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In the Interest of Justice: The Gold Standard for Conviction Integrity Units

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**IN THE INTEREST OF JUSTICE: THE GOLD STANDARD FOR CONVICTION
INTEGRITY UNITS**

Mallory Emma Garvin¹

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¹ J.D. Candidate, 2023, Seton Hall University School of Law; M.A. Columbia University, Teachers College; B.A. Purdue University.

INTRODUCTION

In a response to the question as to why she created a Conviction Integrity Unit in Baltimore, Marilyn Mosby, the State’s Attorney, stated, “The mission of a prosecutor is not to just go after individuals who have committed crimes and zealously advocate on behalf of victims and witnesses of crime. Your mission is justice over conviction.”² While this may not appear to be a radical idea, prosecutors consistently struggle to balance the responsibilities of their dual role—that of an advocate and a servant of justice.³ Today, we are aware of the staggering number of individuals who have been wrongfully convicted in our nation. Whether these cases involved prosecutorial misconduct or not, prosecutors played a role in every one of these wrongful convictions. According to the National Registry of Exonerations, to date, there have been 3,010 exonerations since 1989.⁴ Wrongful convictions are the result of a myriad of factors that unfold throughout an investigation and trial;⁵ however, it is important to note the role that the prosecutor plays and the power they have in every conviction.

Prosecutors are referred to as “ministers of justice”⁶ due to the responsibilities they possess—seek the truth and carry out justice. They are supposed to act as a neutral quasi-judicial official⁷ with a duty to promote justice first and foremost; securing convictions is secondary.

² Timothy Williams, ‘Your Mission is Justice’: A Prosecutor on Why She Helped Free 3 Men, THE N.Y. TIMES (Nov. 29, 2019), <https://tinyurl.com/f5x939pb>.

³ DANIEL MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 2 (2012).

⁴ *National Registry of Exoneration*, NEWKIRK CTR. FOR SCI. AND SOC’Y, (Mar. 10, 2022), <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx>. The National Registry of Exonerations is a project of the University of California Irvine Newkirk Center for Science & Society, University of Michigan Law School, and Michigan State University College of Law.

⁵ Some factors include, false forensic science (junk science), prosecutorial and/or police misconduct, eyewitness misidentification, false confessions, and false accusations. *Ibid.* See generally, RICHARD COVEY & VALENA BEETY, WRONGFUL CONVICTIONS: A READER (2018).

⁶ Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009)

⁷ NAACP Legal Defense Fund, Conviction Integrity Units: Why We Need Them and How They Work, (Feb 25, 2022) <https://tinyurl.com/39u3cfyw>.

However, the reality is that prosecutors have come under attack in recent years due to the publicity of prosecutorial misconduct discovered in wrongful convictions,⁸ as well as a push from activists and intellectuals to fix our broken criminal justice system.⁹ Amidst calls to overhaul the criminal justice system that caused unprecedented mass incarceration, a wave of progressive prosecutors have been appointed and elected on the platform of criminal justice reform.¹⁰ These new progressive prosecutors brought more support for Conviction Integrity Units,¹¹ designed to investigate post-conviction claims of actual innocence.

All Conviction Integrity Units (CIU) have the same purpose –to free the innocent. However, they are organized differently and have different policies and processes. One difference that can have a profound impact on the outcome of an innocence claim is the standard by which they are reviewing the case. Some offices maintain a very narrow scope when determining what cases to review, while others create a broad scope.¹² Some offices base their final determination on whether there is “clear and convincing” evidence of actual innocence.¹³ However, other offices maintain greater flexibility and recognize there is often a gray area where “clear and convincing” evidence of actual innocence might not exist, but justice demands exoneration. In a 2016 national

⁸ The case of the Exonerated Central Park Five shed light on police and prosecutorial misconduct in the case of five innocent teenagers who were convicted of a brutal rape. *E.g.*, Ava DuVernay, *When They See Us* (Netflix, May 31, 2019); THE CENTRAL PARK FIVE (Ken Burns, Sarah Burns & David McMahon, Sundance Selects, 2012).

⁹ *See generally*, RACHEL ELISE BARKOW, PRISONER OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION, (2019); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

¹⁰ BARKOW at 155. *See generally*, Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989 (2020); Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, MICH. L. REV. 1365 (2021) (reviewing the book CHARGED; THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION by Emily Bazelon published in 2019). *See also*, Zara Katz & Alexandra Nicholchev, *A New Approach to Prosecution*, The Human Toll of Jail: A Project of the Vera Institute <http://humantollofjail.vera.org/a-new-approach-to-prosecution/> (last visited Feb. 28, 2022).

¹¹ Also known as Conviction Review Units. I will consistently use the term Conviction Integrity Units (CIU) when referencing a Conviction Integrity Unit or Conviction Review Unit.

¹² This can be designed by state law or the policy of the office.

¹³ This standard is outlined in ABA Model Rule 3.8(h) “Special Responsibilities of a Prosecutor.” MODEL RULES OF PROF’L CONDUCT R. 3.8(h) (A.M. BAR ASS’N 1983). Twelve states have adopted this standard through legislation. This will be discussed at greater length in Part III of this paper.

study of CIUs, one prosecutor stated, “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 we shouldn’t act.”¹⁴ Innocence exists in the muddy water. When a CIU determines that justice demands a case be reviewed or a conviction vacated despite a lack of “clear and convincing” evidence of actual innocence, it is acting in the “interest of justice.” All Conviction Integrity Units should enact an “interest of justice” standard¹⁵ when reviewing cases to ensure that plausible innocence claims are not ignored and the wrongfully convicted are exonerated.

The focus of this paper is on the standard of review CIUs adopt from the beginning of the process, when accepting cases for review, to the last stage, making a final determination. In this paper, I will argue for the “interest of justice” standard to be enacted in all CIUs when reviewing cases. In Part I of this paper, I will discuss wrongful convictions and CIUs more generally to provide the reader with a brief overview of the topic of Conviction Integrity Units so that the reader can better understand the need for the “interest of justice” standard. In Part II, I will discuss the process that CIUs follow when reviewing a case and making a final determination to retry the case or exonerate. The process varies based on the organization and policies of each CIU, and I will address several different CIUs that follow different procedures, all of which would benefit from the use of an “interest of justice” standard of review. Finally, in Part III, I will present my argument for why the “interest of justice” standard is integral for CIUs, which are designed to “reinvestigate[ing] potential miscarriages of justices ... in search for the truth.”¹⁶ It is my hope that

¹⁴ John Hollway, *Conviction Review Units: A National Perspective*, (2016). *Faculty Scholarship at Penn Law*. Scholarship from the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School.

¹⁵ Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 727 (2017).

¹⁶ *Id.* at 706.

after reading this paper, the reader will believe that the only way to ensure that CIUs are rectifying miscarriages of justice and acting as “ministers of justice” is to implement the “interest of justice” standard so that the innocent do not get lost in the muddy waters of the legal process.

I: BACKGROUND: A BRIEF OVERVIEW OF CONVICTION INTEGRITY UNITS

According to the National Registry on Exonerations, as of June 2021, individuals have lost over 25,000 years¹⁷ to false incarcerations. The average number of years lost per exoneration is 8.9,¹⁸ but the numbers vary based on crime and the race of the defendant, with Black individuals convicted of murder losing the most years—15.6.¹⁹ In 2020 alone, 129 people were exonerated after being in prison for a crime they did not commit, and 87 of those cases were found to contain official misconduct leading to a wrongful conviction.²⁰ Out of those 129 exonerees, 61 were exonerated by CIUs.²¹ These numbers should send a powerful message to law enforcement and criminal defense attorneys alike; wrongful convictions continue to persist and policies need to be put in place to avoid wrongful convictions in the future.

A. The Creation of Conviction Integrity Units

Legal scholars in the United States recognized wrongful convictions as early as 1932,²² however, it was not until the work of the Innocence Project,²³ formed in 1992, that the issue started to gain more public recognition. Conviction Integrity Units came onto the scene in the mid-2000s, in a handful of counties and cities such as Santa Clara, California and Dallas, Texas,

¹⁷ *National Registry of Exoneration: 25,000 Years Lost to Wrongful Convictions*, NEWKIRK CTR. FOR SCI. AND SOC’Y, (Mar. 10, 2022), <https://www.law.umich.edu/special/exoneration/Documents/25000%20Years.pdf>.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *National Registry of Exoneration: 2021 Annual Report*, NEWKIRK CTR. FOR SCI. AND SOC’Y, (Mar. 10, 2022), <https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf>.

²¹ *Ibid.*

²² *See generally*, EDWIN M. BORCHARD, *CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE* (1932).

²³ The Innocence Project was founded in 1992 by David Neufeld and Barry Scheck and is affiliated with the Benjamin N. Cardozo School of Law at Yeshiva University in New York City, New York.

as well as an innocence commission in North Carolina. As a result of the work of the Innocence Project publicizing wrongful convictions, and in part due to prosecutors discovering wrongful convictions in their own offices, several prosecutors were motivated to start investigating claims of actual innocence.²⁴

In 2007, Craig Watkins, the Dallas District Attorney, created a CIU that gained national attention after they led the investigations that exonerated several wrongfully convicted individuals.²⁵ Watkins stated that he did not wish to be “tough on crime” but rather “smart on crime” and emphasized that the role of the prosecutor “is to seek justice. It’s just not to convict, but to ensure that justice is served.”²⁶ In 2007, “progressive prosecution”²⁷ was a rarity, yet Watkin’s publicity helped spur the creation of more CIUs across the nation.

To date, there are ninety-three Conviction Integrity Units,²⁸ twenty-five of which were established since 2020.²⁹ These offices exist in only twenty-six states and one in the District of Columbia.³⁰ Some have received criticism and the label of CRINOs (Conviction Review In Name Only),³¹ designed more for show than actually investigating innocence claims. In contrast, other CIUs have been extremely successful such as Wayne County’s Conviction Integrity Unit in Michigan, under the direction of Valerie Newman,³² and Philadelphia’s Conviction Integrity Unit

²⁴ If I am not referring to the title of a specific individual, I will use prosecutors when referring to district attorneys and state attorneys.

²⁵ Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033, 1041 (2011).

²⁶ Drum Major Institute for Public Policy, Dallas DA on Exonerating Individuals, YouTube (March 12, 2022, 6:00pm) https://www.youtube.com/watch?v=RIbhe_X0zbU.

²⁷ This is a term commonly used to describe a modern, liberal approach to prosecution focused on criminal justice reform and reducing mass incarceration.

²⁸ *National Registry of Exoneration: Conviction Integrity Units*, NEWKIRK CTR. FOR SCI. AND SOC’Y, (Mar. 10, 2022), <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx>.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Hollway, *supra* note 15, at 19, n. 25. Coined by Professor Ron Sullivan of Harvard Law School, such units pay merely “lip service” to conviction review but in reality, function more as “conviction preservation units.”

³² *Conviction Integrity Unit*, Wayne County Prosecutor’s Office, <https://www.waynecounty.com/elected/prosecutor/conviction-integrity-unit.aspx> (last visited Mar. 1, 2022).

under the direction of Patricia Cummings.³³ However, with over 2,400³⁴ elected prosecutors across the country, a large portion of the nation functions without CIUs. Smaller jurisdictions might not have the manpower or resources to implement a CIU or they might not have the caseload to warrant one. Some states have implemented statewide units in the attorney general's office, such as New Jersey and Virginia, which alleviates the financial burden on individual prosecutor's offices and also serves to remove CIU investigations from the same office as the original investigation.

North Carolina created an Innocence Inquiry Commission (NCIIC) in 2006 which operates as an independent government body to investigate claims of actual innocence. The Commission, by design, operates much differently from most CIUs, in part because they are independent of state or county offices, and the commissioners reviewing cases of actual innocence are from a diverse set of legal, law enforcement, and layperson backgrounds. The Commission is made up of eight members: a prosecutor, a criminal defense attorney, a sheriff, a superior court judge, a victim's advocate, a member of the public, and two discretionary appointments.³⁵ Since its inception, the commission has exonerated fifteen individuals and they are still the only independent innocence commission in the United States receiving some criticism regarding its lack of efficacy³⁶ and some praise for its independent nature.³⁷

B. The Goals of Conviction Integrity Units

CIUs have three goals: (1) to investigate claims of actual innocence and exonerate innocent individuals; (2) to ensure integrity in every conviction; and (3) to educate law

³³*Conviction Integrity Unit*, Philadelphia District Attorney's Office, <https://phillyda.org/safety-and-justice/investigations/conviction-integrity-unit-ciu/> (last visited Mar. 16, 2022).

³⁴ EMILY BAZELON, CHARGED; THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

³⁵*Commissioners*, North Carolina Innocence Inquiry Commission, <https://innocencecommission-nc.gov/commissioners-2/> (last visited Feb. 29, 2022).

³⁶ Scheck, *supra* note 15, at 712.

³⁷ *Ibid.*

enforcement on how to prevent future miscarriages of justice. The first goal, to exonerate innocent individuals, is the main goal that I will discuss at length in Part II. The second goal stresses the importance of integrity in the criminal justice system; integrity with every conviction and throughout every prosecutor's office. Using the name CIU as opposed to CRU sends a clear message; the unit is not only reviewing post-conviction claims of actual innocence, but they are emphasizing integrity within the system. Conviction integrity is one way to restore the public's faith in law enforcement and progressive prosecutors, an elected position throughout most of the country, know that.³⁸ With recent calls for criminal justice reform, the inequities that exist within the system are gaining the public's attention, though that attention is often fleeting.³⁹ The criminal justice system is further undermined with each innocent person released from prison after months or years spent incarcerated. Therefore, one way to regain the public's trust is to ensure justice for incarcerated individuals who are innocent, which will benefit the public image and opinion of law enforcement. Another way, quite obviously, would be to ensure that innocent individuals are never incarcerated. The importance of this public image should not be understated. If law enforcement asks the public to trust them, they need to trust that they will not be sent to prison for a crime they did not commit. Valerie Newman emphasized the importance of CIUs to "demonstrate[s] a commitment to justice."⁴⁰ What is a criminal justice system without a "commitment to justice"? Newman went on to say, "A good unit works to correct past injustices and educate stakeholders to prevent future injustices."⁴¹

³⁸Fair and Just Prosecution, *Conviction Integrity and Review Statement of Principles*, (2019), <https://fairandjustprosecution.org/wp-content/uploads/2019/08/Conviction-Integrity-Statement-of-Principles.pdf>.

³⁹ See generally, BAZELON, *supra* note 34; ALEXANDER, *supra* note 9; BARKOW, *supra* note 9.

⁴⁰Shahar Akbarzai, *This Wayne County, Michigan Program is Helping Exonerate People For Crimes they Did not Commit*, CNN, (Feb 28, 2022) <https://www.cnn.com/2021/03/01/us/wayne-county-michigan-conviction-integrity-unit-exonerations/index.html>.

⁴¹ *Ibid.*

The third goal for CIUs is to compile information and data on how and why wrongful convictions happen to prevent future wrongful convictions. One of the key principles for CIUs according to Fair and Just Prosecution,⁴² an organization of prosecutors committed to reforming the criminal justice system through fair and just prosecution, is to identify where the errors in a case occurred and put “proactive accountability measures and training”⁴³ in place. CIUs should not stop at investigating those already wrongfully convicted but also prevent wrongful convictions. CIUs have uncovered significant errors, abuses, and problems in prosecutors’ offices. The prosecutor’s offices can use these CIU discoveries to make important and necessary changes. Wrongful conviction investigations have exposed police and prosecutorial misconduct, the danger of junk science, and the unreliability of eyewitness identifications. In individual offices, this information will help to better understand why wrongful convictions happen so that the office can create interoffice policies and educate police and prosecutors on how to avoid future mistakes.

In 2018, newly elected Philadelphia District Attorney, Larry Krasner, named Patricia Cummings, as the new head of the Conviction Integrity Unit. Conviction integrity was and still is, a priority for Krasner, and therefore, he needed to revamp the CIU. Cummings was the ideal recruit for Krasner; not only was she an outsider, but she previously worked at the Dallas CIU. Krasner and Cummings knew they would likely uncover misconduct; however, what they discovered were “horrendous abuses of power”⁴⁴ beyond what they were expecting. In the opening to the CIU

⁴² Fair and Just Prosecution’s stated vision is “to bring together elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility.” Their slogan is promoting justice through leadership and innovation. Fair and Just Prosecution, <https://fairandjustprosecution.org>, (last visited Mar. 2, 2022).

⁴³ Fair and Just Prosecution, Conviction and Integrity Review Statement of Principles, 2019, (Mar. 2, 2022) <https://fairandjustprosecution.org/wp-content/uploads/2019/08/Conviction-Integrity-Statement-of-Principles.pdf>. In addition to the report above they also published another report on “Conviction Integrity Units and Internal Accountability Measures” in 2017.

<https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf>.

⁴⁴ Philadelphia District Attorney’s Office, Conviction Integrity Unit Report, Overturning Convictions—and an Era, (2021), tinyurl.com/CIUreport.

report *Overturing Convictions- and an Era*, released June 2021, Krasner stated, “What we saw.... has taken our breath away.”⁴⁵ After discovering not only the prosecutorial and police abuse, but other mistakes made by the office, the unit launched several projects designed to fix these systemic problems and avoid future wrongful convictions: (1) creation of an office-wide policy establishing an affirmative duty for prosecutors to disclose police misconduct to the defense for officers called to testify in a case;⁴⁶ (2) a partnership with Phillips Black, Inc⁴⁷ to represent *pro se* applicants;⁴⁸ (3) formal review of every case in which police officers with particularly egregious misconduct were involved;⁴⁹ and (4) creation of an open file discovery policy so that defendants have access to all of the information on their case being that *Brady*⁵⁰ violations often lead to wrongful convictions.⁵¹ Despite resistance from police officers and judges alike, the Philadelphia CIU has been extremely successful, exonerating twenty-eight individuals.⁵²

One of the largest mass exonerations came out of Harris County, Texas, when a reporter’s investigation led to the discovery of cases involving innocent defendants who pleaded guilty to drug possession before drug tests came back from the lab.⁵³ There was a major backlog at the drug lab, therefore, many were pleading guilty before the tests returned proving their innocence. For many who were wrongfully convicted in Harris County, by the time the district attorney’s office

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 33.

⁴⁷ Phillips Black, Inc is a nonprofit law office that specializes in advocacy for people who have been sentenced to life without parole or death.

⁴⁸ Philadelphia District Attorney, *supra* note 45, at 35.

⁴⁹ *Id.* at 36.

⁵⁰ *Brady v. Maryland*, 373 U.S. 83 (1963) (holding prosecution must disclose “evidence favorable to an accused” if that evidence is “material either to guilt or punishment”).

⁵¹ *Id.* at 40.

⁵² Zayrha Rodriguez, “Philly D.A.” Larry Krasner’s First Term Under a Lens, THE MARSHALL PROJECT, (Jun. 5, 2021) <https://tinyurl.com/2s3v2upz>; *National Registry of Exonerations: Philadelphia District Attorney’s Office*, NEWKIRK CTR. FOR SCI. AND SOC’Y, (Mar. 13, 2022).

⁵³ Ryan Gabrielson & Topher Sanders, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES (Jul. 7, 2016), <https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html>.

discovered the accurate results from the labs, they finished serving their punishment and possessed a criminal record. The CRU in Harris County started investigating and exonerating those who were wrongly convicted. Harris County exonerated 126 people between 2014 and 2017, and of the 317 lab tests used in guilty pleas in which no drugs were found, 156 were exonerated in total.⁵⁴ This discovery led to policy change in the Harris County District Attorney's Office; the office no longer allows plea deals in felony drug cases without lab tests, unless the plea bargain does not involve any time in jail.⁵⁵

C. The Role of Prosecutors

To understand CIUs, it is important to understand the prosecutor's role in a conviction and the immense amount of power they wield. In *Berger v. United States*,⁵⁶ the Supreme Court explained the twofold aim of the prosecutor "which is that guilt shall not escape, or innocence suffer."⁵⁷ The ABA Model Rules of Professional Conduct, establish "Specific Rules for Prosecutors" under Rule 3.8, and within the Rule 3.8 comments, describe the prosecutor as "a minister of justice and not simply that of an advocate."⁵⁸ As such, Rule 3.8(h) was created to ensure that prosecutors would seek to remediate wrongful convictions when they know of "clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit."⁵⁹ However, a small minority of states have adopted the ABA Rules of Professional Conduct.⁶⁰

⁵⁴ *Ibid.*

⁵⁵ Jon Schuppe, *How One Texas County Drove a Record Rise in Exonerations*, NBC NEWS (March 8, 2017), <https://www.nbcnews.com/news/us-news/how-one-texas-county-drove-record-rise-exonerations-n730161>.

⁵⁶ *Berger v. United States*, 295 U.S. 78 (1935).

⁵⁷ *Id.* at 88.

⁵⁸ MODEL RULES OF PROF'L CONDUCT R. 3.8(h), comment 1 (A.M. BAR ASS'N 1983).

⁵⁹ *Id.* at R 3.8(h).

⁶⁰ Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 622 (2014).

Prosecutors have a great deal of discretionary power in almost every stage of the case. However, there is a stringent hierarchical structure across prosecutor's offices. Elizabeth Webster described the structure of prosecutor's offices using organizational accident theory.⁶¹ At the top of the chain of command is the organization, the courts and lawmakers, then "the workplace," the district attorney and their executive team, and finally "the worker," the individual prosecutor, also known as a line prosecutor.⁶² Line prosecutors have a great deal of discretion when it comes to charging defendants, only having to meet the low standard of "probable cause" and the standards of case law such as *United States v. Batchelder*⁶³ and *Blackledge v. Perry*.⁶⁴ As much as the Court has tried to level the playing field through decisions such as *Brady* and *Giglio v. United States*,⁶⁵ the prosecutor consistently has the upper hand throughout a case, due to plea bargains, more access to law enforcement resources, and their ability to dictate the sentence.

The discretionary power of the prosecutor is reduced in the post-conviction stage,⁶⁶ however, they are far from powerless. A prosecutor alone cannot vacate a conviction; only a judge or the chief executive⁶⁷ possesses that authority. The recommendation that the prosecutor makes to the judge carries significant weight.⁶⁸ Professors Bruce A. Green and Ellen Yaroshefsky assert that in the post-conviction stage the role of the prosecutor should be viewed as administrative; it

⁶¹ Elizabeth Webster, *The Prosecutor as a Final Safeguard Against False Convictions: How Prosecutors Assist with Exoneration*, 110 J. CRIM. L. & CRIMINOLOGY 245, 248 (2020).

⁶² *Ibid.*

⁶³ *United States v. Batchelder*, 442 U.S. 114 (1979) ("when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants" citing *United States v. Beacon Brass Co.*, 344 U.S. 43, 45–46 (1952)).

⁶⁴ *Blackledge v. Perry*, 417 U.S. 21 (1974) (holding "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness'" prohibiting prosecutors from vindictively changing the charges when defendants choose to go to trial.).

⁶⁵ *Giglio v. United States*, 405 U.S. 150 (1972) (extending the duty to disclose to incentives prosecutors offer to induce testimony).

⁶⁶ A defense attorney interviewed by Elizabeth Webster stated, "Line prosecutors ...they don't get to make decisions. They're down here, and someone above them has to approve it, so they may want to do the right thing. They just don't have the authority to do it..." Webster, *supra* note 63, at 293.

⁶⁷ Defendants can appeal to the governor or president for clemency under the executive pardon power.

⁶⁸ Boehm, *supra* note 60, at 615.

is to be “neutral and objective” and not adversarial.⁶⁹ Moreover, depending on state statute, the court’s role in post-conviction proceedings might be limited, thus directing those seeking relief to the executive to appeal for clemency.⁷⁰ Despite any statutory language, some CIUs will review a claim, knowing that their state does not allow judicial relief, and determine a path forward after the investigation is complete.⁷¹ As with the courts, it makes a significant difference if the prosecutor makes a recommendation to the executive or supports a defendant’s plea for clemency.⁷² Regardless of what branch has the ultimate power, the prosecutor’s position on a case can be the difference between freedom or continued imprisonment. This is the power that prosecutors wield in the post-conviction stage.

II: THE POST-CONVICTION EXONERATION PROCESS

In her article discussing the new “dilemma” for prosecutors in post-conviction units, Dana Boehm established that CIUs should maintain three fundamental principles: (1) “foster an office culture of seeking innocence;” (2) “establish a policy of openness and disclosure;” and (3) “facilitate objective review and neutralize prosecutorial bias.”⁷³ These principles are in line with what the Quattrone Center and the Innocence Project hope to see in all CIUs because they establish a foundation of fairness and justice. A CIU that is built upon these fundamental principles will be willing and able to adopt an “interest of justice” mindset from the point that cases are selected to the final determination stage.

⁶⁹ Bruce A. Green and Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 506 (2009).

⁷⁰ Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?* 7 OHIO ST. J. CRIM. L. 771, 786 (2010).

⁷¹ Boehm, *supra* note 60, at 643.

⁷² *Ibid.*

⁷³ Boehm, *supra* note 60, at 647-56.

A. Step One- Case Selection

The first hurdle all defendants seeking post-conviction relief must clear might also be the highest; getting the case accepted by the post-conviction reviewing body. The post-conviction reviewing body could be an innocence commission, as in North Carolina, a Conviction Integrity Unit, the existing appellate division, or another prosecutor(s) that the district attorney assigns to it, and they all have their own set of intake criteria. For the purposes of this paper, I will focus on Conviction Integrity Units.

The process for Conviction Integrity Units begins with applications or requests for review based on claims of actual innocence or a miscarriage of justice. CIUs often accept letters or applications from inmates, their family members, defense attorneys, the media, or organizations such as the Innocence Project.⁷⁴ Some provide digital forms, others have easily accessible applications online, and still, others require an applicant to write a letter to the office requesting an application. On this point, it is important to note that there is also a significant difference among CIUs as to how accessible their application is for the public to find.⁷⁵ Additionally, there is a difference in how the applications are constructed, some being more complex or more difficult to understand than others.

CIUs do not accept cases that were prosecuted outside of their jurisdiction. That does not mean the applicant has to still reside in that jurisdiction, only that their case was originally prosecuted in that jurisdiction. Most CIUs allow family members or “loved ones” to complete

⁷⁴ David Kroepsch, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor's Duty to Serve Justice*, 29 GEO. J. LEGAL ETHICS 1095, 1103 (2016).

⁷⁵ The Philadelphia*, Baltimore, and New Jersey AG Office*, applications are very easy to understand and clearly accessible on their website. The Davidson County CIU has a link to download an application, however it does not work and instead brings you to a different media site. The website states they are developing an online form. Wayne County CIU in Michigan has an easily accessible digital application form to fill out on their website. The CIU in the Virginia Attorney General's Office does not have a website, thus no information at all on how to apply.

*The Philadelphia and Baltimore applications are attached as Appendix A and B.

applications for the defendant.⁷⁶ Finally, all of the CIUs specifically state that the defendant must be living; pleas for posthumous exonerations are not accepted.

Next, CIUs will look to the main claim asserted by the defendant. It is at this point that CIUs start to develop a unique mindset regarding how flexible they will be in accepting applicants, taking a broad or narrow approach during intake. In a seminal study on CIUs in 2016, the Quattrone Center for Fair Administration of Justice coined the term the Conviction Review Case Funnel⁷⁷ to depict how the two approaches differ. Those with a narrow, rigorous screening process will not accept cases with claims based on due process issues if the defendant pleaded guilty, or the applicant is not claiming actual innocence.⁷⁸ It is interesting to note that when this study was published in 2016, there were only twenty-seven CIUs,⁷⁹ and all of them limited cases to those which claimed actual innocence. Since then, and with the wave of progressive prosecutors, several CIUs with a very broad approach⁸⁰ accept applications of those that claim wrongful conviction but not actual innocence, and some even review unjust sentences.

CIUs with a broad approach establish flexible screening for applications with few limitations and establish a safety valve that implements an “interest of justice” standard. According to Barry Scheck, Co-Founder of the Innocence Project, when a CIU adopts an “interest of justice” standard or orientation, they choose to accept cases where “there is a plausible claim of innocence,” “evidence of a constitutional violation,” or if “the interest of justice” requires it.⁸¹

⁷⁶ Cuyahoga County (Ohio) CIU does not allow anyone but the applicant themselves to submit a request for review.

⁷⁷ Hollway, *supra* note 14, at 36-38. *See also* Appendix C.

⁷⁸ *See* Appendix D.

⁷⁹ Hollway, *supra* note 14, at 8, Figure 1.

⁸⁰ CIUs in Philadelphia, Davidson County (TN), Los Angeles County (CA), and the Minnesota AG’s office are a few examples of offices that use the broad approach at intake. *See* Appendix D.

⁸¹ Scheck, *supra* note 15, at 727.

He further explains that under this standard, CIUs should move forward with an investigation without consistently dividing new evidence into categories such as newly discovered, *Brady* violations, or proof of ineffective assistance of counsel, considering some acceptable for review and others not.⁸² In her study on prosecutorial innocence work, Elizabeth Webster asserted that the “interest of justice” standard grants CIUs the flexibility needed to discover wrongful convictions “even in the absence of exculpatory forensic evidence or identification of the actual perpetrator.”⁸³ More recently, some CIUs have established an even broader interpretation of “interest of justice” and always allow room for exceptions to the criteria they establish.

The CIUs of Cook County (IL), Wayne County (MI), Baltimore (MD), and the New Jersey Attorney General’s Office, only accept applications that assert claims of actual innocence. When asserting claims of actual innocence, office requirements range from requiring “‘obvious evidence’ of innocence to ‘plausible’ or ‘reasonable’ evidence.”⁸⁴ Some CIUs apply a more subjective standard, such as “whether a reasonable person might have a reasonable doubt that the conviction is accurate and legitimate.”⁸⁵ However, the CIUs of Davidson County (TN), Philadelphia (PA), Dallas County (TX), and Los Angeles County (CA), among others, review a wide range of issues, not limiting cases to claims of actual innocence, but wrongful convictions⁸⁶ as well. Additionally, the CIUs in Philadelphia (PA), San Francisco (CA), and the Minnesota Attorney General’s Office review claims of unjust sentences. Furthermore, CIUs do not have to

⁸² *Id.* at 727-28.

⁸³ Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 1000 (2020).

⁸⁴ Hollway, *supra* note 14, at 39-40.

⁸⁵ *Ibid.*

⁸⁶ Philadelphia defines wrongful conviction on their application as, “you had some involvement in the crime, [but] the evidence used against you at trial was tainted in some way (e.g. the primary evidence against you was a confession that was obtained after using physical force) OR there was a constitutional violation of your right to a fair trial?” See Appendix A.

fall into one category or another; the two approaches create a spectrum with narrow being on one end of the line and broad being on the other end. Many CIUs will fall somewhere in the middle of these two approaches. The difference in orientation from the outset further determines how the rest of the investigation will proceed within the CIU.

Some district attorney offices rely on the appellate divisions to handle cases involving constitutional violations, whereas others allow CIUs to review cases where constitutional violations might have led to a wrongful conviction. Furthermore, some CIUs require that direct appeals are exhausted and there is a final judgment, such as St. Louis County's CIU, while others, such as Los Angeles County's CIU, will review cases that are still pending appeal or in active litigation. In an interview with Webster, one prosecutor expressed concern about waiting until the direct appeal is final before a CIU can review a case stating, "you don't want to wait until it's too late. You don't want them to burn their one bite at the apple if we can also help."⁸⁷ However, some offices do not want two separate divisions working on the same case because it can lead to office conflict, having each division approaching the case from a different perspective, and it is seen as a waste of resources.⁸⁸

The CRU in the Minnesota Attorney General's Office has "a broad mandate to review a wide range of issues relating to wrongful convictions but shall prioritize claims of actual innocence brought by individuals who are currently in custody."⁸⁹ They do not reject cases where the defendant pleaded guilty or completed their sentence. And while they state that they only review cases when direct appeals are exhausted, they do establish "in special circumstances that strongly suggest that an injustice has occurred or is about to occur, the CRU may agree to

⁸⁷ Webster, *supra* note 61, 281.

⁸⁸ *Ibid.*

⁸⁹ The Office of Minnesota Attorney General Keith Ellison, *Minnesota Conviction Review Unit Charter*, (Jun. 21, 2021) <https://www.ag.state.mn.us/Office/CRU/Charter.pdf>.

review the case before the direct appeal is final.”⁹⁰ This “interest of justice” safety valve is found in several other CIUs such as Philadelphia, Davidson County, and Los Angeles County. When a CIU establishes an “interest of justice” orientation, establishing a mindset for their office that allows for flexibility from the start of the process when accepting applications, a tone is established. Prosecutors understand that injustice will take many forms, not all cases contain black and white facts, and innocence is not a prerequisite for injustice.

Moreover, CIU policies vary as to whether new evidence is necessary to support a claim of actual innocence for the case to be reviewed and what should be considered “new.” The legal meaning of “new evidence” is “deceptively simple”⁹¹ and varies by state. CIUs in New Jersey, Wayne County (MI), and Cook County (IL) require the defendant to show new evidence supporting the claim of actual innocence and expressly state that they will not review any evidence on the trial record. This standard becomes convoluted when old forensic science is debunked by modern science. The modern science is new but the evidence itself is not, therefore, it is not always considered new by the court.⁹² Furthermore, among CIUs that require newly discovered evidence, some CIUs will not consider evidence that *could* have been found during the trial by diligent counsel *new*. Thus, the case could be one of ineffective assistance of counsel which the CIU may or may not accept for review. *Brady* violations are also technically not considered new evidence but only newly discovered by the defense. However, exculpatory evidence violations have legal remedies, and not all CIUs will accept such cases, instead sending them to the appellate divisions.⁹³

⁹⁰ *Id.* at 2.

⁹¹ Justin Brooks et. al., *If Hindsight Is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and A Proposed Model*, 79 ALB. L. REV. 1045, 1050 (2016).

⁹² This was the case in the 2013 trial of Claude Garrett. Garrett’s case is discussed on page 24 of this paper.

⁹³ See, Brooks, *supra* note 91, at 1051-52; Scheck, *supra* note 15, at 727.

B. Step Two- Investigation

If the CIU determines that it will review a case, they proceed to the investigation stage. Many CIUs express taking a holistic approach to investigating and maintaining an open mind throughout the process.⁹⁴ Some CIUs use a cooperative approach,⁹⁵ as recommended by the Innocence Project,⁹⁶ where the CIU investigative team collaborates with defense counsel or innocence organizations. These CIUs will often maintain an open file policy, sharing all information with the defense. All the parties involved collaborate to uncover the truth with full disclosure and transparency. CIUs that adopt a cooperative approach when investigating often possess an “interest of justice” mindset throughout the review process; collaborating with defense counsel or an innocence organization is in the interest of justice to ensure that the truth is uncovered, and the innocent are not imprisoned.

The manner in which the investigation is conducted and by whom determines a person’s guilt or innocence. The depth of the investigation, what evidence is considered, or whether the original trial prosecutor is part of the review process, are all factors that can affect the outcome of the investigation. The size and budget of CIUs are also important factors, some with a large budget and ten to twelve prosecutors and investigators dedicated to their unit alone, while others have an extremely small budget and only three members, therefore resources vary among CIUs.⁹⁷ However, while resources are undoubtedly important, the mindset the CIU possesses and the way

⁹⁴ Webster, *supra* note 61, 278.

⁹⁵ CIUs in Davidson County (TN), Wayne County (MI), Dallas County (TX) and Philadelphia are all known for using a cooperative approach. DA Larry Krasner noted in his report that some judges do not agree with this cooperative approach. (See, Conviction Integrity Unit Report, *supra* note 46, at 15.)

⁹⁶ Scheck, *supra* note 15, at 728-29.

⁹⁷ In 2014, the King’s County (Brooklyn) CRU had an annual budget of \$1.1 million with a staff of ten prosecutors and three investigators. (Kroepsch, *supra* note 74, at 1105.) As of 2020, the Wayne County CIU had an annual budget of roughly \$825,000 and five people on with only one full time prosecutor. (Oralandar Brand-Williams, *Wayne County Prosecutor’s Conviction Integrity Unit Seen as a Boon to Wrongfully Convicted*, The Detroit News, (Feb. 15, 2020), <https://www.detroitnews.com/story/news/local/wayne-county/2020/02/15/wayne-countys-conviction-integrity-unit-has-high-demand/4647938002/>).

they conduct an investigation outweighs the number of resources available. Money and staff certainly help. However, a CIU might have all the money and manpower, but if they only accept cases that can prove actual innocence based on “clear and convincing” evidence, then many cases will never be investigated.

As I noted previously, the orientation of various CIUs exist on a spectrum. CIUs that use a narrow approach when selecting cases, do not do a thorough investigation of old facts, inform the original prosecutor of the case review, and do not collaborate with defense counsel are on one end of the spectrum. Whereas more flexible CIUs that use a broad approach in selecting cases, maintain an “interest of justice” mindset throughout the entire case review, and collaborate with defense counsel in their holistic investigation of the facts are on the other end. Many CIUs do not fall on one end or the other but somewhere along that spectrum.

When a CIU establishes an “interest of justice” standard within their office, they are signing up to take more cases, do a more thorough and time-consuming investigation, and spend more time wrestling with evidence in the gray zone.⁹⁸ CIUs should review a case despite less than perfect facts or statutory authority to grant relief. If they believe that a wrongful conviction may have occurred, it is in the interest of justice to review it further. This is arduous and painstaking work with someone’s freedom on the line. While it is a daunting mission, CIUs should err on the side of caution and review more cases, as opposed to less, to ensure justice. The innocent should not remain in prison due to imperfect facts or a lack of newly discovered evidence. As “ministers of justice” this is precisely the prosecutor’s job, to seek the truth and serve as “neutral quasi-judicial officials.”

⁹⁸ The gray zone is an area of uncertainty cases sometimes fall within; it is not clear that an individual is innocent, but the prosecutor no longer has confidence in the conviction. This is a case in the gray zone.

PART III: STEP FOUR- FINAL DETERMINATION IN THE INTEREST OF JUSTICE

Once the CIU investigation is complete, CIU prosecutors will make a final determination as to whether they should proceed to the court or the executive. The standard of review that CIUs use to make the final determination is paramount because it sets the bar, which the evidence and facts must reach. If the standard is too low, prosecutors will be spending all of their time re-evaluating cases.⁹⁹ However, if it is set too high, such as “clear and convincing” evidence of innocence, innocent individuals will remain incarcerated. Post-conviction legal standards are dictated by case law or state statute; however, the standards are subjective and open to interpretation. Thus, prosecutors still have immense power at this stage to go before the judge and make a recommendation or a motion for a new trial. A judge can ignore the prosecution’s request, however, the recommendation of a CIU is often highly regarded by the court.¹⁰⁰ The final determination of the CIU is of the utmost importance for the applicant, and while they must abide by the law of their state, they possess power and recognition before the court making their final determination critical to the defendant’s case.

A. Affirmatively Demonstrating Innocence or Eliminating Evidence of Guilt?

Establishing a standard rests on the mindset of the CIU. Is the focus of the unit on affirmatively demonstrating innocence or is the focus on eliminating evidence of guilt? Each CIU should have an answer to that question before they begin accepting any applications or requests for relief. While there will be cases that eliminate guilt and demonstrate innocence, not all of them will. If a CIU is focused solely on affirmatively demonstrating innocence, it will adopt a standard that meets that goal such as the “clear and convincing” evidence standard found in ABA Model

⁹⁹ Green & Yaroshefsky, *supra* note 71, at 503. Green and Yaroshefsky argue that “reasonable doubt” standard is too low; “a reasonable doubt about guilt is a far cry from a belief that a miscarriage of justice occurred because the defendant is, in fact, innocent.”

¹⁰⁰ *Id.* at 502-03.

Rules of Professional Conduct 3.8(h). However, if the focus is to remove evidence of guilt, the case may be less clear. A CIU might find that given all of the evidence, they can no longer stand behind this conviction. They may not know who the true perpetrator is nor express certainty that the defendant was innocent, but they cannot say the conviction was one of integrity either. This is the action of a “minister of justice.”

The Quattrone Center recommends that CIUs “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.”¹⁰¹ Similarly, the Innocence Project advises that CIUs “follow state and federal statutes, common law and constitutional precedent with “an ‘interest of justice’ orientation on the application of law to the facts.”¹⁰² Green and Yafoansky contend that “prosecutors should seek to remedy a conviction if a defendant is more likely than not innocent.”¹⁰³ These standards allow for relief in a wide variety of cases in which the defendant is innocent but there is no evidence to affirmatively prove the innocence.

B. The Gray Zone

The gray zone cases are the most trying for prosecutors in a CIU. They do not want to make the wrong decision and they need to convince a judge, but they also need to be able to honestly say that the conviction is one of integrity. CIUs across the nation have developed standards for dealing with gray zone cases: Santa Clara CIU (“No longer have an abiding belief in the conviction”); King County, Washington (“Looking at what we now know about this case, and

¹⁰¹ Hollway, *supra* note 14, at 3.

¹⁰² Scheck, *supra* note 15, at 736-37. The Innocence Project further argues for new state and federal legislation establishing an “interest of justice” safety valve for wrongful conviction claims.

¹⁰³ Ginsburg & Hunt, *supra* note 72, at 787.

considering in light of this knowledge, whether we would have charged in the first place”); Brooklyn CIU (‘A reasonable belief that the interest of justice compel relief’).¹⁰⁴

Prosecutors should keep one question in mind when investigating gray zone cases: does each conviction have integrity? That is why so many post-conviction review units have adopted the name Conviction Integrity Units as opposed to Conviction Review Units. Keeping the integrity of each and every conviction is of vital importance for our entire criminal justice system. Without that integrity, the public will lose faith in the system and see little value in it. In the Quattrone Center’s study, prosecutors described gray zone cases. One prosecutor explained, “I wasn’t saying that the defendant was innocent, I just didn’t feel comfortable saying he was guilty.” Others empathized that if they “lost faith in the conviction” or “learned enough that it undermined their faith in the outcome,” despite a lack of evidence to support “actual innocence,” they would move to vacate the conviction.¹⁰⁵ These prosecutors possess an “interest of justice” mindset. If the prosecutor cannot ethically support the conviction, even if the truth is unclear, then it is in the interest of justice to vacate the judgment. It is in the interest of justice to ensure integrity in every conviction.

C. What to do in the absence of evidence? The Story of Thomas Haynesworth¹⁰⁶

In the winter of 1984, five white women were brutally raped in Richmond, Virginia within a month.¹⁰⁷ The police believed one man committed all five assaults because they all followed the same *modus operandi*; the victims all describe a man with similar characteristics, and they all occurred within a one-mile area radius.¹⁰⁸ Thomas Haynesworth, an 18-year-old

¹⁰⁴ Hollway, *supra* note 14, at 50.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Haynesworth v. Commonwealth*, 59 Va. App. 197, 717 S.E.2d 817 (2011).

¹⁰⁷ *Id.* at 201-05.

¹⁰⁸ Innocence Project, *Thomas Haynesworth*, <https://innocenceproject.org/cases/thomas-haynesworth/> (last visited Apr. 25, 2022).

with no criminal record, was walking down the street one day and passed one of the victims. The victim believed she recognized Haynesworth as her attacker and called the police.¹⁰⁹ Soon, Haynesworth found himself arrested and imprisoned for the rape of five women; he asserted his innocence from the point of his arrest until he was finally exonerated in 2011.¹¹⁰

Haynesworth's story is one of the cases that represent the gray zone because there was a lack of evidence to affirmatively prove Haynesworth's innocence, as Judge Elder vehemently expressed in a scathing dissent.¹¹¹ There was no DNA affirmatively exonerating him, no witness recantation, nor police or prosecutorial misconduct.¹¹² However, there was a great deal of evidence that, when compiled, made a strong case for Haynesworth's innocence; so strong that Virginia Attorney General Keith Cuccinelli asserted a plea for Haynesworth's exoneration.¹¹³

First, while Haynesworth was in jail, twelve more women were raped all following the same *modus operandi* of the five women Haynesworth was accused of having raped.¹¹⁴ DNA from two of the five victims was not Haynesworth's, but Leon Davis'. The same two women who positively identified Haynesworth as their attacker.¹¹⁵ There was no other DNA found on the other three victims.¹¹⁶ Furthermore, modern studies show that misidentification is common among victims due to the trauma of their attack and especially in cross-race identifications, where the victim is a different race than their attacker.¹¹⁷ Finally, Leon Davis was sent to prison for several of the twelve rapes that occurred after Haynesworth was already in jail. While there

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Haynesworth*, at 199-211.

¹¹² *Ibid.*

¹¹³ *Ibid.*

¹¹⁴ Innocence, *supra* note 106.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Nancy K. Steblay, PhD, *Scientific Advances in Eyewitness Identification Evidence*, 41 Wm. Mitchell L. Rev. 1090, 1105 (2015).

were some inconsistencies in the way the victims described their attacker, only one recanted and now believes that Haynesworth is innocent after the post-conviction review.

This case proves that wrongful convictions are not always easily discernible through a recantation or DNA evidence. In this case, there was no single piece of evidence that alone would make a reasonable person believe Haynesworth was innocent. However, when all of the facts and evidence are compiled, taking into account what we presently know about wrongful convictions and witness identifications, would a prosecutor be able to support Haynesworth's conviction while still serving as a "minister of justice"?

D. The Trouble with Fire: The Story of Claude Garrett¹¹⁸

In 1993, Claude Garrett was convicted for murder by arson after a fire started in his home, killing his girlfriend.¹¹⁹ The conviction was based on testimony from experts who stated that the pour pattern,¹²⁰ burns on the victim, and a locked utility closet indicated that Garrett intentionally set the fire and locked the victim in the closet. This was a combination of faulty fire science that has since been debunked¹²¹ and a poor investigation. By 2013, two leading fire scientists reviewed the fire evidence in Garrett's case and were adamant that it was junk science.¹²² When Garrett presented the evidence in 2017, the court dismissed the motion after the Tennessee Attorney General's Office objected stating "the motion reflected no new evidence but merely 'newly written opinions.'"¹²³

¹¹⁸ *Garrett v. State*, No. M201701076CCAR3ECN, 2018 WL 1976358 (Tenn. Crim. App. Apr. 26, 2018).

¹¹⁹ Liliana Segura, *Playing with Fire Part One: How Junk Science Sent Claude Garrett to Prison for Life*, THE INTERCEPT, (Feb. 24, 2015), <https://theintercept.com/2015/02/24/junkscienceclaudegarrett/>.

¹²⁰ Pour pattern was an old theory used by fire scientists to establish if someone started the fire with an ignitable fluid. It has since been found to be a false theory and no longer used among fire scientists.

¹²¹ Covey and Beety, *supra* note 5, at 281-85.

¹²² Segura, *supra* note 119.

¹²³ Liliana Segura, *Playing with Fire Part Five: Nashville DA's Office Seeks to Vacate Claude Garrett's 29-Year-Old Murder Conviction*, THE INTERCEPT, (Nov. 24, 2021), <https://theintercept.com/2021/11/24/claude-garrett-murder-wrongful-conviction/>.

Using the “interest of justice” standard, the Davidson County CRU took Garrett’s case while it was still pending federal appeal and further investigated.¹²⁴ Under their investigation, they found that not only was the fire science inaccurate, but the utility closet had not been locked during the fire.¹²⁵ The entire theory surrounding the case, that Garrett had locked the victim in the closet and poured gasoline to light the house on fire, was entirely false. The closet door could not have been locked, nor is it clear it was ever found locked, the fire science was debunked, and the pattern of the burns on the victim could have been and were explained in a myriad of other ways.¹²⁶ With all of this evidence, the CRU issued a report which included the “new” evidence regarding the pour pattern in hopes that this time the judge would be persuaded. Garrett’s federal public defender and counsel from the Tennessee Innocence Project filed an additional brief with the court to support the arguments of the CRU.¹²⁷

At a hearing on April 5, 2022, the Davidson County CRU asked the judge to vacate Garrett’s conviction. As of the submission of this paper, the judge on this case has not issued an opinion on the matter.

CONCLUSION

In the 1700s, the great legal scholar, William Blackstone stated that it is “better that ten guilty persons escape than that one innocent suffer.”¹²⁸ These profound words are still revered today. There will always be criminals among us in society; they might be found innocent at trial or never caught. This is a reality we all must accept. However, in modern times, it is inconceivable and unacceptable for an innocent person to serve a prison sentence for a crime that they did not

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ Liliana Segura, *Playing with Fire Part Six: Fire Scientists Testify in Support of Claude Garrett’s Bid for Freedom*, THE INTERCEPT, (Apr. 16, 2022), <https://theintercept.com/2022/04/16/fire-arson-claude-garrett-hearing/>.

¹²⁸ 4 William Blackstone, *Commentaries*, 352.

commit. Prosecutors, “ministers of justice” and truth seekers, have the power to prevent this and, Conviction Integrity Units have the power to rectify past injustice. By adopting the “interest of justice” standard, CIUs are taking a step toward ensuring that the innocent do not suffer. It ensures the wrongfully convicted have an opportunity to find relief and prosecutors live up to their title—
"ministers of justice.

APPENDIX A
Philadelphia's Conviction Integrity Unit Request for Review¹²⁹

Conviction Integrity Unit
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October 4, 2021 SB

CONVICTION INTEGRITY UNIT (CIU)
SUBMISSION FORM/REQUEST FOR REVIEW

NAME: _____

INMATE NUMBER: _____ **DATE OF BIRTH:** _____

SOCIAL SECURITY NUMBER: _____

CURRENT CORRECTIONAL INSTITUTION AND ADDRESS:

COUNTY OF CONVICTION: _____

ARRESTING POLICE DEPT.: _____

DATE OF CONVICTION: _____

COURT CASE DOCKET NUMBER: _____

Please return this application to:
DISTRICT ATTORNEY'S OFFICE
CONVICTION INTEGRITY UNIT
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499

Please complete this submission form as fully as possible.
If you do not know the answer to a question, you may leave it blank.

WARNING: THE DISTRICT ATTORNEY'S OFFICE'S CANNOT PROVIDE YOU WITH INFORMATION AS TO WHEN THE REVIEW OF THIS SUBMISSION WILL BE COMPLETED. HOWEVER, DUE TO THE HIGH VOLUME OF REQUESTS, IT WILL BE SOME TIME BEFORE WE CAN REVIEW YOUR SUBMISSION. PLEASE READ THE CONSENT FORM CAREFULLY.

¹²⁹ Philadelphia's Conviction Integrity Unit, *Request for Review*, <https://phillyda.org/wp-content/uploads/2022/01/CIU-Pro-Se-Submission-Form-Final-Revised-10-04-2021.pdf> (last visited, Apr. 26, 2022).

Conviction Integrity Unit
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Office of the District Attorney
City and County of Philadelphia
CONSENT FORM

October 20, 2020

Agreement To Have CIU Review Your Case

(INITIAL EACH LINE AFTER READING)

- | | |
|---|----------|
| 1. I certify that all of the statements in this application are true and accurate. | 1. _____ |
| 2. I acknowledge that providing false information will result in a declination of my submission to the CIU. | 2. _____ |
| 3. I understand that I have no right to a CIU review, and that there is no right of appeal from declination by the CIU. | 3. _____ |
| 4. I understand that the CIU is not my attorney. | 4. _____ |
| 5. I am not currently represented by counsel on the case for which I am seeking review by the CIU. | 5. _____ |

DATE: _____

SIGNATURE: _____

PRINT NAME: _____

Conviction Integrity Unit
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Office of the District Attorney
City and County of Philadelphia
CONSENT FORM

October 20, 2020

Commonwealth of Pennsylvania v. _____		CIU Case #: _____ (internal/CIU use only)
CP-51-CR-_____-_____	Convicted Offense(s):	
Petitioner's name:		
Date of Birth:	Age:	
Date of Offense:	Date of Sentencing:	
Are there open appeals/PCRA? If yes, please list:		
The petitioner must agree to all of the following and indicate such agreement by initialing to the right of each statement.		
<ol style="list-style-type: none"> I acknowledge that I have been convicted of the offense(s) noted above by the Commonwealth of Pennsylvania. I believe that credible evidence of my innocence/wrongful conviction exists. I am requesting that the Conviction Integrity Unit review my claim of actual innocence/wrongful conviction. I am willing to cooperate with the Conviction Integrity Unit's investigation. I understand the Conviction Integrity Unit may determine that my case does not meet their criteria and at any point decline my submission. I understand that I have no right to appeal a declination by the Conviction Integrity Unit of my submission/request for review. I understand that sending this submission to the Conviction Integrity Unit will not extend the deadlines for any PCRA or appellate court claims. <p>(The prosecutors in the CIU at the District Attorney's Office do not represent you and cannot offer you legal advice. A prosecutor cannot legally or ethically be your attorney. If you do not understand any of the above, you should consult an attorney immediately.)</p>		INITIALS OF PETITIONER 1. _____ 2. _____ 3. _____ 4. _____ 5. _____ 6. _____ 7. _____
ACKNOWLEDGMENT BY PETITIONER		
I have read and understand all of the above statements. By initialing the statements and signing below, I understand and agree to comply with any terms herein. No one has told me to agree to anything that I oppose or do not understand. My agreements are of my own free will and are given voluntarily.		
DATE: _____		NAME (PRINT): _____
		SIGNATURE: _____

Conviction Integrity Unit
Page **4** of **16**

October 20, 2020

1. Are you currently serving a sentence? Due to legal limitations, we are only able to assist inmates who have been convicted and are serving a sentence.
☐ Yes ☐ No
2. Were you convicted in Philadelphia County? Due to our office's jurisdiction, we are only able to assist inmates who were convicted in Philadelphia County (state charges only.).
☐ Yes ☐ No (STOP! We cannot assist you.)
3. What is your first language?
4. What is the highest grade you completed in school?
5. Is there any reason that corresponding in writing will be difficult for you?
☐ Yes (Please describe below) ☐ No
6. Have you ever received mental health treatment?
☐ Yes (Please describe below) ☐ No
7. Would you be willing to sign a release to allow us to review your medical records?
☐ Yes ☐ No (Please describe why not)
8. Were you employed at the time of your arrest? If so, please provide the name, address, and telephone number of your employer:
☐ Yes ☐ No

Conviction Integrity Unit
Page 5 of 16

October 20, 2020

9. Please provide the names, addresses, and phone numbers of family and friends who might have information regarding your case. *By writing these names, you are giving us permission to talk to them about your case.*
10. Are you claiming **actual innocence**? Actual innocence means that you were not involved in ANY way (e.g., self-defense is not an actual innocence claim).
☐ Yes ☐ No
11. Are you claiming that you were wrongfully convicted, but not actually innocent? Wrongfully convicted but not actually innocent means that, although you had some involvement in the crime, the evidence used against you at trial was tainted in some way (e.g. the primary evidence against you was a confession that was obtained after using physical force) OR there was a constitutional violation of your right to a fair trial?
☐ Yes ☐ No
12. Are you claiming that you received a disproportionately and/or unfairly long sentence? (e.g. your co-defendant has been released and you are serving a life sentence or a de facto life sentence)?
☐ Yes ☐ No
13. Please list **ALL** the crimes (and the corresponding sentences) that you are **CURRENTLY** incarcerated for.

14. Please describe (in detail) your case the way the **prosecutors** presented it at the time of trial?
15. Please describe (in detail) the facts of your case the way **you** think the crime happened (e.g., was there a struggle, were any fluids discharged like semen, saliva, or blood, did the perpetrator touch several items at the crime scene)? Or, if you are stating that no crime happened, please explain (e.g. your child died because he/she was sick, not because of a criminal act).

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16. Did you go to trial or plead guilty?

☐ Trial

☐ Pled guilty

17. Did you appeal your conviction(s)?

☐ Yes

☐ No

18. Besides your direct appeal, please list all other post-conviction motions and petitions filed in both state and federal court (for example, federal habeas corpus petition, motion for new trial, etc.). **DO NOT SEND COPIES UNTIL YOU ARE ASKED FOR THEM.**

19. Do you have any litigation regarding this case pending in court (criminal or civil)?

☐ Yes (Please list all cases below)

☐ No

20. Do you have copies of documents given to you by your trial attorney (e.g., police reports, discovery, bill of particulars, etc.)? If yes, please list below what you possess. **DO NOT SEND COPIES UNTIL YOU ARE ASKED FOR THEM.**

☐ Yes

☐ No

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21. What was the name of the victim(s)?
22. Did you know the victim(s)? How did you know the victim(s)?
23. How did you become a suspect in the case?
24. Describe your arrest: where were you, when did it happen, and how did it happen?
25. Who were the investigating detectives on your case?
26. Did the police or investigating detective interview you BEFORE you were arrested?
☐ Yes ☐ No
How many times were you interviewed, and for how long?
27. Did the police or investigating detective interview you AFTER you were arrested?
☐ Yes ☐ No
How many times were you interviewed, and for how long?
28. Was any part of the interview(s) recorded or videotaped? If yes, do you have a copy of the interview?
☐ Yes ☐ No
29. Did you give a written statement?
☐ Yes ☐ No

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30. If you gave a statement in any form, please explain why you decided to give a statement, and briefly describe what you told the police.
31. Was any victim or witness asked to identify you prior to trial with a line-up or photos? If so, please describe who identified you and how.
- ☐ Yes ☐ No
32. Do you know of anyone who was asked to identify you but could not? If so, who, when, and where?
- ☐ Yes ☐ No
33. Did any eyewitnesses testify, either for you or against you? [An eyewitness is someone who claims he or she actually saw the crime being committed.] If so, please list their names and any information you have about how to contact them.
- ☐ Yes ☐ No
34. Did you have any co-defendants? Please list all of your co-defendants and any information you have about how to contact them, including their prison number (if known). Did they plead guilty or go to trial? Did any of your co-defendant(s) testify against you?
- ☐ Yes ☐ No

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35. Did you testify on your own behalf? If not, why not?

☐ Yes

☐ No

36. Did any of the victims testify? If so, which one(s)?

☐ Yes

☐ No

37. Did any experts testify during the trial? If so, who and what did they say?

☐ Yes

☐ No

38. Did any police informants or snitches testify against you at your trial? If so, who testified and what did they say?

☐ Yes

☐ No

39. Did anyone testify that you confessed to, or admitted being involved in, the crime?

☐ Yes (Please describe below) ☐ No

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40. Did anybody testify against you in exchange for a promise of leniency in his or her own case?

☐ Yes (Please describe below) ☐ No

41. Did anyone who testified against you, including the alleged victim, have a reason to lie?

☐ Yes (Please describe below) ☐ No

42. Who else testified for the **prosecution** at your trial?

43. Who testified for the **defense** at your trial?

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44. Do you have an alibi that proves you could not have committed the crime?

☐ Yes (Please describe below) ☐ No

45. Did you attempt to prove your alibi at trial? If so, how? If not, why not? Did you discuss your alibi with your attorney? If not, why not?

☐ Yes ☐ No

46. Did the prosecution use any of the following against you to convict you?

If you check one of the boxes, please explain below.

- | | |
|--|---|
| <input type="checkbox"/> Bite mark analysis | <input type="checkbox"/> Shaken baby-syndrome |
| <input type="checkbox"/> Microscopic hair comparison | <input type="checkbox"/> Blood typing (AB, O, etc.) |
| <input type="checkbox"/> Arson science | <input type="checkbox"/> Microscopic fiber or carpet analysis |
| <input type="checkbox"/> Gunshot residue (GSR) | <input type="checkbox"/> Bullet/Ballistic comparison |
| <input type="checkbox"/> Fingerprints | <input type="checkbox"/> DNA |

47. Please describe the defense that you or your attorney raised at trial. (For example, if you were convicted of rape, did you assert that the sex was consensual, or that you were wrongfully identified? Or, if you were convicted of murder, did you argue self-defense, present an alibi, or raise some other defense?)

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48. Was any physical and/or biological evidence recovered during the investigation of your case? [Examples of this type of evidence are blood, hair, clothing, weapons, etc.] If so, please describe it.

☐ Yes

☐ No

48a. If applicable, was a rape kit obtained from the alleged victim?

☐ Yes

☐ No

48b. Did you ever see or hear about a report of the test results? If so, what did it say? If you have the DNA report, **please send a copy along with this application.**

☐ Yes (Please describe below) ☐ No

48c. Were the results used at trial?

☐ Yes (Please describe below) ☐ No

48d. Do you know what lab or individual conducted the test?

☐ Yes (Please name below) ☐ No

49. Is there new evidence in your case—or could testing develop new evidence in your case—which the jury did not hear about in your original trial that would demonstrate your actual innocence/wrongful conviction?

Some possible examples could include:

- 1) A DNA test that a lab could perform on the crime scene evidence which would conclusively prove that you did not commit the crime.
- 2) A DNA test which a lab could perform which would point to someone else having committed the crime.
- 3) A DNA test on the crime scene evidence which could be put in the national DNA database of convicted felons and which might match to a convicted felon showing that that person actually committed the crime.
- 4) A key state witness against you at the time you were convicted who has now recanted his or her testimony. By “recanted,” we mean that the witness is now saying that he or she lied against you before, or was mistaken before, and that they now are saying something different that shows you are innocent.
- 5) A new witness who has recently come forward, and who did not testify before, who can now testify that you are innocent. This can be someone who saw the crime and says it was someone else who they saw do it, or someone who provides you with a solid alibi because they were with you somewhere else when the crime occurred.
- 6) Other new science other than DNA, such as gunshot residue analysis or new arson science, which could be performed on the crime scene evidence and which would show that you are innocent. (Note: lead bullet analysis and arson science have greatly advanced in recent years. Many old methods that might have been used to convict you are now considered inaccurate. If you were convicted as a result of arson science or gunshot residue analysis, new studies showing those methods were flawed could constitute new evidence).
- 7) Evidence that your lawyer did not present that could have proven you innocent.

****Note:** The above list is not a complete list of examples and this type of evidence does not necessarily demonstrate actual innocence/wrongful conviction in every case. The list is included simply to provide some examples of evidence the jury did not hear which could, depending on the facts of your case, be used to demonstrate actual innocence or that you were wrongfully convicted.

Having read the examples of “new evidence,” please answer question 49 describing the new evidence in your case:

(If you are writing to the CIU claiming you are wrongfully convicted, but not actually innocent OR received a disproportionately and/or unfairly long sentence, please explain if there is new evidence supporting these claims, e.g. evidence of an officer’s misconduct has come to light through another case or a new witness has come forward that demonstrates you are guilty of murder of the third degree rather than the second degree)

50. Do you know who committed the crime(s) of which you were convicted? If yes, please name them below and provide that person’s whereabouts (if known).

☐ Yes

☐ No

51. How do you know that this person committed the crime?

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52. Please tell us anything else you would like us to know that could help us prove your innocence, demonstrate you were wrongfully convicted, and/or received a disproportionately and/or unfairly long sentence. Use additional sheets of paper if necessary.

Signature of inmate: _____

Date: _____

APPENDIX B
New Jersey Attorney General Office's Conviction Review Unit Request for Review¹³⁰



Philip D. Murphy
Governor

Sheila Y. Oliver
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF PUBLIC INTEGRITY AND ACCOUNTABILITY
PO BOX 085
TRENTON, NJ 08625-0085
TELEPHONE: (609) 376-3310

Matthew J. Platkin
Acting Attorney General

Thomas J. Eicher
Executive Director

REQUEST FOR REVIEW BY CONVICTION REVIEW UNIT

The Conviction Review Unit (CRU) reviews claims of actual innocence by persons convicted of felonies in New Jersey state courts to determine whether there is clear and convincing evidence of actual innocence. You may apply for a review regardless of whether you were convicted at trial or pled guilty.

Eligibility requirements:

1. You must have been convicted in the New Jersey Superior Court, Criminal Division of indictable conviction(s), also known as felony offenses.
2. Individuals who are in custody, serving time on the sentence for which they were wrongfully convicted will have priority over individuals who have been released from custody.
3. The application for review must be based on objectively credible and verifiable evidence of innocence.
4. Your case may not be on direct appeal. If you have a post-conviction motion pending in any court your request for a review may be put on hold until that motion is decided.



¹³⁰ New Jersey Attorney General's Office Conviction Integrity Unit, Request for Review, <https://nj.gov/oag/opia/downloads/Request-for-Review-Amended-2021.pdf>.

1. Name: _____
2. Date of Birth: _____
3. Social Security Number: _____
4. SBI number: _____
5. Current Address:
(if incarcerated, Correctional Institution Address)

6. Are you currently serving a sentence? YES ____ NO ____
7. If yes, how long is your sentence? _____
8. Nature of the offense of conviction: _____

9. County of Conviction: _____
10. Case Number (Indictment or Accusation Number): _____
11. If applicable, federal habeas docket number: _____
12. Are you **currently** represented by an attorney? YES ____ NO ____
If so, attorney's name and phone number: _____

13. Do you currently have an appeal or post-conviction motion pending in any court?
YES ____ NO ____
If an appeal, Appeal Number: _____



If so, which organization? _____

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and extend across the width of the page. There are no margins, text, or other markings on the paper.

[illegible]

17. To fully understand the reasons you say that you are innocent, we may want to review some of the important documents from your case. PLEASE DO NOT SEND THESE DOCUMENTS NOW. If we need a document, you will be contacted and told which documents to send.

Check off the materials which you have in your possession:

☐ Discovery

☐ Appellate Division Opinion(s)

☐ Briefs filed in the Appellate Division

☐ Trial transcripts If yes, how many volumes: _____

☐ Briefs filed on Post-Conviction Relief

☐ Post-Conviction Relief Opinions

☐ Post-Conviction Relief Transcripts If yes, how many volumes: _____

☐ Federal Court Documents Specify: _____

☐ Other Legal Documents Specify: _____

18. Please list the name(s) of the attorney(s) who have represented you at past proceedings in your case:

Trial Name: _____

Direct Appeal Name: _____

Post-Conviction Relief Name: _____

Federal Proceedings Name: _____

Other: Name: _____



Please read the following provisions carefully and sign below if you agree:

I understand that the CRU does not represent me as an attorney and cannot give me legal advice. I understand that if I **currently** have an attorney, all future communications must be made through my attorney.

I understand that anything the CRU learns in the course of review or re-investigation may be shared with other law enforcement agencies.

I understand this request for review does not extend any judicial time frames to file an appeal or petition or motion for post-conviction relief.

I understand that I have no right to a CRU review of my case and no right to appeal any CRU decision.

I understand that the CRU will conduct a preliminary review of all cases in which a formal request has been made. I also understand that if the CRU accepts my case for further review, that does not mean I will receive relief. I understand that decisions about whether CRU will re-open a full case investigation, as well as how the claim will be investigated and resolved, will be made by the CRU.

I agree to fully and openly cooperate with the CRU review, which includes allowing the CRU to contact and speak with my **previous** attorney(s) about any NON-PRIVILEGED matter, and allowing the CRU to see my client file, as maintained by my previous attorney(s), to review any information, other than privileged communications or attorney work-product contained within my file.

I understand that information gathered by the CRU to review my application may be disclosed to appropriate third parties who may be assisting in the review of my case, including law students and innocence project volunteers.

Signature: _____

Dated: _____

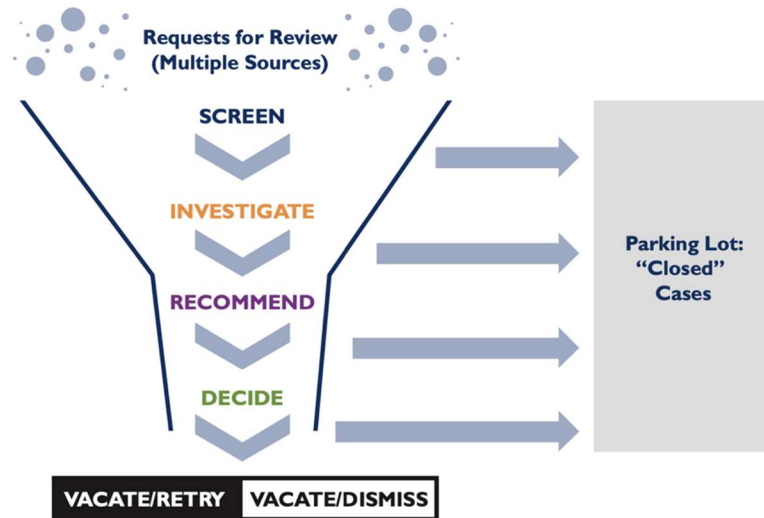
Return the completed Request for Conviction Review form and any other documentation to the following address via US Mail:

Office of the Attorney General
Conviction Review Unit
P.O. Box 085
Trenton, New Jersey 08625-0085



APPENDIX C
Quattrone Center Case Funnel for CRU Review¹³¹

Figure 8. Case Funnel for CRU Review.

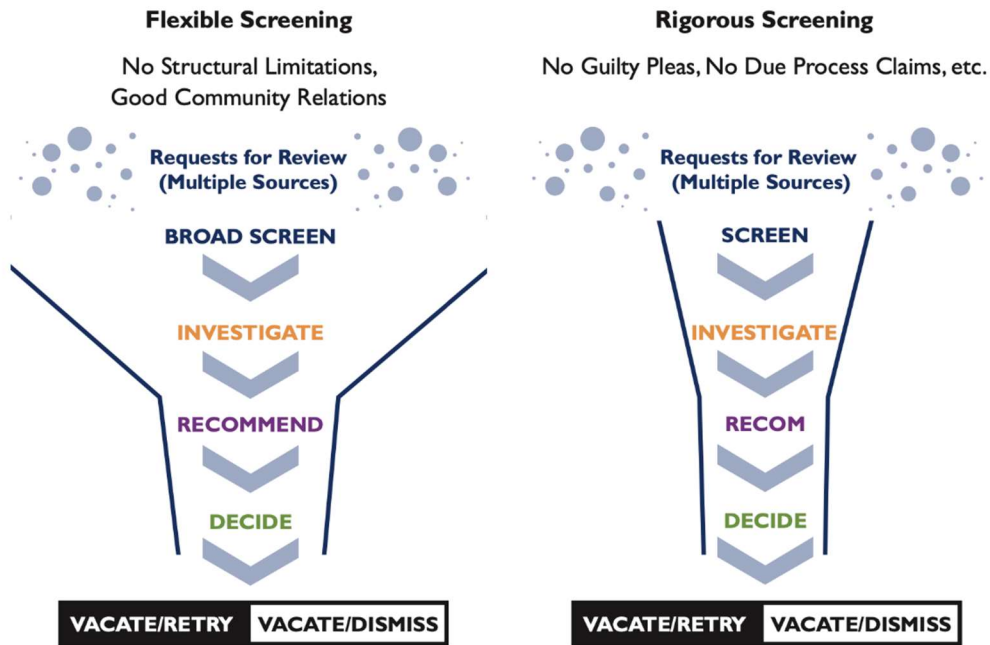


¹³¹ Hollway, *supra* note 14, at 36. This figure is referred to on page 14.

APPENDIX D

Quattrone Center Impact of Screening Policies¹³²

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



¹³² Hollway, *supra* note 14, at 38. This figure is referred to on page 14.