion is not to reverse or vacate the conviction becomes clear. The decision to stop reviewing a petition for actual innocence presents a somewhat paradoxical, but important question: in a situation where a petitioner steadfastly maintains his innocence despite some evidence to the contrary, how does a good faith CRU dedicated to ensuring accurate convictions decide when to **stop** an investigation?

CRUs differ in their answers to this question, from the linear “[w]hen facts deviate from allegations, you stop” to the circular “[w]hen you’re done, you’re done.” Others compared it to the decision of whether to charge or to go to trial, saying that the decision to stop an investigation was based on a multitude of factors that were difficult to define in total:

It’s hard to tell. If we get something definitive, certainly in the meantime, then we can act. If they give us their theory of the case and we look at some of the leads and we look at some of the theories that they’re putting forward and it’s not going anywhere, then we may get to the point at some

point where we’re just going to decide that there’s nothing new here and we’re not going to do anything with regard to the conviction.

The best practice for sincere CRUs here may borrow from concepts of procedural justice, which seek to improve judicial listening, respect and empathy for the individuals on their dockets. Similarly, CRUs that truly engage in a collaborative process are likely to get better (i.e., less contentious) outcomes among petitioners or counsel who (a) feel that the CRU has honestly and openly discussed the allegations of error, (b) have been involved in the CRU’s process and know what resources have been expended and what steps have been taken in the service of the investigation, and (c) have received substantive rather than bureaucratic or administrative reasons for not conducting certain testing, etc.

Once a decision not to proceed is made, some CRUs have a practice of providing notification to petitioners in writing, while others communicate more informally, particularly if petitioner is represented by counsel. As in other settings, some CRUs are comfortable sharing the rationale for the cessation of the review: “we’re happy to communicate our findings to defense counsel and listen to their reactions, but more often than not, you’ve made your mind up,” while others choose to be more vague, feeling that a reason is not required for the rejection of a claim, and providing one simply leaves an opening for a persistent petitioner to continue to keep an actual innocence conversation alive longer than is minimally necessary.

Collection and Publication of Metrics and Accomplishments

As stewards of taxpayer funds, it is the responsibility of the DA and CRU head to understand the impact of the CRU they manage, and such information should generally be made available to the public for evaluation and comment.⁵⁸ Such disclosures should benefit the Office, the Unit and the community, as they will dispel concerns that the CRU is merely a PR stunt and allow for thoughtful discussion regarding appropriate modifications and agreement among stakeholders over time. The word “should” in the previous sentence, however, looms large. DAs who provide such information are subject to different interpretations of the information from political opponents, the media, and others, and thus it is incumbent upon the defense bar, judges, and the media to understand and support such voluntary steps towards fact-based case review, giving more transparent jurisdictions the benefit of the doubt when evaluating the results.

Tracking the CRU’s activity and determining metrics for its utility can and should go beyond the number of exonerations that the CRU recommends. While some CRUs have exonerated dozens of individuals and created impressive goodwill in their jurisdictions, a lack of exonerations should not necessarily be viewed as evidence of CRINO. Generating large numbers of exonerations may be more challenging than it seems. CRUs to date have grown in large urban centers, by and large, and smaller, less populated jurisdictions can be expected to have fewer allegations and instances of error to review. A more reliable approach to reassure external observers in the jurisdiction of the true intentions of the CRU, while making a case to legislators and others about its utility, would be the dissemination of data about the CRU’s activities. Examples of what activities might be useful to measure the CRU’s impact are suggested by the

annual report of the NCIIC. The data presented in the NCIIC’s Annual report provides an excellent template that to date has not been followed by any other CRU, though the data could easily be gathered and provided by each CRU without any danger or injury to specific case investigations, witnesses, victims or next of kin, or other issues around confidentiality.

⁵⁸ As with other disclosures involving criminal cases, individually identifiable information should be disclosed with care, if at all, to protect victims and witnesses.



North Carolina Innocence Inquiry Commission: A Case Study of Independence and Transparency

The CRU with the most independent and transparent structure (though not the most flexible one) is not a “traditional” CRU at all, but rather the state-funded North Carolina Innocence Inquiry Commission (NCIIC), which effectively serves as a clearinghouse for all post-conviction claims of actual innocence throughout the state, conducting investigations independent of the prosecutors’ offices involved, and making recommendations regarding the claims to a review board and ultimately to a judicial tribunal at which the prosecutors and victims may participate.

The NCIIC has no prosecutors involved in its case reviews, which simultaneously underscores its independence from allegations of prosecutorial bias and makes a strong argument that there is nothing inherently prosecutorial about the skills needed to thoroughly investigate past cases where inaccurate convictions are alleged. Rather, the membership of the NCIIC consists *entirely* of outside perspectives, including:

- One victims’ advocate;
- One criminal defense attorney;
- One member of the public (currently a Commissioner on Urban Planning and Community Economic Development);
- One Sheriff; and
- Two discretionary members appointed by the Chief Justice of the Supreme Court.

The staff of the Commission is similarly devoid of prosecutors, consisting of:

- Executive Director
- Associate Director
- Associate Counsel
- Paralegal
- Legal Investigator
- Grant Staff Attorney (paid for by federal grant money for DNA case review)
- Grant Investigator (paid for by federal grant money for DNA case review)

While some members of the NCIIC have law degrees, all view their roles as primarily investigational; they will present their findings to a Judge, and ultimately are requesting a judicial hearing at which the DA’s Office may speak and/or present.

Prior to moving for a judicial hearing, however, the NCIIC consults with its Advisory Board, which is required by law to consist of the following:

- Superior Court Judge
- Sheriff
- Criminal Defense Attorney
- Prosecuting Attorney
- Victim’s Advocate
- Public Member (non-attorney, non-judge)
- Three (3) Discretionary Appointments by the Chief Justice.

The statewide Innocence Commission model should, in theory, allow for centralized (and therefore more plentiful and experienced) case reviews, and those reviews should be at least as objective as reviews conducted by “traditional” CRUs, who are investigating activities within their own offices. But the strategy is not without its potential downsides. First, where traditional CRUs are voluntary activities sponsored by DAs, the NCIIC is a legislative mandate that is being imposed on all prosecutors in North Carolina. It would be surprising if some of those prosecutors did not feel that the NCIIC is an undesired intrusion on their work, a Monday morning quarterback intent on exposing the office’s mistakes. Without any ownership of the review, these prosecutors are more likely to bristle at the NCIIC’s requests, and as elected officials outside of a reporting chain linked to the NCIIC, they are more able to oppose a recommendation of dismissal or vacation of charges than other CRUs.

Another potential weakness of the NCIIC is its inability to implement any of its recommendations, including its findings of actual innocence. Rather, the NCIIC makes a recommendation regarding each specific case to the Commission as a whole. “If five or more of the eight voting members of the Commission conclude there is sufficient evidence of factual innocence to merit judicial review, the case shall be referred to the senior resident superior court judge in the district of original jurisdiction by filing with the clerk of court the opinion of the Commission with supporting findings of fact, as well as the record in support of such opinion...” From

here, the court appoints a panel of three judges, none of whom have been previously involved in the case, and a hearing is held for the NCIIC, the DA in question and petitioner’s counsel (who may be court-appointed if the petition to the CRU was filed *pro se*). Only if the three-judge panel unanimously feels that the convicted person is innocent by clear and convincing evidence can the petitioner be released with the dismissal of all or any charge. There are multiple opportunities among the many steps between the NCIIC’s initial recommendation and an actual finding of exoneration for a savvy DA to delay or disrupt the case review process.

The transparency of the NCIIC, however, provides a way to judge whether the cynical view in the preceding paragraph is occurring. The NCIIC posts on its web site an annual report prescribed by the North Carolina legislature.⁵⁹ The report, which includes the Commission’s case filter, allows the general public to review the size and scope of the actual innocence problem in North Carolina. The top of the filter may be seen as a reasonable proxy for the number of people incarcerated in the state who believe they should be exonerated; the middle can be a proxy for the percentage of the believers who have articulated colorable claims of innocence; and the bottom, the exonerations, shows the actual impact of the NCIIC and provides a group of cases ripe for careful root cause analysis and dissemination of recommendations for improvements throughout the criminal justice system in the jurisdiction.

The Annual Report also provides the following key information about the Commission:

- Commission members and staff;
- A description of activities, including four cases that led to judicial hearings exonerating individuals based on actual innocence. In these cases, which are matters of public record, all documents used in the Commission's exoneration hearing are posted on the NCIIC website;
- Annual case statistics:
 - o New claims of actual innocence: 180
 - o Average number of new claims of actual Innocence per year: 205
 - o Number of claims of actual innocence since inception of NCIIC: 1,642
 - o Number of claims reviewed and closed: 1,482
 - o Number of exonerations: 8
- Specific case statistics:
 - o Types of crime at issue
 - o Basis of the innocence claims submitted
 - o Reasons for rejection.
- Results of investigations (a useful metric for the NCIIC specifically, which has been granted subpoena power and thus wants to show its ability to conduct thorough investigations)
 - o Number of cases where the NCIIC found physical evidence or files reported missing by other agencies: 18
- Presentations made to other agencies

This information suggests an active case filter statewide; with a little more research, it could easily be broken down by case and by jurisdiction to evaluate how various counties within the state are participating in terms of number of cases, average duration of reviews, etc. The

average time for a case from petition to resolution across the various parts of the funnel, for example, could inform policy makers can identify appropriate levels of staffing to handle a reasonable flow of additional claims in the future, which may be useful as cases do not always appear in regular time intervals.

The NCIIC is an admirable experiment, creating a top-down model for cultural change and a thoughtful safety net for the criminal justice system to identify and review potential errors in the administration of justice. It remains to be seen whether the model operates more effectively and efficiently than the "traditional" CRU model, and its inability to implement "best practices" that might be identified in the course of conducting case reviews may limit its ability to help prevent the recurrence of errors in the future. Still, the NCIIC's emphasis on independence and transparency and its willingness to investigate cases openly and objectively bode well for its future, and provide a useful counterpoint for CRUs operating within DA's Offices.



Measuring the Impact of CRUs

As CRUs proliferate across the country, it is important to realize that the lack of a CRU is not proof of an unwillingness to review plausible claims of actual innocence, just as the existence of a CRU is not in itself proof of the willingness to conduct them.

The sort of data collection contemplated here does not seek to publicize case-specific information that is not already part of the public record, or to reveal information that could jeopardize witnesses, victims, or next of kin. Rather, the assessment of aggregated information about the activities undertaken by the CRU can convey quantitative and qualitative information about inaccuracies in the criminal justice system and thoughts about how to reduce them over time. This could easily be reflected in a case funnel that show the process from the CRU's receipt of a request for assistance through to the decision to vacate a conviction. Such a funnel might have the stages set forth in Table 2 on page 73.

A unified case funnel of all CRUs that submitted data in response to our requests is below. Fields in gray were not reported by the CRUs. We supplemented the data provided with information posted on the National Registry of Exonerations.⁶⁰ Of the nineteen (19) CRUs that participated in our survey and interviews, only eleven (11) published or provided their case funnel information.⁶¹ The information was not provided for a variety of reasons, with the most popular being that the statistics were not

kept, the individual was too busy, or the office decided not to release the data publicly.

It is important to recognize that case funnels are not static. As previously noted, CRU policies will impact the number of requests for assistance received by the CRU, and these policies may change over time. In addition, the number of petitions received by an office is likely to be at its largest within the first 6-24 months after announcing the CRU, and then can be expected to increase shortly after any published exoneration, as other inmates hear of a successful petition to the CRU. It is probably safe to assume, however, that these numbers will diminish over time.

The information we have suggested here should not be burdensome to collect or to publish. Most of it, if not all, is likely to be retrievable from even a basic case management system, or can be kept “on the fly” by the person handling the intake of petitions for assistance to the CRU. Understanding the flow of cases through the CRU funnel and gathering deidentified information about the underlying issues in these cases will go a long way towards establishing the value of the CRU within a jurisdiction and will support requests for additional funding, as well as chart a course towards creating a culture of sustained self-evaluation and self-improvement that is crucial to the reduction of inaccurate convictions over time.

⁶⁰ The National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>, last accessed October 8, 2015. Individual exonerees whose profiles included the “CIU” tag were counted and distributed by county.

⁶¹ <http://www.innocencecommission-nc.gov/stats.html>, last accessed October 8, 2015.

Table 2. Case Funnels for Conviction Review Units.

Office	Year Established	Requests for Review	Substantial Investigations	Reviews Pending	Exonerations	Rejections	Investigations	NRE Exonerations**
Bexar County, TX	2015	200	50	15	1	175	15	1
Pima County, AZ	2014	35	17	15	0	0	17	-
Middlesex County, MA	2014	-	-	-	-	-	-	-
Cuyahoga County, OH	2014	70	15	-	0	-	-	-
Philadelphia County, PA	2014	101	6	89	0	-	-	-
Nassau County, NY	2013	3	2	0	0	0	2	-
Ventura County, CA	2012	17	15	2	1	11	5	1
Cook County, IL	2012	435	435	-	12	238	222	14
Lake County, IL	2012	16	5	1	2	1	2	2
Oneida County, NY	2012	-	-	-	-	-	-	-
Kings County, NY	2011	-	-	-	-	-	-	21
San Diego, CA	2011	-	-	-	-	-	-	1
Baltimore, MD	2011	-	-	-	-	-	-	3
New York, NY	2010	175	17	0	5	-	1	4
Colorado Justice Review Program	2010-13	4,976	-	-	1	-	-	-
Wayne County, MI	2010-13	-	-	-	-	-	-	-
Harris County, TX	2009	-	-	-	-	-	-	77
Dallas County, TX	2007	-	-	35	28	-	-	25
North Carolina Inn. Inq. Comm.	2006	1,768	1,549	-	8*	-	9	-
Santa Clara County, CA	2004-08, 2010	1,447	6	0	5	1	0	4
TOTALS		9,243	2,117	157	55	426	273	153

* NCIC reports 8 exonerations at hearing and one additional exoneration due to its investigations.

** Includes data reported by National Registry of Exonerations



Can CRUs Prevent Future Errors?

As currently practiced, the CRU model is a model of error remediation, as opposed to one of error prevention. CRUs work to identify cases where errors may have been committed, and they take steps to correct those errors. Done conscientiously, it is a valuable and important service, adding tremendous legitimacy to our criminal justice system. To the extent that the process deployed by the CRU is a collaborative process with reduced adversarial posturing driven solely to find the truth, CRUs have the ability to transcend both the administrative limitations of post-conviction appellate litigation and our cynicism about the adversarial process, and truly improve the functioning of the criminal justice system.

At the same time, a CRU that merely contents itself with resolving or redressing errors in the adjudication of guilt or innocence is missing a far larger and more important opportunity to improve the system. As the focal point for analysis of cases where errors are alleged, CRUs are well positioned to be the leading advocate of training and implementation of “best practices” that will assist not just prosecutors or investigators in DA’s Offices, but law enforcement, defense attorneys, judges, and juries to *prevent* such errors in the future.

Recent conferences or symposia discussing CRUs⁶² suggest that DAs are starting to understand this potential,

⁶² Northern California Innocence Project Symposium on Conviction Integrity Units, Oct. 28, 2015; Kings County (NY) District Attorney’s Office Summit on Wrongful Convictions, Nov. 5, 2015.

but that their CRUs have not translated this potential into reality. The gap between observing this opportunity and implementing effective reform can be vast, and most individuals running CRUs tell a story very different than their District Attorneys regarding their ability to conduct effective analyses of *why* a mistake was made in the adjudication of a case, much less have the time or the resources to actually advocate for, design, or implement preventative reforms to such errors. While some CRUs have conducted training on, for example, optimized procedures for conducting photographic lineups to minimize eyewitness identification mistakes or rewritten policies for the handling of Brady material in criminal cases, such actions are more likely a response to news articles or conversations with other prosecutors than they are an actual feedback loop generated by a specific case review within the office. What's more, such activity regularly occurs in offices without CRUs as well, making it difficult to suggest that CRUs have somehow "raised the bar" on best practices and training.

Part of the challenge is administrative. Almost no CRUs gather data about the cases reviewed, and what data has been gathered is predominantly administrative, rather than the disciplined "Just Culture Event Review" recommended in other industries and in, for example, a crime lab setting.⁶³ It is important to realize that reviews to improve the safety of a system, or to prevent future errors within that system, are inherently different than the investigation of factual innocence that the CRU undertakes. Just Culture Event Reviews are non-disciplinary reviews of unintended outcomes – which might include errors, mistakes, adverse events, or misconduct – to understand the environmental, procedural, supervisory, or other circumstances that enabled, incited, or failed to prevent the unintended outcome. The case review conducted by a CRU, by contrast, is a fact-based evaluation of guilt or

innocence in a criminal case. Thus, in cases where the CRU decides that the criminal justice system has made an error, it should ensure that the jurisdiction is actively engaging in a Just Culture Event Review to learn from the error, and prevent its recurrence.

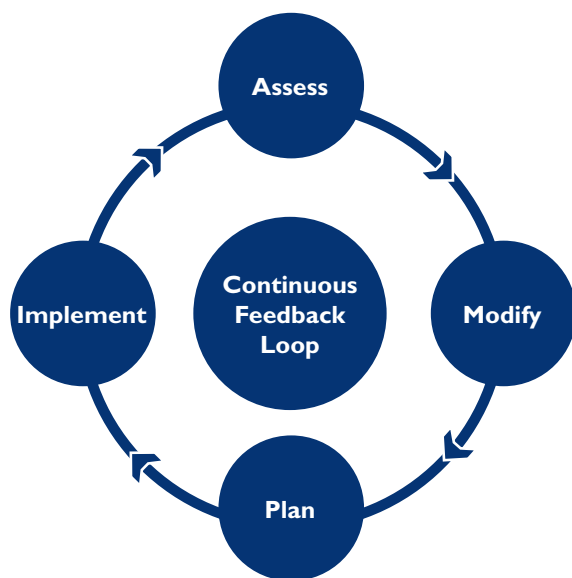
None of the offices we spoke to have implemented such review, nor have they looked at their case filters as potential databases for aggregated analysis, useful to catalog the types of errors in the cases they review for potential use in trend-spotting or contextual learning.⁶⁴

In fairness to CRUs, there is an undeniable structural limitation on the ability of a CRU to implement procedural improvements to reduce errors. As a creation within the DA's Office, the authority of the CRU to mandate changes to law enforcement activity to prevent future errors extends only as far as the DA's Office. Certainly, many of the errors that can lead to inaccurate convictions are committed by prosecutors, but many are committed in other parts of the criminal justice system as well. Inaccurate eyewitness identifications and false confessions, for example, are typically committed during the investigation phase when a police department is in charge of the case. Ineffective assistance of counsel is based on the activity of defense counsel. A CRU might rightfully identify a need for modified practices to address these problems, but it lacks the ability to force the implementation of the solutions.

⁶³ National Commission on Forensic Science, Directive Recommendation: Root Cause Analysis (RCA) In Forensic Science, referred to United States Attorney General on August 11, 2015. Available at <https://www.justice.gov/ncfs/work-products-adopted-commission>, and attached as Appendix C.

⁶⁴ One challenge that individual prosecutors' offices face here is that the number of cases reviewed in a single jurisdiction, particularly in smaller offices, is unlikely to be sufficiently large to draw accurate systemic conclusions from the cases. A state-wide or nationwide data gathering model may be needed for such aggregated analysis.

Figure 15. Feedback Loop.



Still, CRUs persist in the attempt to learn from the cases they review and to implement improvements to the adjudication process that are designed to reduce errors in the future. “We do spend time talking about not just specific cases, but are there policies, are there procedures, are there things we can put into place to prevent some of these cases from happening in the first place.” All agree in theory that some sense of learning from these errors is useful, but too few offices are conducting such work in practice:

Is it the role of the CRU to identify, communicate, or implement changes as a result of lessons learned in the cases that you’re reviewing? I’m hoping that it will be. It hasn’t historically been that. The unit was created with the notion of making sure that the claims of people, innocence claims are properly addressed, and they’re addressed without some of the

procedural hurdles that exist under [post-conviction review statutes]. If along the way as we go on in time we see things that are procedurally not correct or need improvement then we’ll certainly react to that, and train on that.

Another question unresolved by CRUs to date is how to address situations in which there could be multiple instances of the same error. No CRUs were eager to embrace the conduct of an “audit” that would expand a case review to review a large group of related cases to ensure that all potential incidences of the error were identified and addressed. In such situations, most people interviewed suggested that they would conduct broader reviews “when they feel it necessary” but were not able to describe what those conditions might be. For whatever reason, such audits appear to be more easily embraced when pertaining to a crime lab, and less clear when pertaining to a colleague in a DA’s Office or a police officer. Brooklyn and Harris County, however, have conducted or are in the process of conducting such reviews, and their work may serve as tutorials for such reviews moving forward.

Several CRUs indicated a history of, or a philosophy supportive of conducting audits in instances where prosecutorial or police misconduct have been alleged. The publicity surrounding Detective Louis Scarcella in Brooklyn is one example of this; the CRU is in the process of reviewing 150 cases involving the Detective to determine whether any of those cases should be reinvestigated. In another jurisdiction, the DA conducted an audit based on an intentional act of bad faith taken by a prosecutor. The theory in that office was that a discovery of intentional misconduct was something likely to have been repeated, and so delving into additional cases for that prosecutor was necessary to rule out other potential affected cases.

In truth, the creation of a broad-based “cycle of improvement” that will analyze errors found by CRUs and implement reforms to prevent future errors throughout the criminal justice system is not something that a CRU can reasonably be expected to do alone. It requires the participation of all criminal justice stakeholders within a jurisdiction. As such, this may be an area where an outside organization, along the lines of an Innocence Commission, could add value to CRUs across a broader jurisdiction (for example, a state). The Texas Innocence Commission, or the Pennsylvania or California commissions that reviewed wrongful convictions, could be used to receive data from prosecutors’ offices on a variety of activities, including data on cases that are reversed. This data could be analyzed and discussed with a cross-disciplinary group and discussions had on how to implement best practices throughout the state. The Commission could also have authority to order a broader review of cases in situations where the possibility of multiple instances of the same or similar errors existed.

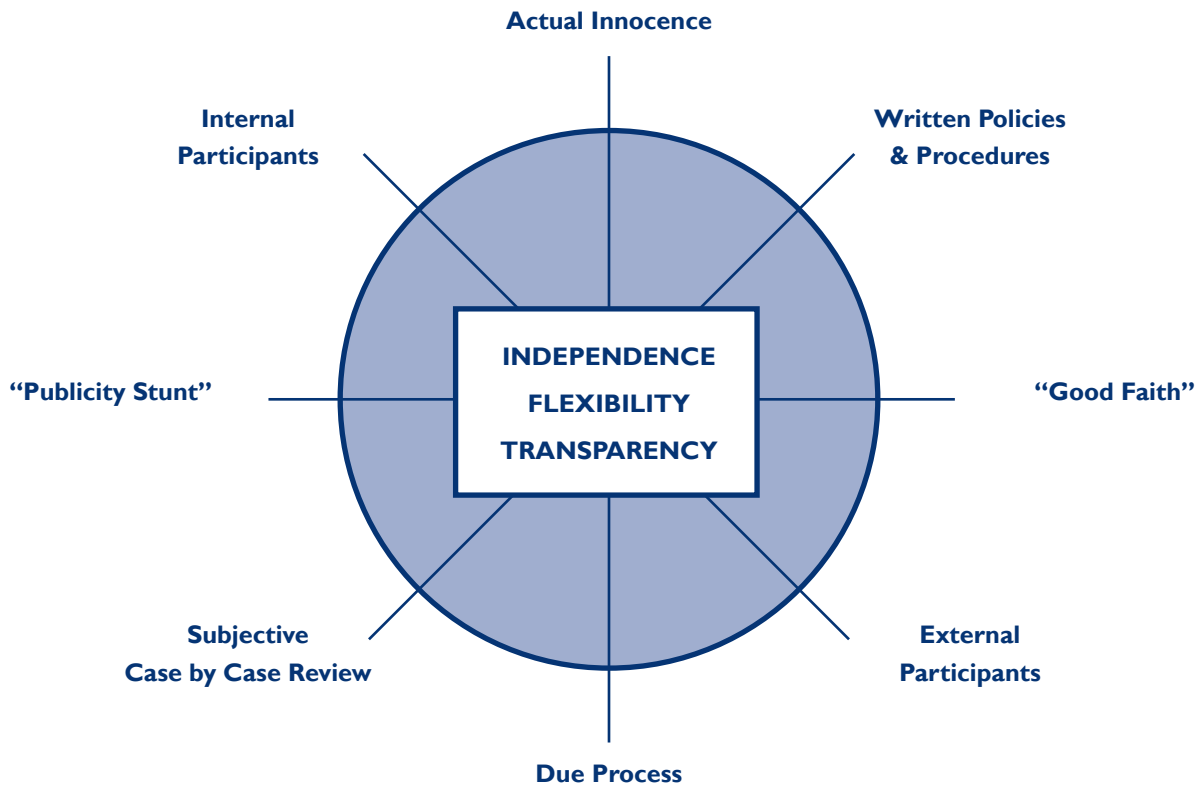


Conclusion

The variety of philosophies, policies, and practices across the 19 CRUs that participated in this project is no surprise. High-quality Conviction Review Units are balancing acts, seeking to satisfy a diverse set of stakeholders across multiple dimensions. CRUs seek to identify and rectify cases of injustice that have fallen through the cracks of our judicial system notwithstanding all of its intricate checks and balances. Given the complexities inherent in all of these goals, it is probably more surprising to note how many areas the DAs and leaders of CRUs did agree on than to observe the differences.

The best CRUs manage to evaluate and resolve a large number of claims of actual innocence by leveraging independence, flexibility, and transparency so that all involved – CRU attorneys, the defense bar, victims of crime, victims of procedural injustice, and communities – have confidence that the District Attorney and her office are focused on the legitimacy of all convictions secured by the office, and are using a thoughtful and reliable process of review, evaluation, and communication to ensure that the CRU's balancing act is emphasizing the right metrics for the community (see Figure 16 below).

Figure 16. The Competing Concerns of Conviction Review Units.



One could point to the small (but growing) number of CRU exonerations secured to date as evidence that the approach has its limitations. On the other hand, with so many brand-new CRUs, and so little data gathered by more established CRUs, a complete evaluation of the utility of the different approaches employed by the CRUs is clearly premature.

Whether CRUs will live up to their promise is far from clear. CRUs have the potential to showcase the criminal justice system working at its best. Done well, a CRU can be a force of good in the criminal justice community, a model that operates with objectivity and focuses on real-world truth to integrate adversarial viewpoints, analyze

conflicting and complex information and address claims for individuals suffering from a State-imposed injustice. Whether the model extends and realizes its potential as a force for education and improvement of techniques to investigate and adjudicate criminal charges or not, good faith CRUs that operate with independence, flexibility, and transparency can build bridges across what is too often a bitter ideological divide between prosecutors and defense counsel, and between law enforcement and the communities they serve, and restore the community's faith that each part of the system is operating to ensure that perpetrators of crime – and only perpetrators of crime – are held accountable for their acts in ways that preserve the constitutional freedoms of all.

APPENDIX A. METHODOLOGY

This paper consists of quotes and synthesized observations gathered from semi-structured interviews with the leaders of 19 CRUs throughout the country, as well as with prosecutors in offices who did not have formal Conviction Review Units, but who believed that their offices conducted the analogous work if and when cases of actual innocence were alleged in their jurisdictions. (A copy of our questionnaire is included in the appendix to this paper.) We also spoke to a group of defense attorneys in the same jurisdictions as the CRUs to understand how people might perceive the activities of CRUs with different stated philosophies, policies, or practices.

Conviction Review Units throughout the United States were identified through internet and other media research. The Quattrone Center for the Fair Administration of Justice, with the assistance of Barry Scheck of the Innocence Project, created an interview questionnaire (attached below as Appendix B) to be administered to at least one individual in each office in a leadership or supervisory role with the CRU in question.

Twenty-four offices were contacted by phone or email with interview requests, including twenty-three offices with active CRUs and one office that does not have a

CRU but was known through personal communication with the authors to have actively considered starting a CRU. Of the twenty-three offices with a CRU that were contacted, seventeen agreed to participate, with other opting not to participate or not responding to repeated requests. Of offices that affirmatively elected not to participate, the reason given for not participating was a belief on the part of the CRU representative that the CRU had not been in existence long enough to provide useful information to the project.

Participation in interviews was voluntary. Interviews were conducted in person where possible and by phone where necessary. All interviews were recorded using the Voice Base recording and human transcription system unless recording was declined by the interviewee. If the interviewee declined to be recorded, notes of the interview were taken contemporaneously. Transcripts or notes of interviews were logged, coded and organized in NVivo 10 for Windows. No review of comments or quotes was permitted unless quotes were sought for attribution, in which case the quotes have been reviewed and approved by the individual given attribution. Where statements were made by an interviewee about the perspective of external participants, an individual outside the CRU who was familiar with the CRU's operations (e.g., a defense attorney who had communicated with the CRU in question) was contacted and his/her opinion requested. Such communications were memorialized through contemporaneous notes, but were not recorded.

A working draft of this paper was circulated to all originally contacted CRUs in December, 2015, and selected data and responses gathered from respondents were included in this version.



APPENDIX B.

Interview Guide for Conviction Review Unit Interviews

A. Office/Unit Demographics

1. Office
 - i. Size of office
 - ii. Number of prosecutors
 1. Is there an appeals unit?
 2. Is there a post-conviction unit?
 3. Does state attorney general handle state habeas? If yes, what is relationship with state AG?

- iii. Is there a police or investigator department that is part of the office?
 - 1. If so, how many investigators?
- iv. Nature of caseload (homicides, robberies, burglaries, narcotics, etc.)
- v. Demographics of jurisdiction
- 2. How many different police departments are there within your jurisdiction?
- 3. CRU characteristics
 - i. When was the CRU first formed?
 - ii. Why – what was the occurrence or factor that prompted its creation?
 - iii. Size of CRU
 - 1. Number/type of prosecutors?
 - a. Do they have other duties in the office? If so, please describe.
 - 2. Other members who are non-prosecutors, such as investigators or clerical support?
 - a. Who do those investigators work for?
 - i. Police or prosecutor, and are they
 - ii. ex-police detailed or are they independent?
 - iv. How is CRU funded?
 - v. Is there training for CRU staff?
 - 1. What does the training consist of?
 - 2. Who does it?

B. Protocols and Procedures

- 1. Does the CRU have written protocols and procedures?
- 2. If so, what do they cover?
- 3. Can we have a copy?

C. Case Acceptance Criteria

- 1. What are the sources of your cases/from where will you accept cases?
 - i. Public Defender
 - ii. Police
 - iii. Court
 - iv. Family member
 - v. Innocence Project/non-profit
 - vi. Other

2. What standard do you use before deciding to **investigate or review** a claim?
 - i. Is factual innocence required? What does factual innocence mean?
 - ii. A “colorable” claim of factual innocence?
 - iii. A “plausible” claim of factual innocence?
 - iv. A “reasonable possibility” of factual innocence?
 - v. If none of these adequately describes the standard, how would you define it?
3. Do you restrict your review to matters involving only “newly discovered evidence,” i.e., evidence that could not have been discovered with exercise of due diligence by counsel?
4. Do you consider “due process” claims while conducting a CRU review such as
 - i. Undisclosed Brady/Impeachment material
 - ii. Ineffective assistance of counsel
 - iii. Other “fair trial” claims
 - iv. If you do not, is there another unit in the DA’s Office that would consider such a case?
5. Would you accept a case where the motion for a new trial is outside the statute of limitations?
6. Do you cumulate or combine in any way evidence pointing toward factual innocence and evidence supporting a due process claim
 - i. In your decision to investigate or review a claim?
 - ii. In your decision to grant relief?
 - iii. If so, please describe in your own words that process works?
7. If the CRU discovers at any point in its review of a case that there is a “substantial claim” of misconduct against a prosecutor, how would that be handled?
 - i. By the CRU?
 - ii. Referred elsewhere in the office?
 - iii. Referred to an independent entity or party?
 - iv. Is “substantial claim” the standard you would use, or is it another standard?
 - v. How severe would the misconduct need to be?
 1. Legal error but honest mistake
 2. Ethical
 3. Criminal
 - vi. Is there a statutory procedure for such a referral in your jurisdiction? If so, how does it work?
 - vii. Are you free to follow a different procedure – appoint your own independent entity or party? Do you think it’s a good or bad practice?

8. Same question as 6, except for police misconduct? What triggers an independent person to come in and run the process or make decisions?
9. What is your ability to discipline or fire an underperforming prosecutor/investigator, or one who commits intentional misconduct?
10. Does the CRU consider guilty plea cases?
 - i. If so, is there a higher standard that must be met before deciding to review or investigate? What is that standard?
11. Are there cases where the CRU is more likely to conduct an investigation or review than others?
 - i. An application for DNA testing?
 - ii. An application for a review of fingerprints?
 - iii. An application for other scientific testing?
 - iv. An application involving allegations of prior unreliable forensic science?
 - v. An application involving allegations against a police officer or prosecutor with a prior history of misconduct?
 - vi. An application involving allegations against a jailhouse informant?
 - vii. An application involving allegations of eyewitness identification?
 - viii. An application involving allegations of a false confession?
 - ix. Other?

D. Conduct of Review

1. How many applications received?
2. How many accepted for investigation or review?
3. In how many cases did you consent to relief?
4. In how many cases did courts grant relief where no agreement could be reached?
5. What is the breakdown on grounds for relief:
 - i. Innocence;
 1. Based on DNA
 2. Based on other scientific evidence
 3. Recantation
 - ii. Due process violation
 1. Brady
 2. Ineffective assistance
 3. Other grounds
 - iii. Both Innocence and due process violations

6. What is your practice on post-conviction disclosure of your file and/or police files?
7. What documents do 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
8. Do you reach out to other agencies that might have documents about the case that are not in your physical possession?
 - i. Would you make these documents available to the defense?
9. 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?
10. Would you consent to greater disclosure of your file or police files if there were an agreement with petitioner's counsel not to disclose the information until the Conviction Integrity review process is complete?
11. Will you share documents with opposing counsel and allow them to use those documents in a subsequent appeal if you find no need to grant relief?
 - i. Would that make you more or less likely to share information?
12. What is the role of the prosecutors who tried the underlying case in the review process
 - i. Witness?
 - ii. Any role in the decision making process
13. Does petitioner's counsel get an opportunity to:
 - i. Make a presentation?
 - ii. Participate in the investigation?
 - iii. Respond to evidence discovered in the course of the investigation?
 - iv. Any other role?
14. Under what circumstances would you do a PCRA test of forensic data/DNA?
 - i. Under what circumstances would you:
 1. Conduct that review voluntarily
 2. Agree if asked
 3. Fight the request?
 - ii. What if inmate turned down a testing request at trial?
 - iii. What lab would conduct that testing?

15. Do you reach out to other agencies that might have documents about the case that are not in your physical possession?
 - i. E.g., medical examiner in Philadelphia
 - ii. Would you make these documents available to the defense?
16. What discovery, if anything, do you require the defendant or the source of the allegations for review to turn over to the CRU?
 - i. PAIP suggestion: New, credible, and ideally corroborative evidence
 - ii. Example: we will turn over all information except _____; important to fill in all the blanks there.
 - iii. Do you have agreements for data sharing to control or limit disclosure to the review, and/or to ensure no media leaking, etc.?
 - iv. Would an information sharing agreement be useful?
 - v. If so, what would it need to include?
17. What information would cause you to feel that you had investigated enough?
18. Is the person who brought the case to your attention given a chance to refute your conclusions before they are announced?
 - i. Example: Brooklyn has independent 3 atty interim review panel – they are supposed to come in and critique the CRU’s review.
 - ii. Example: Lake County (IL) has a special paralegal/investigator position, and a 10-person review team made up of people outside Lake County
19. How are your conclusions announced? Do you explain why you have made a decision and if so, to whom?

E. Criteria for Granting Relief

1. What is the standard for consenting to relief on innocence grounds?
 - i. Clear or convincing evidence of innocence?
 - ii. A reasonable probability of a different outcome?
 - iii. Application involving claim of self-defense or claim of mens rea?
 - iv. Interests of justice?
2. How is that standard different from what PCRA requires in your jurisdiction?
3. In consenting to relief on a due process claim, do you consider new factual evidence of innocence unrelated to the due process claim and not part of the original trial record?
4. What other factors might you consider in terms of accepting or rejecting factors?

F. Audits

1. When a case is reversed for failure to disclose exculpatory evidence, have you ever conducted an audit of prior cases of the prosecutor involved?
2. The police officers?
3. The prosecutor's supervisors?
4. Do you think such an audit is a good idea? If not, why not?
5. Learning from error – what they have learned, what is important, what they would advise people to do or worry about or whatever... political/real limitations in various places.

G. Learning from Error

1. Does the CRU catalog errors that might have occurred in cases it reviews?
2. Does it communicate those errors to anyone inside or outside the Office?
3. It is a role of the CRU to identify, communicate or implement changes as a result of lessons learned in cases reviewed?
 - i. If so, how does the CRU do this?
1. For internal changes
2. For external changes (e.g., new eyewitness ID procedures that would need to be implemented by police)



APPENDIX C.

National Commission on Forensic Science Directive Recommendation on Root Cause Analysis (RCA)



NIST
National Institute of
Standards and Technology
U.S. Department of Commerce

Subcommittee

Interim Solutions

Commission Action

On August 11, 2015, the Commission voted to adopt this recommendation with a more than two-thirds majority (93% affirmative) vote.

Type of Work Product

Policy Recommendation.

Recommendation

The U.S. Attorney General should direct the adoption of appropriate root cause analysis protocols for all forensic science service providers (FSSPs) or forensic science medical providers (FSMPs) who are part of the federal government or are receiving federal funds, and to establish policy for restoration procedures that comply with the recommended root cause analysis process. **RECOMMENDATION:** The US Attorney General should direct the adoption of appropriate root cause analysis protocols for all forensic science service providers (FSSPs) or forensic science medical providers (FSMPs) that are part of the federal government or are receiving federal funds, and to establish policy for restoration procedures that comply with the recommended root cause analysis process.

Background

Forensic laboratories accredited under programs that adhere to the ISO/IEC 17025, *General requirements for the competence of testing and calibration laboratories*, are required to “establish a policy and a procedure and shall designate appropriate authorities for implementing corrective action when nonconforming work or departures

from the policies and procedures in the management system or technical operations have been identified.” A problem or nonconformity may be identified through a number of different techniques, including internal and external audits, reviews of the management system, customer feedback, or staff observations.

Corrective Actions are potential solutions that address a nonconformity and eliminate or minimize the risk of repeating the nonconforming work or departure from policies and procedures. A Corrective Action is a requirement when *any* error or nonconformity is identified. ISO 17025 (4.9.1) states that “The laboratory **shall** have a policy and procedures that shall be implemented when **any aspect** of its testing and/or calibration work, or the results of this work, do not conform to its own procedures or the agreed requirements of the customer.” (Emphasis added.) ISO 17025 (4.9.2) states that “Where the evaluation indicates that the nonconforming work could recur or that there is doubt about the compliance of the laboratory’s operations with its own policies and procedures, the corrective action procedures given in 4.11 shall be promptly followed”. In addition, “The laboratory shall establish a policy and a procedure and shall designate appropriate authorities for implementing corrective action when nonconforming work or departures from the policies and procedures in the management system or technical operations have been identified.” ISO 17025 (4.11.1). To establish the best corrective actions, and as required by ISO 17025 (4.11.2), an investigation is initiated to determine the root cause(s) of the situation or condition: “The procedure for corrective action shall start with an investigation to determine the root cause(s) of the problem.” Root Cause Analysis (RCA) is a critical step of determining corrective actions for substantive errors, and may be the most important part of establishing *proper* corrective actions.

Implementation Recommendations

Understanding that all human systems are fallible, and that risks in a system can be minimized, the Department of Justice should encourage federal Forensic Science Service Providers (FSSPs) and Forensic Science Medical Providers (FSMPs) to consistently strive to be “high reliability organizations” and ensure a culture of constant self-monitoring and self-improvement by incorporating established practices of “just culture”¹ and learning from error. To this end, the Department of Justice shall require its FSSPs and FSMPs to create and maintain protocols around the conduct of Root Cause Analysis (RCA) to address nonconforming work or departures from policies or procedures.² The Department or its designee will periodically review those RCA policies to ensure they include the following:

- Objective **guidance** as to when a RCA should be conducted;
- The regular provision of appropriate **training** to key personnel on how a RCA should be conducted;
- **Training** to all employees within the FSSP and FSMP on RCA principles and processes, to enhance the quality of the RCA and its acceptance within the laboratory environment;
- Proper **construction** of the investigative team conducting a RCA;
- Definition of and procedures for an **investigation** that identifies the extent of nonconforming work and its causal factor(s) in a blame-free environment, prioritizing continuous improvement of laboratory quality, safety and reliability by learning from nonconformities;
- **Recommendations** that identify corrective actions to minimize the chance of future recurrence of nonconformities identified in the RCA;
- **Guidelines** that define when and how to identify other cases that may have also been affected by an identical or similar nonconformity, and the obligation to conduct a retrospective re-analysis of and address such cases;
- **Communication** of the existence of the nonconformity to internal and external individuals impacted by the nonconformity;
- **Provision of Safe Harbor** to employees who report nonconformities or near misses, including use immunity for participation in an RCA and limitations on the disclosure of materials generated in the course of an RCA;
- **Implementation** of actions designed to minimize the chance of future similar nonconformities and to appropriately redress injury caused by the nonconformity; and
- **Documentation** of each nonconformity as well as the proposed corrective action in a manner that does not publicly identify confidential information regarding specific individuals or cases, but that makes the learnings from the RCA publicly available for the review and benefit of other FSSPs and FSMPs.

Implementation Strategy

The US Attorney General should collaborate with FSSPs and FSMPs as well as experts in the field of RCA to establish guidelines in compliance with the above for the design, implementation, and review of RCAs, and for the periodic review of protocols and procedures regarding RCAs that may be updated over time. In addition, the Organization of Scientific Area Committees (OSAC) should be tasked with further exploration and periodic definition of best practices in RCA as applied to FSSPs and FSMPs.

¹ A “just culture” can be defined as “a culture that recognizes that competent professionals make mistakes and acknowledges that even competent professionals will develop unhealthy norms (shortcuts, “routine rule violations”), but has zero tolerance for reckless behavior.” Agency for Healthcare Research & Quality Glossary, available at http://psnet.abrg.gov/popup_glossary.aspx?name=justculture.

² Different terms may be used for unplanned and/or unintended occurrences in human systems, including adverse events, errors/omissions, mistakes, nonconformities, etc. We have selected the terms “nonconforming work” or “nonconformity” to include each of these various unplanned and/or unintended occurrences as well as departures from policies or procedures, and note that any of the above may include good faith or malfeasant behavior. Furthermore, “nonconformity” is broadly defined herein to include “near misses,” or unplanned occurrences or events that had the potential to result in a nonconformity but did not do so due to a fortunate turn of events, as opposed to a deliberate system design. Near misses should be addressed with the same diligence and vigor as actual nonconformities.

APPENDIX A:

Supporting Information and Examples of Root Cause Analysis

Despite the best intentions and best efforts of forensic science professionals, supervisors, and managers, nonconformities will occur in forensic laboratories, as in any complex organization. It is the position of the National Commission on Forensic Science that all responsible forensic science providers should embrace and implement a just culture¹ of “learning from error” and continuous improvement to minimize the occurrence of nonconformities and/or misconduct in the performance of forensic science services over time. This is true regardless of an organization’s history of error, since “[a]dverse events, like the number of adverse events, are poor indicators of the general safety of a system... Safe organizations can still have bad adverse events, whereas unsafe systems can escape them for long periods. Furthermore, progress creates new risk that is difficult to anticipate but is a feature of new procedures and technologies.”²

Forensic laboratories accredited under programs that adhere to the ISO/IEC 17025 General requirements for the competence of testing and calibration laboratories are required to “establish a policy and a procedure and shall designate appropriate authorities for implementing corrective action when nonconforming work or departures from the policies and procedures in the management system or technical operations have been identified.” A problem may be identified through a number of different techniques, including internal and external audits, reviews of the management system, customer feedback, or staff observations.

“Corrective actions” are potential solutions that eliminate or minimize the risk of repeating the nonconforming work or departure from policies and procedures. Corrective action is a requirement when any error or nonconformity is identified. To identify the best corrective actions, and as required by ISO 17025,³ an investigation is initiated to determine the root cause(s) of the situation or condition. Root Cause Analysis (RCA) is a critical step and may be the most important part of identifying and implementing appropriate corrective actions.

ISO/IEC 17025 also requires laboratories to establish procedures to identify needed improvements and potential sources of nonconformities. This proactive process is termed “preventative action” and follows a similar process of Root Cause Analysis to identify the best solutions to prevent or minimize the chance of nonconformity from occurring.

RCA has been used productively not only throughout the healthcare industry but also in aviation, manufacturing and other quality-minded industries to conduct event reviews that lead to actionable change of policies and procedures to reduce the occurrence of nonconformities.⁴ The goal of RCA is to learn from nonconformities and to implement corrective actions in order to reduce further similar events that might compromise lab report or opinion integrity. An important feature of the RCA is that it is a blame-free analysis: “[b]laming and punishing for adverse events that are made by well-intentioned people... drives the problem of iatrogenic harm underground and alienates people who are best placed to prevent such problems from recurring.”⁵

¹ A “just culture” can be defined as “a culture that recognizes that competent professionals make mistakes and acknowledges that even competent professionals will develop unhealthy norms (shortcuts, “routine rule violations”), but has zero tolerance for reckless behavior.” Agency for Healthcare Research & Quality Glossary, available at http://psnet.abrq.gov/popup_glossary.aspx?name=justculture.

² Barach P, Berwick DM. Patient Safety and the reliability of health care systems. *Ann Intern Med* 2003; 138(12):997-8. Barach uses the health care term “adverse event” to define an unintended outcome; in the forensic science context we use the ISO 9000-defined term “nonconformity,” which encompasses any deviation from a policy or procedure regardless of its impact.

³ ISO/IEC 17025:2005(E) (hereafter, ISO 17025), General requirements for the competence of testing and calibration laboratories, Section 4.11.2 Cause Analysis. “The procedure for corrective action shall start with an investigation to determine the root cause(s) of the problem.”

A subset of nonconformity is the “near miss,” a nonconformity or unplanned event that had the potential to affect the accuracy or reliability of the laboratory results or work product, but did not do so through a fortuitous intervention. Only a fortunate break in the chain of events prevented a potentially systemic nonconformity. Near misses are nonconformities and must be evaluated as such. Further, they should be evaluated in the same way they would be if the nonconformity had actually occurred. To do otherwise would suggest that because this near miss did not result in a nonconformity, the contributing factors that caused the near miss have been resolved.

This document sets forth recommendations for the standardized use of RCA to identify why an error has occurred in a forensic laboratory setting and make recommendations for the prevention of the future occurrence of similar nonconformities.

Types of Nonconformities Suitable for Root Cause Analysis and A Structure for Analyzing Causes.

It is common for a RCA to identify multiple factors that combined to cause the nonconformity. Indeed, the purpose of the RCA is to identify any and all contributing factors. While no framework can specifically identify and catalog all factors that could contribute to a nonconformity, one framework for evaluating nonconformities has been provided by British researcher Dr. James Reasons. Dr. Reasons describes three different types of error:

1. **Decision error:** One made because information, knowledge, or experience is lacking
2. **Skill-based error:** One made while engaged in a familiar task
3. **Perceptual error:** One made because input to one of the five senses is degraded or incomplete.

These errors typically fall into one of four categories:

1. **Unsafe Acts:** those performed by the operator
2. **Preconditions for Unsafe Acts:** environmental factors contributing to the error
3. **Supervision:** management actions affecting the operator
4. **Organizational Influences:** culture, policies, or procedures of the organization that affect the operator.

Dr. Reasons describes some nonconformities as “errors” and others as “violations,” distinct from errors in that they are “intentional departure[s] from accepted practice.” Violations may be:

1. **Routine violation:** habitual, repeat departures, enabled by “bending of the rules.”
2. **Exceptional violation:** a willful departure outside norms, not condoned by management.

A structure for categorizing different causes of many common unintentional or intentional nonconformities follows.

⁴ ISO 17025, Section 4.12.” 4.12.1 Needed improvements and potential sources of nonconformities, either technical or concerning the management system, shall be identified. When improvement opportunities are identified or if preventive action is required, action plans shall be developed, implemented and monitored to reduce the likelihood of the occurrence of such nonconformities and to take advantage of the opportunities for improvement.

⁵ Rinciman WB, Merry AF, *Error, blame, and the law in health care – an antipodean perspective*. Ann Intern Med. 2003 Jun 17; 138(12):974-9.

Figure 1. Types of Unsafe Acts.

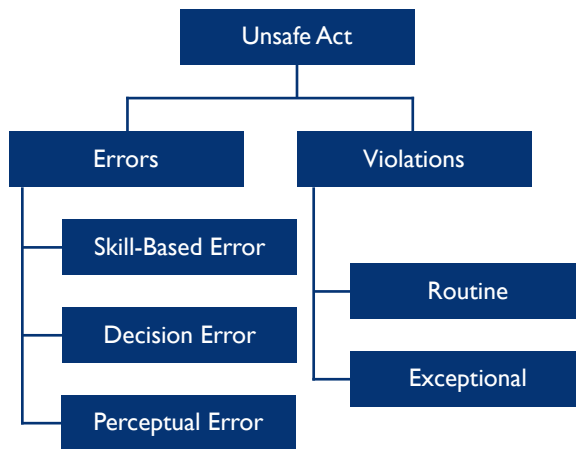


Figure 2. Causes of Preconditions for Unsafe Acts.

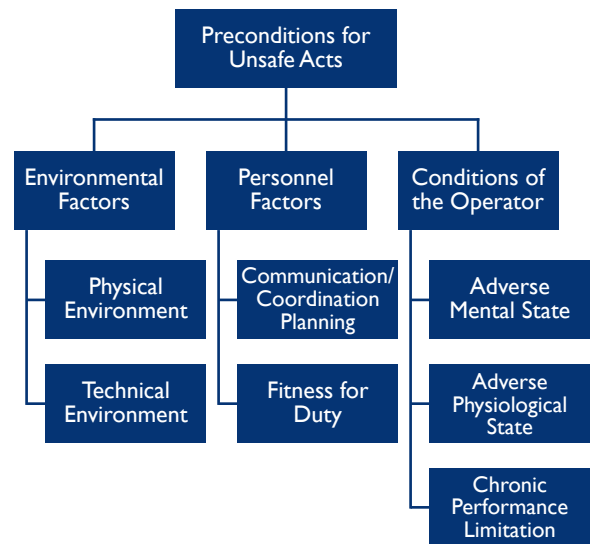


Figure 3. Causes for Nonconformities of Supervision.

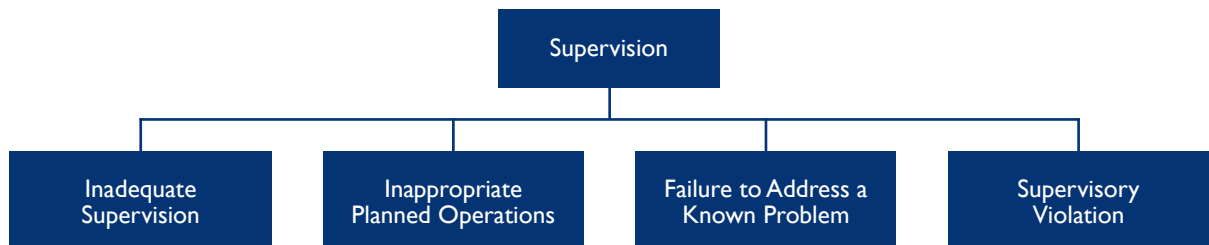
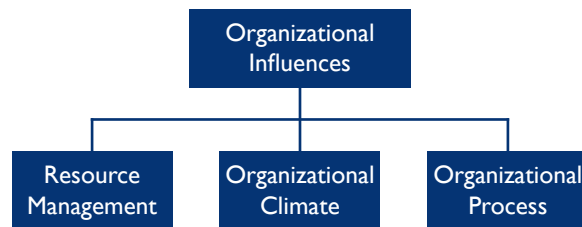


Figure 4. Causes of Undue Organizations Influences.



How should an RCA be conducted?

It cannot be emphasized enough that **RCAs are not performance evaluations, and their purpose is learning, not punishment.** Accordingly, personnel and discipline issues should be handled through a separate process from RCA. In many contexts, including transportation and healthcare, the activities and output of an RCA are inadmissible as evidence and excluded from discovery in litigation to ensure this purity of purpose. The “just culture” focus of the RCA creates shared accountability: the system is responsible for providing an environment that is optimally designed for safe care and staff is responsible for their choices of behavior and for reporting system vulnerabilities.⁶

While specific recommendations for the conduct of RCAs may differ, a few themes emerge from review of RCAs across industries:

- **Construction.** RCAs should be performed by a team. There is a benefit to engaging multiple perspectives and multidisciplinary personnel whose backgrounds encompass the various parts of the technical analysis and management systems, and reporting process to ensure a holistic review of factors that contributed to the nonconformity that might otherwise be overlooked.

- o The number of participants conducting the RCA can vary depending on the nature of the nonconformity. For more substantial nonconformities, RCAs often work best when performed by multidisciplinary teams, from all levels of staff, with fundamental knowledge of the specific area involved.
- o The team should have people who were not involved with the specific incident to ensure objectivity in the review.
- o A facilitator should be appointed who was not directly implicated in the incident.
- **Investigation.** The nonconformity should be analyzed for its causal factors.
 - o Detailed review of the event by the team
 - o Identify problems – *what* went wrong. Is this a one-time event or a recurring error?
 - o Identify Root Causes/Contributing Factors – *why* it went wrong. Focus on objective causes and minimize causation conclusions that focus solely on blaming an individual or individuals, rather than evaluating environmental, organizational, supervisory, and other factors where possible
 - o Prioritize the factors that contributed to the nonconformity, evaluating both their severity and the probability that these factors will cause harm in the future
 - o Develop interventions that conform with the prioritization and likelihood of repetition of the various factors
- **Recommendation.** The team should make specific, prioritized recommendations for corrective actions that are intended to

⁶ Agrawal, A, *Patient Safety: A Case-based Comprehensive Guide*, 2014.

prevent occurrences of similar events. The recommendations may incorporate input from primary operators who will be affected by the recommendations to enhance their ability to be implemented efficiently. These recommendations should be made in writing and stored for future review as needed.

- **Implementation.** Implement those corrective actions, considering the quality of analysis, the cost of the suggested interventions, and their likely real-world impact on safety and reliability.
- **Evaluation.** Evaluate the corrective actions and take subsequent additional action as needed.
- **Professional Standards and a “Just Culture.”** A “Just Culture” is one that balances blame-free event reviews with the need for professionals, including FSSP/FSMPs, to be personally accountable for adherence to reasonable standards of professional conduct. Typically, this involves the creation of a separate disciplinary process, managed outside the RCA process, in the event that the RCA uncovers evidence of intentional wrongdoing by any individual. A sample tool to assess the necessity of such a parallel disciplinary process used in a hospital setting is attached.

To preserve the integrity of the RCA as a blame-free event review, it is important that any disciplinary process be additional to, and separate from, the RCA, and that the individual in charge of making determinations about disciplinary action be informed by, but not reporting to or involved in, the RCA itself.

Documentation/Implementation of Improvement.

ISO/IEC 17025 4.11.3 and 4.11.4 requires all selected changes resulting from corrective action investigations be documented and implemented. In addition, laboratories are required to monitor the results of the corrective actions to ensure the effectiveness of the solutions; this monitoring should similarly be documented.

In the criminal justice context, documentation and implementation of corrective action should include the obligation on the part of the panel conducting the RCA to communicate the nonconformity to individuals or agencies involved in casework that may have been affected by the nonconformity.⁷ This duty extends to other individuals who may be similarly situated to those directly affected by the nonconformity that has been discovered. For example, an RCA could be performed on a nonconformity regarding the miscalibration of an instrument used to assess blood tests in a single DUI case. If an error is discovered, it would lead to an obligation to identify all others who might be affected by the miscalibration and inform them about the re-evaluation of their cases. Not all nonconformities affect casework, but when they do, it is important to note that the life and liberty of a human being may be (or may not be) affected.

For this reason, forensic science service providers have a duty to inform others of the nonconformity, which should include a new, amended, or supplemental report with the correct results and an explanation of the initiating nonconformity distributed to the various parties in a case. The FSSP/FSMP must work with the proper legal authority to identify and notify all individuals whose cases were affected by the nonconformity/error, and should participate in the suitable remedy as appropriate.

⁷ Note that corrective action may correct errors from which inferences of guilt or innocence may be drawn.

Training of Personnel to Conduct RCAs.

Root cause analysis may be the most difficult part of establishing proper corrective actions following a nonconformity. By becoming proficient at investigating and solving problems of nonconformity in their work, a laboratory will ultimately need to conduct fewer investigations. But if done inappropriately, a root cause analysis investigation may lead to the inadvertent blame of individuals instead of identifying where a work process has broken down. Such blame will be detrimental to encouraging participation in the root cause analysis process.

A study that evaluated an aggregated group of RCAs in the healthcare setting identified lack of time (55%), unwilling colleagues (34%) and inter-professional differences (31%) as the top three barriers to RCAs.⁸ Each of these barriers can be addressed, at least in part, by experienced facilitation and support from senior management within the organization.

Accordingly, a recommendation is made to establish key individuals within a forensic laboratory to serve as facilitators of root cause panels. Characteristics of successful RCA facilitators will likely include, but may not be limited to:

- Interested in facilitating and documenting problems
- Excellent listening skills
- Naturally inquisitive
- Comfortable speaking in front of a group
- Detail-oriented
- Relatively calm disposition
- Good rapport with front-line personnel and management

Once selected, these individuals should be required to receive annual specialized training on the topic of root cause analysis to include practice in running group facilitations.

When Should an RCA Be Conducted?

ISO 17025 (4.9.2) states, “Where the evaluation indicates that the nonconforming work could recur or that there is doubt about the compliance of the laboratory’s operations with its own policies and procedures, the corrective action procedures given in 4.11 shall be promptly followed.” ISO 17025 (4.11.2) continues, “The procedure for corrective action shall start with an investigation to determine the root cause(s) of the problem.” Properly done, RCAs include: *investigation* of facts and circumstances that caused or contributed to the nonconformity; *development* of interventions that should minimize the chance of future similar nonconformities, *implementation* of those interventions, and *evaluation* of the impact of the interventions. As such, they should be deployed with an eye towards the severity and risk of the problem.

Some laboratories, including the FBI Laboratory, categorize nonconformities in their work product as Level 1 or Level 2. Level 1 nonconformities are situations or conditions that directly affect and have a fundamental impact on the quality of the work product or the integrity of evidence. Level 2 nonconformities are situations or conditions that may affect the quality of the work, but does not, to any significant degree, affect the fundamental reliability of the work product or the integrity of the evidence.

Another approach, modeled after that of the Veterans’ Health Administration (VHA), evaluates whether a full RCA is needed based on the severity of the nonconformity and the likelihood of its reoccurrence:⁹

⁸ Bowie, Paul, Skinner, J. and de Wet, C. *Training health care professionals in root cause analysis: a cross-sectional study of post-training experiences, benefits, and attitudes.* BMC Health Services Research 2013, 13:50.

⁹ A “near miss” should be included for RCA review if its score qualifies when viewed as if the event had actually occurred.

Table 1. Potential RCA Initiation Matrix.

Probability	Severity			
	Catastrophic Systemic errors in procedure that affect several outcomes or reported results; intentional misconduct or recklessness in execution of role	Major Casework or proficiency test error that affects outcome or reported result. Potential problems that may affect the reliability, accuracy or performance of a test procedure or policy; serious negligence in execution of role.	Moderate Clerical nonconformity affecting result but corrected during the review process prior to reporting; nonconformity that does not affect outcome or reported result	Minor Clerical nonconformity that does not affect outcome or reported result
Frequent Likely to occur multiple times in 1 year	3	3	2	1
Occasional May occur several times in 1-2 years	3	3	2	1
Uncommon May happen once in 2-5 years	3	2	1	1
Remote May happen once in 5+ years	3	2	1	1

RCA Required for 3, Recommended for 2, Optional for 1

When an RCA is required or recommended, it should be conducted both on actual nonconformities and on nonconformities that *could* have occurred but for a fortuitous intervention or timely discovery. Such interventions are called “near misses,” and they should be scored in the SAC Matrix as if they were an event that actually occurred. Such reviews of near misses or “close calls” are valuable “because they occur much more frequently than adverse or reviewable sentinel events and do not require harm to a patient before learning can occur.”¹⁰ Indeed, “the absence of safety, like poor health, is clearly signaled by near misses, injuries, and fatalities, which lend themselves to close analysis and quantification.”¹¹

It is also important that the RCA process include steps designed to understand whether or not the error has been repeated, and if so, the extent of the nonconformities. An example would be the use of an improper reagent in a chemical test – appropriate auditing should be conducted to ensure what other tests, if any, might have been similarly compromised by the improper reagent. Another example might be the calibration of lab equipment, which would likely require a review of all tests conducted between the dates of the last calibration and the discovery of the error.

¹⁰ Bagian, James et al., *The Veterans Affairs Root Cause Analysis System in Action*. Journal on Quality Improvement, 2002, Vol. 28 No. 10, 531 – 545, at 531.

¹¹ *Making Sense of Root Cause Analysis Investigations of Surgery-Related Adverse Events*, Cassin, Bryce R., Barach, Paul R., Surg Clin N Am. 92 (2012) 101-115.

Creating a “Safe Harbor” to Encourage Transparency and Reporting of Error

It has been shown in numerous settings that providing a “safe” environment – that is, an environment that encourages and prevents negative use of important quality and/or reliability information – enhances participation in RCAs, and thus improves both their frequency and their substance.

The key characteristics of such a Safe Harbor include:

1. Qualified Immunity for Participants.

- a. An individual should not be disciplined in any way for participating in a RCA, or offering a candid and good faith assessment of the role of others in an incident under review.
- b. In addition, an individual who reports an error should receive positive consideration from any disciplinary body if the individual self-reports an error within a reasonable time after the incident (e.g., 10 days). Note that this does not protect the individual from any liability that may accrue for the individual’s role in the error, though the FSSP/FSMPs should consider the positive impact of the self-reported information in its assessment of any necessary punishment.

2. Protection from discovery for Notes, Minutes, Correspondence, and/or Reports generated as part of an RCA. In order to ensure that the RCA is an event review only, designed to learn from error and improve upstream processes, materials generated as part of an RCA should not, generally speaking, be discoverable in civil or criminal litigation related to the incident. This is in keeping with Peer Review Protection Acts that hold healthcare event reviews as undiscoverable in 46 states throughout the United States.¹²

3. Nothing in this safe harbor should be viewed as limiting the discovery rights of individuals to information about the underlying facts related to a nonconformity (i.e., facts or documents pertaining to the actual nonconformity, as opposed to documents generated by the RCA process). The purpose of the safe harbor is merely to ensure that no one is penalized as a result of his or her participation in a valuable event review designed to improve the technical and management system process, the quality of the laboratory work product, and the fair administration of justice.

¹² To the extent an error justifying a RCA occurs in a criminal case, the defendant may have enhanced rights to learn about the results of the RCA as part of his/her criminal defense. Such an issue can be managed by the court of relevant jurisdiction on a case-by-case basis, with the information that the Attorney General views the protection of RCA work product to be an important public interest that does not preclude any discovery sought by the defendant on the underlying facts at issue.



APPENDIX D.

Additional Writings on Conviction Review Units

Scheck, Barry. Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them. *Cardozo L. Rev.* 31:6, 2010, pp. 2215 – 2256.

“Conviction Integrity Units: Vanguard of Criminal Justice Reform,” Center for Prosecutorial Integrity White Paper, released Dec. 4, 2014

Barkow et al., Center of the Administration of Criminal Law, New York University School of Law, “Establishing Conviction Integrity Programs in Prosecutors’ Offices”

Moore, Terri, "Prosecutors Reinvestigate Questionable Evidence: Dallas Establishes a 'Conviction Integrity Unit,'" *Criminal Justice*, Volume 26, Number 3, Fall 2011

Gross, Samuel, et al., "The National Registry of Exonerations: Exonerations in 2014," Published January 27, 2015, available at <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>.

- Rachel E. Barkow, Prosecutorial Administration: Prosecutor Bias and the Department of Justice, 99 Va. L. Rev. 271 (2013)
- Rachel E. Barkow, Organizational Guidelines for the Prosecutor's Office, 31 Cardozo L. Rev. 2089 (2010)
- Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869 (2009)
- Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. PA. L. REV. 959 (2009).
- Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. REV. (June 2006), cited with approval in *Kansas v. Marsh*, 126 S. Ct. 2516, 2532 n.3 (2006) (Scalia, J., dissenting).



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