



eCOMMONS

Loyola University Chicago  
Loyola eCommons

---

Criminal Justice & Criminology: Faculty  
Publications & Other Works

Faculty Publications and Other Works by  
Department

---

3-19-2020

## The Prosecutor as a Final Safeguard Against False Convictions

Elizabeth H. Webster

Loyola University Chicago, [ewebster1@luc.edu](mailto:ewebster1@luc.edu)

Follow this and additional works at: [https://ecommons.luc.edu/criminaljustice\\_facpubs](https://ecommons.luc.edu/criminaljustice_facpubs)

 Part of the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Webster, Elizabeth H.. The Prosecutor as a Final Safeguard Against False Convictions. *Journal of Criminal Law and Criminology*, 110, 2: 245-305, 2020. Retrieved from Loyola eCommons, Criminal Justice & Criminology: Faculty Publications & Other Works,

This Article is brought to you for free and open access by the Faculty Publications and Other Works by Department at Loyola eCommons. It has been accepted for inclusion in Criminal Justice & Criminology: Faculty Publications & Other Works by an authorized administrator of Loyola eCommons. For more information, please contact [ecommons@luc.edu](mailto:ecommons@luc.edu).



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 License](#).  
© Webster, 2020.

# THE PROSECUTOR AS A FINAL SAFEGUARD AGAINST FALSE CONVICTIONS: HOW PROSECUTORS ASSIST WITH EXONERATION

ELIZABETH WEBSTER\*

I. LEGAL MECHANISMS FOR SEEKING RELIEF FROM FALSE CONVICTION.....	250
A. Detecting Procedural Errors, Not Factual Ones.....	251
B. Belated Review of New Exculpatory Evidence.....	254
C. Assumption of Impartiality.....	255
D. The Prosecutor as a Pathway to Exoneration.....	257
II. METHODOLOGY.....	265
A. Strengths and Limitations.....	270
III. FINDINGS.....	274
A. Selecting The Prosecutor Tasked With Innocence Review.....	274
1. Conviction Integrity Units.....	275
2. Appellate Divisions.....	277
3. Other Approaches.....	281
B. Screening Decisions.....	287
C. Determining The Outcome.....	292
IV. DISCUSSION.....	296
A. Reforms for Prosecutors' Offices.....	299
B. Reforms for the Postconviction Appeals Process.....	303
CONCLUSION.....	305

---

\* This project was supported by Grant Number (2017-IJ-CX-0012), awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Any opinions, findings, conclusions, or recommendations expressed in this presentation are those of the author and do not necessarily reflect the views of the Department of Justice.

Legal scholars have devoted significant scholarly attention to explaining why prosecutors reject postconviction evidence of innocence.<sup>1</sup> Indeed, some prosecutors have appealed postconviction defense motions exhaustively—even in the face of forensic evidence of innocence—rather than acknowledge a factual error.<sup>2</sup> Yet, recent years have seen an undeniable shift. Prosecutors have always had the authority, the ethical obligation, and the investigative tools to identify false convictions.<sup>3</sup> Now it seems that some have the political will to remedy them as well. As of 2018, the National

---

<sup>1</sup> See generally Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006) (discussing prosecutors' reticence to reevaluate convictions even after evidence of guilt has been discredited); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007) (arguing that prosecutors resist acknowledging exculpatory DNA evidence because of cognitive biases rather than ethical failures); Laurie L. Levenson, *The Problem With Cynical Prosecutor's Syndrome: Rethinking A Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) (arguing that senior prosecutors become cynical about innocence claims); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (discussing how the institutional culture of prosecutors' offices and political pressures encourage prosecutors to resist innocence claims); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011) (arguing that a prosecutor's self-perception as a champion of justice leads to denial of exculpatory DNA evidence in the postconviction stage); Hilary Ritter, *It's the Prosecution's Story, but They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825 (2005) (discussing how some prosecutors would rather invent a new theory of the crime rather than acknowledge errors discovered through postconviction DNA testing); Keith Swisher, *Prosecutorial Conflicts of Interest in Post-Conviction Practice*, 41 HOFSTRA L. REV. 181 (2012) (describing the conflicts of interest that prosecutors experience in revisiting their own prior convictions).

<sup>2</sup> See, e.g., Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009) (describing prosecutorial opposition in the Palladium nightclub case resulting in two wrongful convictions); Orenstein, *supra* note 1 (describing prosecutorial opposition in the cases of Wilton Dedge, Earl Washington and William McCaffrey); Ritter, *supra* note 1 (describing prosecutorial opposition in the case of Roy Criner); Swisher, *supra* note 1 (describing prosecutorial opposition in the case of Ray Krone).

<sup>3</sup> Ethical obligations for prosecutors' postconviction behavior, developed by the American Bar Association, stipulate that a prosecutor must "remedy the conviction" when the prosecutor becomes aware of "clear and convincing evidence" demonstrating that the defendant did not commit the offense. See MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professionalconduct/rule38specialresponsibilitiesofaprosecutor/commentonrule38.html](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professionalconduct/rule38specialresponsibilitiesofaprosecutor/commentonrule38.html) [<https://perma.cc/S7NP-MBGV>]. In addition, the National District Attorney Association (NDAA) has also issued postconviction standards, including the duty to "cooperate in post-conviction discovery proceedings" and to notify the court and seek the release of the defendant if the prosecutor "is satisfied that a convicted person is actually innocent." NATIONAL PROSECUTION STANDARDS, § 8, 1.7–1.8 (NAT'L DISTRICT ATT'Y ASS'N 2016).

Registry of Exonerations (NRE) reported that a total of 344 exonerations had been achieved with the assistance of Conviction Integrity Unit prosecutors.<sup>4</sup> Conviction Integrity Units (CIUs), also commonly known as Conviction Review Units (CRUs) among other titles, investigate claims of innocence and wrongful conviction claims through a separate unit in the chief attorney's office.<sup>5</sup> The rapid emergence of CIUs,<sup>6</sup> and the hundreds of exonerations that have followed, demonstrate this shift.

Scholars have welcomed the newly created CIUs;<sup>7</sup> yet, aside from their existence, little is known about them. Even less is known about prosecutors' postconviction efforts outside the context of CIUs. What are the circumstances that foster prosecutors' assistance with exoneration? What

---

<sup>4</sup> *National Registry of Exoneration: Exonerations in 2018*, NEWKIRK CTR. FOR SCI. AND SOC'Y, app. tbl. A (Apr. 9, 2019), <https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf> [<https://perma.cc/3BSK-CW96>]. 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.

<sup>5</sup> See, e.g., the following CIU website statements of purpose: Bexar County, TX ("The CIU will investigate claims of actual innocence or wrongful convictions by convicted defendants who have already been through their trial and appeal processes") *Conviction Integrity Unit*, BEXAR COUNTY DISTRICT ATTORNEY, [www.bexar.org/1422/Conviction-Integrity-Unit](http://www.bexar.org/1422/Conviction-Integrity-Unit) [<https://perma.cc/M49S-YFCH>] (last visited Feb. 11, 2020); Salt Lake City, UT ("The Conviction Review Unit (CRU) reviews and investigates post-conviction claims of innocence and makes recommendations to the District Attorney about the disposition of those claims.") *Salt Lake County District Attorney's Office forms a Conviction Integrity Unit*, SALT LAKE CITY DISTRICT ATTORNEY, <https://slco.org/district-attorney/conviction-integrity/> [<https://perma.cc/9RAZ-N3JM>] (last visited Feb. 11, 2020); Suffolk County, NY ("The Conviction Integrity Bureau ("CIB") aims to achieve and ensure justice by investigating claims of innocence, remedying identified wrongful convictions, and providing proactive support and recommendations to the Office to prevent wrongful convictions") *Conviction Integrity Bureau*, SUFFOLK COUNTY DISTRICT ATTORNEY, <https://suffolkcountyny.gov/da/About-the-Office/Bureaus-and-Units/Conviction-Integrity-Bureau> [<https://perma.cc/YTA4-XXHN>] (last visited Feb 11, 2020).

<sup>6</sup> NEWKIRK CTR. FOR SCI. AND SOC'Y, *supra* note 4. At the close of 2018, forty-four CIUs had been created throughout the U.S. mostly in large, urban jurisdictions such as Dallas, Houston, Brooklyn, Chicago, and Los Angeles. *Id.* at 2. The advent of CIUs appeared in 2002 and gained steadily in popularity since 2010. See *id.* at fig. 1.

<sup>7</sup> See generally DANIEL S. MEDWED, PROSECUTORIAL COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 135 (2012) ("Taking a Fresh Look at Innocence: The Case for Prosecutorial Innocence Units"); Roger A. Fairfax, Jr., *The Smart on Crime Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 911 (2012) (recognizing CIUs); Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxxi (2015) (advocating for the creation of more conviction integrity units); Ellen Yaroshefsky, *Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 343 (2010) (applauding the efforts of the Dallas County Conviction Integrity Unit).

processes have prosecutors' offices developed to uncover false convictions?<sup>8</sup> How do they decide which innocence claims have merit? The answer to these questions could enhance and encourage prosecutors' postconviction cooperation both within and outside the context of the CIU. It could contribute to a more holistic understanding of the additional resources still required to ensure the discovery of false convictions.

Therefore, the present study illuminates both CIU processes and the efforts of prosecutors reviewing individual innocence claims. I conducted semi-structured interviews with twenty prosecutors whose assistance had been instrumental to a post-2005 exoneration and also with nineteen defense attorneys who had worked with cooperative prosecutors on cases culminating in exoneration since 2005. I asked these thirty-nine respondents about their experiences and decision-making structures in specific exoneration cases as well as their impressions of postconviction practices writ large.

I found that postconviction decisions—such as which prosecutor should be tasked with reviewing innocence claims, how to screen and evaluate innocence claims, and how to decide the outcome of a case—reflect decision-making at several levels. Using organizational accident theory,<sup>9</sup> we can conceptualize the following three levels: the top level of “the organization” establishes the organizing principles for postconviction innocence review; in this application it refers to the legal structure of the postconviction appeals process established by the courts and lawmakers. These organizing principles are then communicated through “the workplace”—the district attorney and her executive team. The executive team establishes policies reflective of the larger organization. Finally, there is “the worker”—the individual prosecutor—who operates the machine. The worker's decisions are influenced and moderated by both the organization and the management.<sup>10</sup>

---

<sup>8</sup> By using the term “false conviction” rather than “wrongful conviction,” I mean to narrow the focus of the discussion to actual innocence claims, as distinct from other types of conviction error; for example, a procedural error. Although some conviction integrity units do review these types of claims in addition to actual innocence claims, the present study investigates only those false conviction claims based, at least in part, on actual innocence.

<sup>9</sup> Organizational accident theory provides a systems approach to identifying and correcting error. It attempts to look beyond individual actors to broader system failings that may have contributed to the errors. *See e.g.*, JON SHANE, *LEARNING FROM ERROR IN POLICING: A CASE STUDY IN ORGANIZATIONAL ACCIDENT THEORY* (2013) (for an extended discussion of the theory and how it has been applied to criminal justice system failings).

<sup>10</sup> *See* JAMES REASON, *MANAGING THE RISKS OF ORGANIZATIONAL ACCIDENTS* 16 (1997) (providing the concept for the hierarchical framework of the organization, the workplace, and the worker).

In the postconviction stage, executive-level decisions drive the decision-making process. Unlike earlier-stage decisions—such as declining to prosecute or dismissing a case pre-trial—the decision to dismiss a false conviction remains at the discretion of the elected chief attorney.<sup>11</sup> Furthermore, the line prosecutor’s decision to recommend exoneration reflects executive decisions about how to process innocence claims. At the same time, judicial and legislative decisions regarding the rules and procedures of the postconviction stage influence both line prosecutor and executive decisions.<sup>12</sup> Teasing out these layers of decision-making is more than a theoretical exercise. It carries implications for reforms of both policy (in the crafting of legislation and court rules) and in practice (in the processing of innocence claims through the prosecutor’s office).

The Article proceeds in four parts. Part I discusses the legal mechanisms for seeking relief from false conviction and places prosecutors’ role in reviewing postconviction innocence claims against the backdrop of the failings of the postconviction appeals process for the actually innocent. Part II describes the qualitative research methodology. Part III reports the study findings according to a sequence of salient decisions marking an innocence claim’s route through the prosecutor’s office. The sequence begins with deciding how to route innocence claims through the prosecutor’s office, next, how to screen them, and finally, how to make outcome decisions. In each part, I demonstrate how individual prosecutors’ postconviction decisions are informed and influenced by the office hierarchy and the postconviction appellate system. Part IV concludes with a discussion of the prosecutor’s role as a safeguard against false convictions as well as the policy implications of these findings.

---

<sup>11</sup> E.g., Ronald F. Wright, *Prosecutor Institutions and Incentives*, 18 *CRIMINOLOGY CRIM. JUST. L. & SOC’Y* 85 (2017) (discussing the line prosecutor’s decision-making, including how supervisors in large jurisdictions may have limited information about the case-level decisions of their line staff).

<sup>12</sup> Shawn Bushway & Brian Forst have developed a typology of discretion that captures this dynamic. See Shawn D. Bushway & Brian Forst, *Studying Discretion in the Processes that Generate Criminal Justice Sanctions*, 30 *JUST. Q.* 199, 201 (2013) (“The choice by legislators to impose sentencing guidelines is an act of Type B discretion—the legally allowable choice by judges of sentences within the sentencing guideline ranges is an act of ‘weak’ or Type A discretion. Type B discretion, the ability to create rules and policies, can be used to limit and shape Type A discretion, and there is often a tension between the rules set by actors (Type B) and the discretion available to lower level actors within those rules (Type A).”).

## I. LEGAL MECHANISMS FOR SEEKING RELIEF FROM FALSE CONVICTION

Much like other “high-risk fields”<sup>13</sup> (e.g. business, medicine, aviation), criminal justice system processes are complex and capable of producing serious accidents. High-risk fields must, therefore, develop safeguards to prevent and protect against accident. As James Doyle writes, criminal justice system safeguards, or “screens” may include a “police supervisory screen, a crime lab screen, a prosecutorial barrier, a grand jury process, an advisory trial screen, and an appellate review screen.”<sup>14</sup> The appellate process operates as a late-stage safeguard against the possibility that accidents have occurred but have not yet been discovered. CIUs have also been credited with providing safeguards to correct false convictions<sup>15</sup> even after they have occurred. Although the question of the prevalence of false convictions remains a subject of scholarly debate,<sup>16</sup> it is generally agreed upon that not all false convictions have been (or will ever be) discovered.<sup>17</sup> After all, criminal justice system accidents are less obvious than a plane crash, a market crash, or a dead patient. As such, criminal justice system accidents may pass undetected more readily than they do in other high-risk fields. Moreover, overturning false convictions presents the risk of false exoneration—a false negative.<sup>18</sup> Further, in the pursuit of alternative suspects, attorneys risk

---

<sup>13</sup> James M. Doyle, *Orwell’s Elephant and the Etiology of Wrongful Convictions*, 79 ALB. L. REV. 895, 903 (2015).

<sup>14</sup> JAMES M. DOYLE, U.S. DEPT. OF JUST., LEARNING FROM ERROR IN THE CRIMINAL JUSTICE SYSTEM: SENTINEL EVENT REVIEWS, MENDING JUSTICE: SENTINEL EVENTS REVIEWS, A SPECIAL REPORT OF THE NATIONAL INSTITUTE OF JUSTICE 3 (2014).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., Paul G. Cassell, *Overstating America’s Wrongful Conviction Rate: Reassessing the Conventional Wisdom about the Prevalence of Wrongful Convictions*, 60 ARIZ. L. REV. 815 (2018) (arguing that wrongful conviction scholars have exaggerated the estimated rate of these types of errors); George C. Thomas, III, *Where Have all the Innocents Gone?*, 60 ARIZ. L. REV. 865 (2018) (agreeing that previous estimates have been too high but also arguing that Cassell underestimates the wrongful conviction rate) (in response).

<sup>17</sup> See Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 533 (2005) (“a large number of false convictions in noncapital cases are never even discovered because nobody ever seriously investigates these cases”); see also Robert J. Ramsey & James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Errors*, 53 CRIME & DELINQ. 436, 441 (2007) (writing that exonerations underestimate the universe of wrongful convictions. “Most cases are the result of some serendipitous circumstance wherein a wrongly convicted individual fortuitously happens to have his or her case investigated by an individual or organization that champions their case and commits the resources necessary to see that justice is done.”).

<sup>18</sup> See Brian Forst, *Managing Miscarriages of Justice from Victimization to Reintegration*, 74 ALB. L. REV. 1209, 1212 n.8 (2010) (“Rigorous assessments of criminal justice policies

producing a second false positive should the reinvestigation falsely accuse an innocent person.<sup>19</sup> Discovering and correcting organizational accidents in the criminal justice system therefore presents unique complexities. It is within this high-risk field of complexity that prosecutors' offices improvise systems for uncovering and correcting "accidents" of false convictions.

Prosecutors' role in detecting false convictions can best be understood against the backdrop of the failings of judicial review, for it is partly because of appellate system inadequacy that falsely convicted defendants have taken to prevailing upon prosecutors for relief.<sup>20</sup> The legal scholarship suggests that judicial review is ill-equipped to identify the factually innocent for at least three reasons: 1) an overemphasis on procedural, rather than factual errors; 2) belated review of new exculpatory evidence; and 3) an assumption of judicial impartiality. This relationship between judicial postconviction review and prosecutorial postconviction review demands a closer examination than it has received in previous legal scholarship. Scholars have suggested that prosecutors provide safeguards against false conviction not otherwise available through judicial review.<sup>21</sup> Therefore, I begin with an overview of appellate failings before turning to a discussion of prosecutors' postconviction responses to innocence claims, both supportive and oppositional.

#### A. DETECTING PROCEDURAL ERRORS, NOT FACTUAL ONES

Findley and Scott aptly summarize the limitations of the appellate review process, writing, "One of the most startling revelations to newcomers to the justice system is that appeals have almost nothing to do with guilt or innocence. Appellate courts, as a matter of principle, decide legal questions

---

and decisions explicitly weigh the relative costs of these errors, often referred to as false positives (arrests and convictions of the innocent incarcerations of harmless people) and false negatives (failures to convict culpable offenders or to incarcerate dangerous convicts). In any given system, these two types of errors are often hydraulically linked, so that reducing one produces an increase in the other. In other cases, new technology and methods arise that allow for decreases in both errors simultaneously (DNA testing, more effective methods of interrogation).")

<sup>19</sup> See Paul G. Cassell, *Tradeoffs Between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks*, 48 SETON HALL L. REV. 1435, 1447 (2018) (noting the case of Anthony Porter and Alstony Simon, in which Simon was convicted of the crime after Porter's exoneration, and then Simon was also eventually exonerated).

<sup>20</sup> See Fred C. Zacharias, *The Role of Prosecutors in Serving Justice after Convictions*, 58 VAND. L. REV. 171, 175 (2005) ("[O]nce appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong.")

<sup>21</sup> E.g., MEDWED, *supra* note 7, at 124 ("[A] prosecutor's openness to an innocence claim is vital to ensuring a full-fledged airing in court because of long-standing judicial and legislative concerns about reexamining old cases.")



and focus on process, not the accuracy of factual determinations.”<sup>22</sup> Historically, the purpose of the appeals process was not to remedy factual errors (as clemency was intended to accomplish)<sup>23</sup> but rather to correct procedural ones.<sup>24</sup>

Judicial review often results in default findings of “harmless error” or procedural justifications for denying the claim.<sup>25</sup> Brandon Garrett’s study of 200 DNA exoneration cases found that courts reviewing the cases on appeal often identified errors as harmless.<sup>26</sup> The reversal rate for the DNA exonerations—in which defendants had later been forensically cleared—was indistinguishable from a matched comparison group of rape and murder convictions.<sup>27</sup> Put simply, the defendants later revealed to be actually innocent were no more likely to receive relief than any other appellant.

Moreover, the U.S. Supreme Court has yet to resolve the issue of whether freestanding actual innocence claims based on newly discovered evidence present sufficient legal justification for relief.<sup>28</sup> In the paramount case of *Herrera v. Collins*, the Court had an opportunity to state whether actual innocence alone—in the absence of procedural errors—could ever constitute sufficient legal grounds for relief. It neglected to do so.<sup>29</sup>

---

<sup>22</sup> Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 348 (2006).

<sup>23</sup> See *Herrera v. Collins*, 506 U.S. 390, 391 (1993) (“History shows that executive clemency is the traditional ‘fail safe’ remedy.”).

<sup>24</sup> See Nancy J. King, *Judicial Review: Appeals and Postconviction Proceedings*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 217 (Allison D. Redlich et al. eds., 2014) (“A primary reason that judicial remedies have not provided a direct path to relief for the wrongfully convicted is that they were never intended to serve this purpose. Asking a judge to decide whether a conviction is factually accurate is like trying to fit a square peg in a round hole.”).

<sup>25</sup> Brandon L. Garrett, *Patterns of Errors*, 130 HARV. L. REV. F. 287, 291 (2017) (“Today, a wide range of procedural obstacles typically make it unnecessary for a judge to even reach the question whether a claim has any merit. Harmless error rules lie below many layers of procedural sediment.”).

<sup>26</sup> Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 107–08 (2008).

<sup>27</sup> See *id.* at 127 (finding a 14% reversal rate among the 200 cases, which excluding death penalty reversals, becomes 9%, statistically insignificant difference from that in the comparison group).

<sup>28</sup> See Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W.L. REV. 171, 186 (2014) (discussing *Herrera v. Collins* and writing, “[t]he court, without reaching the question of whether innocence is a valid constitutional claim, held that Herrera was not entitled to relief.” Kaneb also argues that Herrera’s case was “far from ideal for innocence” and that a stronger claim may have compelled the court to consider the question of whether innocence poses a freestanding claim for federal habeas review).

<sup>29</sup> See *Herrera v. Collins*, 506 U.S. 390, 418–19 (1993).

Herrera's petition, which was denied, introduced new evidence in the form of informant affidavits and did not raise procedural errors.<sup>30</sup> The decision reinforces the legal primacy of procedural fairness over factual accuracy.

Still, the *Herrera* ruling does not preclude state courts from recognizing newly discovered evidence of innocence as a valid basis for a postconviction claim, and many of them do.<sup>31</sup> State caselaw and statutes often provide legal mechanisms for relief on newly discovered evidence of innocence alone, without also requiring a procedural grievance or a constitutional violation.<sup>32</sup> These remedies have their own shortcomings. Brooks and colleagues' survey of state laws finds many to be DNA-centric and to set a high legal standard for relief that puts the burden on the defendant to effectively establish his own innocence.<sup>33</sup> Nancy King adds that many states have limited actual innocence legal remedies for certain types of defendants, "barring defendants whose persuasive proof of innocence is not DNA evidence, or defendants who pleaded guilty rather than going to trial."<sup>34</sup>

Therefore, falsely convicted defendants may rely upon trial errors—improper jury instructions, prosecutors' inflammatory statements, or ineffective assistance of counsel—to receive relief, but this strategy can

---

<sup>30</sup> *Id.* at 416–17 (“[I]n state criminal proceedings the trial is the paramount event for determining the guilt or innocence of the defendant. Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of ‘actual innocence,’ not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.”).

<sup>31</sup> See 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, 1078 (2015) (recognizing states such as California, Connecticut, Illinois, New Mexico and New York which “have explicitly recognized the right to a freestanding claim of actual innocence” and noting that still other states treat post-conviction newly discovered evidence claims as synonymous to actual innocence claims); John M. Leventhal, *A Survey of Federal and State Courts’ Approaches To A Constitutional Right Of Actual Innocence: Is There A Need For A State Constitutional Right In New York In The Aftermath Of CPL § 440.10(G-1)*, 76 ALB. L. REV. 1453, 1477 (2012) (discussing the states that recognize “freestanding claims of actual innocence” and the limitations of these measures, including Illinois, Missouri, New Mexico, and Maryland).

<sup>32</sup> See generally Leventhal, *supra* note 31.

<sup>33</sup> See Brooks et al., *supra* note 31, at 1054 (“Unfortunately, many of the changes to the criminal justice system and proposed legislation dealing with new evidence focus in large part on DNA test results.”).

<sup>34</sup> Nancy J. King, *Appeals*, in 3 REFORMING CRIMINAL JUSTICE 253, 270 (Erik Luna ed., 2017).

preclude the possibility of ever establishing their factual innocence.<sup>35</sup> Indeed, some prosecutors have been faulted for ignoring the issue of actual innocence altogether by offering defendants some other form of relief in exchange for their freedom. This often takes the form of an *Alford* plea, in which the defendant maintains his innocence but accepts that the prosecution has enough evidence to retry the case.<sup>36</sup> Relief on procedural grounds cannot compare to exoneration as a remedy for the falsely convicted. The defendant will not be eligible for compensation;<sup>37</sup> and the system will have mischaracterized the true nature of the error. Most importantly, the defendant will not be publicly vindicated and may not be recognized as factually innocent by his community and the general public.

#### B. BELATED REVIEW OF NEW EXCULPATORY EVIDENCE

In most states, after a brief window when defendants can file for a new trial, new evidence of innocence will not be considered until defendants have completed their direct appeal and entered the postconviction stage.<sup>38</sup> This process can take years, meaning that only those serving lengthy prison sentences can avail themselves of the remedy.<sup>39</sup> In addition, most states do not provide indigent defendants with an attorney in the postconviction stage.<sup>40</sup> Without legal advocacy and expertise, and lacking the ability to

---

<sup>35</sup> See King, *supra* note 24, at 224–25.

<sup>36</sup> See Megan Rose, *What Does an Innocent Man Have to Do to Go Free? Plead Guilty*, PROPUBLICA, Sept. 7, 2017, <https://www.propublica.org/article/what-does-an-innocent-man-have-to-do-alford-plea-guilty> [<https://perma.cc/CG5K-EUMS>] (detailing the ProPublica and The Atlantic investigation of cases in Baltimore City and County in which defendants with innocence claims accepted postconviction plea deals).

<sup>37</sup> See Elizabeth Griffiths & Michael Owens, *Remedying Wrongful Convictions: Societal Obligations to Exonerees*, in *WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD* 267, 270 (A.D. Redlich et al. eds., 2014) (noting that statutory compensation schemes often require forensic evidence of innocence or gubernatorial pardons). See generally Evan Mandery et al., *Criminology: Compensation Statutes and Post-Exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553 (2013) (providing overview of the importance of compensation in rehabilitating the wrongfully convicted).

<sup>38</sup> See Daniel Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 676 (2005) (“First, many time limits governing motions for a new trial on the grounds of newly discovered evidence are remarkably brief. As a result, these remedies are of limited utility to the bulk of criminal defendants who, in the immediate aftermath of their convictions, might not have the resources or the good fortune to find new evidence.”).

<sup>39</sup> See King, *supra* note 24, at 220 (reporting that the mean custodial sentence for state felony offenders is three years, “barely long enough to complete the appellate process”).

<sup>40</sup> See Keith Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 605 (2009) (“While most states have statutes permitting motions for a new trial based on newly discovered evidence, or permitting challenges to fact-based constitutional claims such

investigate from behind bars, filing pro se leaves indigent prisoners at a considerable disadvantage.<sup>41</sup> Yet, in the postconviction stage, most claimants have no alternative. Release may provide more opportunities for investigation and more financial opportunities to retain counsel, but these advantages are undermined by the defendant's limited access to judicial review after incarceration.<sup>42</sup> Despite evidence of the myriad injurious effects of a criminal record,<sup>43</sup> courts tend to overlook the need for relief after a custodial sentence has been served.<sup>44</sup>

### C. ASSUMPTION OF IMPARTIALITY

Claims in the postconviction stage—a defendant's first meaningful opportunity to present new evidence—are typically sent first to the trial court and reviewed by the trial judge who originally handled the case.<sup>45</sup> This

---

as ineffective assistance or *Brady* claims, those proceedings are almost always collateral proceedings; they are not a part of the direct appeal process. As such, they usually come after the direct appeal, after the defendant has served significant time or even the full sentence in prison, and, most importantly, after the defendant no longer has a right to the assistance of counsel to present those claims." Findley further notes that death penalty cases prove an exception to this general rule.)

<sup>41</sup> See BRANDON GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 195 (2011) (writing "[m]ost pro se petitioners simply don't stand a chance").

<sup>42</sup> See King, *supra* note 24, at 220 ("In federal court and in just over half of the states, postconviction review is limited to prisoners who are still incarcerated or on parole after their direct appeals have been completed.")

<sup>43</sup> See generally ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016) (documenting how poor defendants suffer from nearly insurmountable financial obstacles through court-imposed monetary sanctions); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (finding that criminal record holders, especially black men, experience employment discrimination); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1 (2016) (arguing that public access to criminal records fosters an "enduring stigma" for record holders that leads to loss of opportunities); Sarah E. Lageson & Shadd Maruna, *Digital Degradation: Stigma Management in the Internet Age*, 20 PUNISHMENT & SOC'Y 113 (2017) (discussing the prevalence of online criminal records and their damaging effects to personal reputation); Elizabeth Westrope, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy*, 108 J. CRIM. L. & CRIMINOLOGY 367 (2018) (discussing the failure of current remedies such as expungement statutes to prevent the employment discrimination that criminal record holders face).

<sup>44</sup> See King, *supra* note 24, at 220.

<sup>45</sup> See Medwed, *supra* note 38, at 699 (writing that "many new trial motions and post-conviction petitions premised on newly discovered non-DNA evidence are directed to the trial judge who handled the case originally"). Medwed also notes that habeas corpus petitions may be filed in the county of conviction or the county of confinement. *Id.*; see also King, *supra* note 24, at 220 (reporting that the postconviction petition for relief is filed in the trial court where petitioner was convicted).

system prioritizes efficiency over accuracy. The trial judge will be familiar with the case. She may use her existing knowledge of the case to evaluate the credibility of the claim. This knowledge could be especially useful in cases involving recanting witnesses. The disadvantage of such a practice is that the trial judge has a “vested interest” in denying that the conviction is flawed.<sup>46</sup> The legal process assumes that judges maintain impartiality despite their involvement in the original trial.

However, research into judicial decision-making and cognitive biases calls this assumption into question. Findley and Scott’s analysis of cognitive bias in appellate review describes the influence of “outcome bias” and “hindsight bias.”<sup>47</sup> They write: “the outcome of the case—conviction—tends to appear, in hindsight, to have been both inevitable and a ‘good’ decision.”<sup>48</sup> This may apply to judicial review in general<sup>49</sup> and one would expect it may apply to the original trial judge in particular. Judges, being human, may struggle to accept evidence that their earlier assessment was flawed.<sup>50</sup> They may naturally ascribe a higher value to their own decision-making skills and “perceive themselves as fair individuals who, in the main, render or oversee correct decisions.”<sup>51</sup>

By the time most defendants get the opportunity to introduce new evidence of innocence, the assertion of their guilt has been argued, established, and finalized on direct appeal. Judges have professional incentives to avoid opening up new legal inroads to flimsy postconviction innocence claims. Indeed, finality has legitimate benefits for crime victims and witnesses, for juries, and for courts.<sup>52</sup> Victims need closure, and

---

<sup>46</sup> Medwed, *supra* note 38, at 659–60 (“Even more, motions seeking relief on the grounds of new evidence are often filed with the original trial judge, a person who may have a vested interest in the outcome, and that judge’s decision normally receives tremendous deference on appeal.”).

<sup>47</sup> Findley & Scott, *supra* note 22, at 319–20.

<sup>48</sup> *Id.* at 320.

<sup>49</sup> *See id.* at 320, 348 (writing “[h]indsight bias and outcome bias have particularly serious implications for appellate and postconviction review by judges” and “[n]ormative tunnel vision does not end after conviction; it intensifies as cases proceed through appellate and postconviction litigation.”).

<sup>50</sup> *See generally* THOMAS GILOVICH, *HOW WE KNOW WHAT ISN’T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* (1991) (examining human tendencies to draw conclusions based on what we expect to see and what we want to see).

<sup>51</sup> Medwed, *supra* note 38, at 701.

<sup>52</sup> *See* Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 552 (2014) (discussing the balance between accuracy and finality and exploring the legitimate interests in preserving finality); David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1054 (2010) (“Taking Finality Seriously”).

witnesses need assurance that they will not be badgered into recanting their testimony by convicted defendants and their family members.<sup>53</sup> Juries may take their trial obligations more seriously when they believe that the verdict will stand.<sup>54</sup> Courts, with limited resources and “newer and more pressing matters,” simply cannot prioritize postconviction review.<sup>55</sup> After direct appeal, the system is invested in maintaining the conviction and expending few (if any) resources on continued litigation.<sup>56</sup> Postconviction procedural rules reveal an “institutional bias in favor of preserving convictions at all costs” that applies on both the state and federal level.<sup>57</sup>

This abiding interest in the principle of finality stands in direct tension with the need for factual accuracy. To use a term from the organizational accident literature, case finality confers “productive advantages.”<sup>58</sup> The need to deliver the final product is balanced against the importance of protection against accidents.<sup>59</sup> Applied to the appellate context, the need to deliver finality must be weighed against the risk of failing to identify a false conviction.<sup>60</sup> Historically, the appellate system has tipped the scales in favor of finality.<sup>61</sup>

#### D. THE PROSECUTOR AS A PATHWAY TO EXONERATION

Amidst this dearth of options for falsely convicted defendants, prosecutors have the power and the potential to provide an additional

---

<sup>53</sup> See generally SERI IRAZOLA ET AL., *STUDY OF VICTIM EXPERIENCES OF WRONGFUL CONVICTION* (2013) (describing victims’ rights legislation with a duty to protect victims from the accused), <https://www.ncjrs.gov/pdffiles1/nij/grants/244084.pdf> [perma.cc/ZUW4-7UU5].

<sup>54</sup> See Wolitz, *supra* note 52, at 1056 (“The idea here is that the system needs to invest some decision-maker(s)—namely, the trial judge and jury—with sufficient final authority to impress upon them the weight of their responsibility. Any increase in the ability of the litigants to reopen the case post-trial necessarily diminishes the trial court’s authority and thus undermines its sense of responsibility.”).

<sup>55</sup> *Id.* at 1055 (“Any incremental increase in review adds to already overwhelmed dockets of courts, increases expenses, and takes away resources from adjudication of newer and more pressing matters.”).

<sup>56</sup> See Leventhal, *supra* note 31, at 1466 (writing about federal courts’ reluctance to consider freestanding innocence claims).

<sup>57</sup> Stephanie Roberts Hartung, *Post-Conviction Procedure: The Next Frontier in Innocence Reform*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION* 247, 252 (Daniel S. Medwed ed., 2017).

<sup>58</sup> See REASON, *supra* note 10, at 6.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 4 (discussing the relationship between production and protection).

<sup>61</sup> See Laurie L. Levenson, *supra* note 52, at 551 (“The criminal justice system is obsessed with finality.”).

safeguard. Through their quasi-judicial role<sup>62</sup> and their accountability “to seek justice within the bounds of the law, not merely to convict,”<sup>63</sup> prosecutors have both the opportunity and the incentive to facilitate exoneration in false conviction cases. Moreover, a variety of developments may arise that would compel the prosecutor’s proactive review: They may become aware of new exculpatory evidence of innocence in a case (for example, when an alternate suspect confesses); they may identify defects in evidence submitted in pursuit of a previous conviction; or new technological developments may necessitate case review.<sup>64</sup> Although prosecutors lack the authority to unilaterally release convicted defendants, they can bring a motion to vacate the judgement and order a new trial through the courts. Provided that the court grants the motion, prosecutors can then move to dismiss the case.<sup>65</sup>

Legal and empirical research suggests that most prosecutors are typically unwilling to take this step. In Gould and Leo’s study of 260 wrongful conviction cases, prosecutors were found to have “played a significant role” in only 9% of the exonerations.<sup>66</sup> The authors write that prosecutors “remain entrenched in a highly adversarial mindset in the post-conviction exoneration process.”<sup>67</sup> In Brandon Garrett’s study of 200 DNA exonerations, he finds that in at least seventy-one (36%) of the cases, defendants had to apply for a court order for DNA testing “absent willing cooperation of law enforcement.”<sup>68</sup> A study of prosecutorial assistance among the exoneration cases listed by the NRE found that only 32% of prosecutors sought to help overturn the false conviction.<sup>69</sup> In sum, the

---

<sup>62</sup> See generally Stanley Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988) (discussing the prosecutor’s dual quasi-judicial and adversarial roles).

<sup>63</sup> AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION: STANDARD 3-1.2 “FUNCTIONS AND DUTIES OF THE PROSECUTOR,” [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/P7RV-AA6J>].

<sup>64</sup> See Zacharias, *supra* note 20, at 176 (exploring the question “When are Prosecutors’ Postconviction Justice Obligations Implicated?”).

<sup>65</sup> See generally *id.* at 185 (describing procedural process in detail).

<sup>66</sup> Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALB. L. REV. 325, 344 (2015) (defining “significant role” as indicating that the prosecutors “engaged in substantial investigation or advocacy,” which surpasses simply not opposing defense motions. The authors also report that prosecutors opposed 10% of the exoneration cases.).

<sup>67</sup> *Id.* at 332.

<sup>68</sup> Garrett, *supra* note 26, at 119.

<sup>69</sup> See Elizabeth Webster, *A Postconviction Mentality: Prosecutorial Assistance in Exoneration Cases*, 36 JUST. Q. 323, 333 (2019) (“Prosecutors provided some level of assistance with the exoneration in 32.5% or 524 of the 1,610 cases in the sample.”).

prosecutor's modal response to postconviction innocence claims appears to be either resistance or ambivalence.

Legal scholarship featuring case studies of prosecutors' responses to innocence claims supports this empirical evidence. Prosecutors' denial of factual error, even in the face of dispositive evidence of innocence, has been a source of fascination for legal scholars.<sup>70</sup> Research explores how some prosecutors have undermined efforts to uncover errors and refused to acknowledge those that do surface. Prosecutors' resistance to acknowledging factual errors has been attributed to both psychological bias<sup>71</sup>—similar to that experienced by reviewing judges—and to institutional pressures.<sup>72</sup>

Postconviction claims often involve allegations of wrongdoing on the part of defense attorneys or prosecutors,<sup>73</sup> since petitioners are limited in their ability to make these types of claims on direct appeal.<sup>74</sup> New evidence of

---

<sup>70</sup> See generally Bandes, *supra* note 1 (discussing the effect prosecutorial tunnel vision can have on wrongful convictions); Burke, *supra* note 1 (reviewing the problem of prosecutor's cognitive bias in postconviction proceedings and inviting prosecutors to make modest reforms to combat these biases); Levenson, *supra* note 1 (focusing on the fact that senior prosecutors, and not young prosecutors, are more likely to resist exonerations); Medwed, *supra* note 1 (reviewing the political and organizational barriers that lead many prosecutors to ignore postconviction allegations of innocence); Orenstein, *supra* note 1 (reviewing how and why prosecutors resist allowing DNA testing and deny the obvious implications of DNA evidence when that evidence exonerates the convicted); Ritter, *supra* note 1 (examining the court's potential use of harmless error and judicial estoppel to prevent prosecutors from creating a new theory of the crime when the results of postconviction DNA testing undermine the theory upon which a defendant was convicted); Swisher, *supra* note 1 (analyzing the ways prosecutorial review of postconviction cases causes conflicts of interest and suggestions of reform).

<sup>71</sup> See Bandes, *supra* note 1; Burke, *supra* note 1; Alafair Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1632–33 (2006).

<sup>72</sup> See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 353 (2001) (discussing the conviction mentality that stems from “politics, institutional pressures, adversarialness, self-righteousness, and arrogance”); Medwed, *supra* note 1, at 134–38 (exploring “[p]rofessional [i]ncentives to [o]btain and [m]aintain [c]onvictions”); Swisher, *supra* note 1, at 202–04 (describing prosecutors’ “[u]nhealthy [f]ear of [c]ivil [l]iability”).

<sup>73</sup> See Levenson, *supra* note 52, at 572 (“It is not enough to argue that the petitioner may be innocent. Petitioners and their counsel must engage in the equivalent of thermal nuclear habeas warfare to succeed. The net result is a distorted, exaggerated practice where petitioners are more likely to argue that every prosecutor is a *Brady* cheater, every defense lawyer provides ineffective assistance of counsel, and every police officer is dismissive of exculpatory evidence.”)

<sup>74</sup> See King, *supra* note 34, at 258 (explaining how direct appeal does not review claims like ineffective assistance of counsel or the state's failure to disclose exculpatory evidence, both of which are common contributors to wrongful conviction).



innocence may include material, exculpatory evidence that was withheld from the defense in violation of *Brady v. Maryland*.<sup>75</sup> Of those DNA exonerees in Garrett's study bringing postconviction claims, the most successful raised ineffective assistance of counsel (29%) or allegations that prosecutors had withheld exculpatory evidence (16%).<sup>76</sup> *Brady* violations could be the result of intentional misconduct or the inadvertent oversight of an overworked prosecutor.<sup>77</sup> In either case, prosecutors would be understandably reticent to expose such an error, particularly if they would be the one held responsible for it. In extreme cases, they may fear being sued or that their office may be sued.<sup>78</sup> More likely, they may fear inviting professional reprisal and disciplinary sanction.<sup>79</sup>

Institutional pressures may also discourage prosecutors from objectively considering postconviction innocence claims. The "new prosecutor's dilemma"<sup>80</sup> lies in discovering innocent defendants amidst a sea of guilty petitioners. Prosecutors, overwhelmed by the volume of postconviction motions, may become jaded to the possibility of innocence.<sup>81</sup> As a percentage of the prison population, relatively few defendants ever file postconviction motions, but this still translates to a large number of claims received.<sup>82</sup> Daniel Medwed identifies a prosecutor's "needle in a haystack disincentive," writing, "Not only might a prosecutor be more dubious about the legitimacy of a specific motion given the quantity of comparable papers, but the sheer volume also makes it harder to isolate the meritorious claims,

---

<sup>75</sup> 373 U.S. 83, 91 (1963).

<sup>76</sup> Garrett, *supra* note 26, at 96 (see "Table 5: Criminal Procedure Claims Raised by Exonerees").

<sup>77</sup> See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 263 (2011) ("[M]any prosecutors are asked to commit malpractice on a daily basis by handling far more cases than any lawyer can competently manage.").

<sup>78</sup> See Swisher, *supra* note 1, at 202–04 (describing prosecutors' "[u]nhealthy [f]ear of [c]ivil [l]iability"); Zacharias, *supra* note 20, at 218 (discussing "[t]he range of conflicts of interest").

<sup>79</sup> See generally Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 PENN. L. REV. 960, 975–79 (2009) (discussing American Bar Association Rules of conduct and disciplinary sanctions—though acknowledging that these are rarely enforced—as well as internal office hiring and firing practices).

<sup>80</sup> Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 620–23 (2014) (stating that the ethical obligations for prosecutors in the face of new postconviction exonerations have not been updated).

<sup>81</sup> MEDWED, *supra* note 7, at 127 ("The last thing prosecutors want is to encourage prisoners to bury them with marginal innocence claims.").

<sup>82</sup> See Nancy J. King et al., *Habeas Litigation in the U.S. District Courts*, (Vand. U. Law Scho. Legal Stud. Research Paper No. 07-21, 2007).

even for the prosecutor predisposed to hunt for them.”<sup>83</sup> Requests for postconviction DNA-testing have allowed some innocence claims to transcend the haystack. Yet, in the twilight of the DNA era, innocence claims may increasingly hinge on non-DNA evidence,<sup>84</sup> such as witness recantations, confessions of alternate suspects, and less probative forms of forensic evidence.

Prosecutors’ disinclination to reconsider innocence claims—and in some cases, their outright and dogged opposition to these claims—can prove insurmountable for defendants. Prosecutors enjoy broad postconviction discretion,<sup>85</sup> and defendants are unlikely to prevail if the prosecutors oppose postconviction relief.<sup>86</sup> On the other hand, when prosecutors facilitate an exoneration, they can provide an alternative safeguard for falsely convicted defendants when the appellate system fails. For example, prosecutors’ support for postconviction forensic testing or evidentiary hearings in a case may help persuade judges to grant defendants’ requests.<sup>87</sup> In addition, prosecutors’ access to law enforcement resources might facilitate reinvestigations.

As CIUs have emerged, scholars have observed and welcomed them<sup>88</sup> as the “best chance”<sup>89</sup> for systematically identifying false convictions and as a “smart on crime”<sup>90</sup> criminal justice reform. Several district attorneys and CIU chiefs have published articles describing their own processes,<sup>91</sup> and

---

<sup>83</sup> Medwed, *supra* note 1, at 149.

<sup>84</sup> See Medwed, *supra* note 38, at 657–58 (describing the difficulty of achieving exoneration with non-DNA evidence).

<sup>85</sup> See Zacharias, *supra* note 20, at 173 (“[P]rosecutorial discretion is at its height in the postconviction context”).

<sup>86</sup> See Green & Yaroshfsky, *supra* note 2, at 486–87 (“A court is more likely to grant relief if a prosecutor joins in a defendant’s motion to set aside his conviction based on new evidence . . . Conversely, it would be exceedingly difficult to prevail over the prosecutors’ opposition either in court or in the executive mansion.”).

<sup>87</sup> See Daniel Medwed, *The Prosecutor as Minister of Justice*, 84 WASH. L. REV. 35, 37 (2009) (“A key variable, then, in the ability of a criminal defendant to have a chance for success on a post-conviction claim of innocence often lies in the nature of the prosecutor’s response; prosecutorial openness to the possibility of the defendant’s innocence may go a long way toward convincing the judge of the merits of that claim, if only to the extent of granting an evidentiary hearing.”).

<sup>88</sup> See NEWKIRK CTR. FOR SCI. & SOC’Y, U. CAL. IRVINE, *supra* note 4, at 12 (noting the “important” role of CIUs in 2018 exonerations and writing “[a]s the number of CIUs increases, we may see more exonerations secured by cooperation of IOs [innocence organizations] and CIUs”).

<sup>89</sup> Kozinski, *supra* note 7 (advocating for the creation of more conviction integrity units).

<sup>90</sup> Fairfax, Jr., *supra* note 7, at 911.

<sup>91</sup> E.g., Ingrid H. Chandler, *Conviction Integrity Review Units: Owning the Past, Changing the Future*, 31 CRIM. JUST. 14 (2016) (describing the Conviction Integrity Review

these tend to emphasize unit successes as well as prosecutors' postconviction ethical obligations. Scholarly research of CIUs includes articles exploring best practices,<sup>92</sup> case studies analyzing a small subset of individual units,<sup>93</sup> and overviews providing details about the number and existence of CIUs.<sup>94</sup> Much of this research offers guidelines for CIUs in case reinvestigation, discovery-related concerns, working with police departments and defense attorneys, developing standards of review, training prosecutors, and more.<sup>95</sup>

The most comprehensive of its kind, "Conviction Review Units: A National Review,"<sup>96</sup> surveyed and interviewed nineteen CRUs and issued a series of recommendations, including independence from the appellate units, the ability to report directly to the district attorney, and the flexibility to allow

---

Unit of Harris County, Texas); Cyrus R. Jr. Vance, *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629 (2013) (describing the formation and goals of the New York County District Attorney's Conviction Integrity Program); 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 (2012) (describing the Dallas County Conviction Integrity Unit).

<sup>92</sup> E.g., Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705 (2016) (reviewing recently created conviction integrity units across the country) [hereinafter Scheck, *Conviction Integrity Units Revisited*]; Barry C. Scheck, *Professional and Conviction Integrity Programs: Why We need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215 (2010) (creating a framework to consider for the development of Professional Integrity and Conviction Integrity units) [hereinafter Scheck, *Professional and Conviction Integrity Programs*].

<sup>93</sup> E.g., Boehm, *supra* note 80 (reporting on case studies of CIUs in five offices); see also ESTABLISHING CONVICTION INTEGRITY PROGRAMS, NYU LAW CENTER ON THE ADMINISTRATION OF JUSTICE REPORT, [http://www.law.nyu.edu/sites/default/files/upload\\_documents/Establishing\\_Conviction\\_Integrity\\_Programs\\_FinalReport\\_ecm\\_pro\\_073583.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf) [<https://perma.cc/2RQ3-FXNL>] (focusing on Manhattan DA office and Santa Clara County's CIU).

<sup>94</sup> E.g., *National Registry of Exonerations: Exonerations in 2017*, NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE (2018), <https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf> [<https://perma.cc/YP6K-VXDE>] (finding that there were thirty-three Conviction Integrity Units operating nationally in 2017); NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE, *supra* note 4, (finding forty-four CIUs in existence in 2018); Daniel 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 (2016) (outlining the growth of Conviction Integrity Units from emergence in 2002 through 2016).

<sup>95</sup> E.g., Boehm, *supra* note 80; JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE, FACULTY SCHOLARSHIP AT PA. L. 1 (2016), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty\\_scholarship](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2615&context=faculty_scholarship) [<https://perma.cc/27EC-3NAW>]; Kroepsch, *supra* note 94; Scheck, *Professional and Conviction Integrity Programs*, *supra* note 92; Scheck, *Conviction Integrity Units Revisited*, *supra* note 92.

<sup>96</sup> Hollway, *supra* note 95.

for broad case selection criteria, among others.<sup>97</sup> Above all, the report advocates for independence, flexibility, and transparency of prosecutorial practices.<sup>98</sup> The report endeavors to provide guidelines for CRUs operating in good faith, observing that bad faith efforts—dubbed CRINOs (Conviction Review In Name Only), or “conviction preservation units”<sup>99</sup>—can be worse than no CRU at all for the threat that they pose to the legitimacy of sincere efforts in other jurisdictions.

The Innocence Project has also developed guidelines for CIUs based on the experiences of innocence organizations collaborating with such units across the country.<sup>100</sup> These include detailed recommendations for case intake and selection, investigation, staffing, reporting results, and learning from errors.<sup>101</sup> Barry Scheck provides additional commentary on these guidelines, addressing several potential CIU pitfalls.<sup>102</sup> For example, he writes: “Some prosecutors may be tempted to send all post-conviction matters that involve constitutional claims, such as *Brady* violations or ineffective assistance of counsel claims, to their appeals unit even if the petitioner or their counsel raise ‘plausible’ claims of innocence and request a CIU investigation.”<sup>103</sup> What is the source of this temptation for prosecutors? Perhaps prosecutors are tempted to assume that courts can handle postconviction cases that involve constitutional claims and therefore such cases don’t require CIU attention. Perhaps they are reluctant to review allegations of intentional and unintentional misconduct that may arise in the context of a *Brady* violation or ineffective assistance of counsel claim. Whatever the case may be, Scheck’s commentary highlights the relevance of the office appeals unit and its relationship to the CIU.

Beyond these few studies, scholarship has not kept pace with the rapid emergence of CIUs or examined their significance for prosecutorial discretion. Research investigating the assistance of prosecutors reviewing innocence claims outside the context of a CIU has not yet appeared. Even those who advocate for CIUs concede that it is impractical in most small

---

<sup>97</sup> *Id.* The report’s recommendations, issued in four categories, include: Independence, Flexibility, Transparency and Prevention.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 19 n.25.

<sup>100</sup> INNOCENCE PROJECT: CONVICTION INTEGRITY UNIT BEST PRACTICES 2, 4 (2015), <https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf> [<https://perma.cc/Q876-39EV>].

<sup>101</sup> *Id.*

<sup>102</sup> Scheck, *Conviction Integrity Units Revisited*, *supra* note 92, at 720–46.

<sup>103</sup> *Id.* at 727.

jurisdictions to create such a unit.<sup>104</sup> Approximately 74% of prosecutors' offices serve a population of fewer than 100,000 people.<sup>105</sup> A broader understanding of postconviction innocence review therefore depends upon examining processes in smaller and medium-sized jurisdictions as well.

However, the difficulty of accessing prosecutors' offices presents obstacles to conducting this type of research. Green and Yaroshefsky describe a lack of transparency regarding postconviction processes:

Certainly, there have been many reported cases in which prosecutors learned of new evidence, investigated or failed to investigate, and made or opposed efforts to secure the defendant's release . . . But because prosecutors' internal processes are not transparent, very little is known about the internal deliberations and rationales for what prosecutors have done.<sup>106</sup>

Even with increased scrutiny on prosecutors' postconviction decision-making and with the creation of best practices in CIU jurisdictions, this lack of transparency remains an obstacle for researchers and for the general public. The NRE has documented its attempts to reach CIUs in thirty-three of the jurisdictions where a CIU has been implemented.<sup>107</sup> They found that ten of the units had no website and were also inaccessible by phone.<sup>108</sup> The report concludes:

As a result, it appears that these units are not, as a practical matter, accessible to the public at large. In particular, innocent criminal defendants and concerned family members who seek exoneration are not likely to be able to present their cases to these CIUs unless they can afford to hire lawyers.<sup>109</sup>

Discovering factual errors matters for the falsely convicted, and it matters for a system that wishes to learn from its errors. However, the "marginalization of factual error,"<sup>110</sup> the slow pace of justice, the denial of indigent postconviction defense counsel, and the assumption of judicial

---

<sup>104</sup> See Hollway, *supra* note 95, at 21 ("It should be noted, though, that many smaller state or local prosecutors' offices may lack the resources to separately staff a CRU.").

<sup>105</sup> BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007- STATISTICAL TABLES, NATIONAL CENSUS OF STATE COURT PROSECUTORS (2007), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/K32S-N82Z>].

<sup>106</sup> Green & Yaroshefsky, *supra* note 2, at 481.

<sup>107</sup> NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE, *supra* note 94, at 14–15.

<sup>108</sup> *See id.*

<sup>109</sup> NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE, *supra* note 94, at app. tbl. A; *see also* NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE, *supra* note 4, at app. tbl. A, (providing a similar table, which reports that thirteen of the now forty-four CIUs do not have web addresses).

<sup>110</sup> DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 212 (2012) (noting that court rulings reveal a prioritization of bureaucratic considerations "over the protections against false verdicts").

impartiality undermine appellate review remedies.<sup>111</sup> Furthermore, prosecutors do not appear to fill the “error correction gap”<sup>112</sup> left by appellate shortcomings.<sup>113</sup> While prosecutors have the potential to identify and rectify false convictions (and in some jurisdictions they have the demonstrated track record as well), research suggests that a variety of professional and psychological disincentives conspire to discourage prosecutors from doing so.<sup>114</sup>

With this context, I now turn to the methodology.

## II. METHODOLOGY

To explore this understudied area, I conducted semi-structured interviews with nineteen defense attorneys and twenty prosecutors. In speaking directly with attorneys engaged in exoneration cases I hoped to develop an understanding of how prosecutors assist in the project of identifying and correcting false convictions, how they make decisions about individual cases, how they determine the practices that enable them to make those decisions, what challenges they face, and what more might yet be done. In this part, I explain the interview methodology and research design; I describe characteristics of the respondents, eligibility for participation, and interview questions; and I explore the strengths and limitations of the methods.

Attorneys represented nineteen states and thirty-six unique jurisdictions and include sixteen women and four persons of color.<sup>115</sup> All but two respondents had ten years or more of experience as criminal attorneys. Three of the defense attorneys and six of the prosecutors formerly served as opposing counsel. A trend among some urban jurisdictions has been to select a former defense attorney to head the CIU.<sup>116</sup> In this sample, such CIU heads count as prosecutors. Similarly, some defense attorney respondents had accrued more years of experience as prosecutors. For ease of discussion, these two categories of “defense attorney” and “prosecuting attorney” are rendered static, though some respondents brought a variety of experiences on

---

<sup>111</sup> See *supra* Section I.A–I.C.

<sup>112</sup> King, *supra* note 34, at 270.

<sup>113</sup> See *supra* Section I.D.

<sup>114</sup> See *supra* Section I.D.

<sup>115</sup> Defense attorneys are counted according to the county in which their client was exonerated. Most defense attorneys represented clients by state or region, handling cases outside their home jurisdiction.

<sup>116</sup> See Scheck, *Conviction Integrity Units Revisited*, *supra* note 92, at 738–40 (discussing staffing recommendations for CIUs).

both sides of the courtroom to bear. See Tables 1 and 2 for additional prosecutor and defense attorney characteristics.

Table 1: Prosecutor Respondents (N=20) (Response Rate = 50%)

<i>Race</i>		<i>Career Stage as an Attorney</i>	
White	17	Early (< 10 years)	2
Non-White	2	Mid (10 > 20 years)	8
<i>Gender</i>		Late (> 20 years)	9
Male	10	<i>Geographic Region</i>	
Female	9	Northeast	6
<i>Type</i>		Midwest	4
Private	5	South	6
Public	6	West	3
Innocence Org	8	<i>Experience as opposing counsel</i>	
		Yes	3
		No	16

Table 2: Defense Attorney Respondents (N=19) (Response Rate = 86%)

<i>Race</i>		<i>Career Stage as an Attorney</i>	
White	18	Early (< 10 years)	0
Non-White	2	Mid (10 > 20 years)	10
<i>Gender</i>		Late (> 20 years)	7
Male	13	Retired	1
Female	7	No longer a prosecutor	2
<i>Type</i>		<i>Geographic Region</i>	
Elected District Attorney	5	Northeast	5
Appellate Attorney	2	Midwest	5
Supervising Trial Attorney	4	South	6
CIU	9	West	4
<i>Experience as Opposing Counsel</i>		<i>Jurisdiction Size</i>	
Yes	6	Small (< 500k)	3
No	14	Medium (500k > 1 mil)	7
		Large (> 1 mi)	10

To be eligible for the study, defense attorney respondents must have served as one of the chief postconviction attorneys on an exoneration case that featured some level of assistance from prosecutors. Prosecuting attorney

respondents must have assisted defense counsel or else proactively facilitated or supported an exoneration. Exoneration cases and attorneys were identified through the NRE, an online, open-source registry. The NRE tracks U.S. cases since 1989, the year of the first DNA exoneration.<sup>117</sup> Only those exoneration cases since 2005 were considered in order to avoid problems with retrospective reinterpretation and also to better capture recent exoneration processes. Narrative case profiles are provided for each case listed by the NRE, and attorney respondents were culled from these profiles. When attorney names were not included in the case profile, background legal and media research was conducted to determine the actors involved. Contact information for individual attorneys, or an attorney's assistant, was then accessed online.

Determinations about whether or not prosecutors had assisted with the exoneration were based on any one of a number of supportive actions, for example: joining in a defense motion to vacate the conviction, reinvestigating a troubled conviction, requesting postconviction forensic testing, and more.<sup>118</sup> I reviewed these case profiles as well as non-public NRE data about the prosecutor's role in 1,610 state-based exonerations to determine the prosecutor's actions in each case. Whenever necessary, I supplemented this information by researching news articles and legal documents online. Details

---

<sup>117</sup> THE NATIONAL REGISTRY OF EXONERATIONS: GLOSSARY, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> [<https://perma.cc/86QZ-6V5Z>] (last visited Nov. 2, 2019) (explaining that exonerations come about in a variety of ways: through a pardon or certificate of innocence, an acquittal on retrial, a posthumous exoneration, or, most commonly, the prosecution or judge's decision to dismiss charges postconviction). When highly probative material evidence like DNA exists, the defendant may receive a pardon based on innocence. Conversely, the exoneration may take the form of an acquittal at retrial. In these cases, prosecutors pursued a new conviction, but the new evidence of innocence sufficiently convinced the jury of reasonable doubt. *Id.* The NRE definition of "exoneration" depends upon evidence of innocence, but not upon an explicit declaration of innocence. The NRE does not claim to know whether every exonerated person listed is factually innocent. *Id.*; see also SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 6 (2012), [https://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) [<https://perma.cc/DP6B-DWTX>] (In defining exoneration, Gross and Shaffer explain that they "do not claim to be able to determine the guilt or innocence of convicted defendants," because "in difficult cases, nobody can do that reliably.").

<sup>118</sup> Other supportive actions include recommending that the case be dismissed or that the defendant be pardoned, publicly asserting belief in the defendant's innocence or apologizing, assisting or supporting the conviction review efforts of other government officers, and pursuing postconviction evidence of innocence and sharing this evidence with defense soon after discovery. In some cases, prosecutors' supportive actions were undermined by resistance or opposition. When the available evidence suggested that prosecutors obstructed the path to exoneration, then the prosecutor was not considered to have assisted in that case. More detailed information is available from the author upon request.



of the litigation were not always discoverable; determinations were made based on the available information. In total, 524 cases were determined to have involved some degree of prosecutorial assistance. Narrowing the sample to those exonerations since 2005 resulted in 330 exoneration cases through which attorney respondents would be considered eligible for this study.

Case selection was further narrowed to avoid over-sampling of attorneys from any one state. Over half of the eligible cases (177 of 330) came from just three states: Texas, New York, and Illinois. I sought variety so as to avoid overemphasizing legal practices and statutory idiosyncrasies peculiar to specific states. I also avoided over-sampling attorneys who had worked on DNA exoneration cases since decision-making processes in these cases may follow a similar pattern (culminating in forensic evidence of innocence).

I intentionally did not select attorneys who worked together on the same exoneration case. Though this design would have strengthened internal validity by triangulating information through at least two participants, it would also have undermined efforts to guarantee confidentiality since respondents could easily discover that their counterpart on the case had also been interviewed. Furthermore, sourcing a wider variety of jurisdictions enhances external validity while also permitting prosecutors who have assisted with an exoneration independently—or with minimal involvement from the defense—to be included in the sample. Finally, selecting only pairs of attorneys may have introduced a selection bias towards compatible, cooperative relationships since attorneys may be less willing to speak critically of their counterpart if that individual was also being interviewed.

Interviews were conducted between April 2016 and November 2018. Whenever possible, I made arrangements to conduct these interviews in person; however, given the national scope of the study, most interviews were conducted over the phone.<sup>119</sup> All but one of these interviews (which was documented by typewritten notes at the respondent's request) were audio recorded and transcribed soon after the recording. Defense attorney and prosecutor interviews were conducted concurrently. Statements made by each group informed an evolving understanding of the other.

The average interview length was eighty-four minutes. Each of the two semi-structured interview guides (one for prosecutors and one for defense

---

<sup>119</sup> In total, twelve of the defense attorneys and four of the prosecuting attorneys were interviewed in person. The rest were conducted over the phone.

attorneys)<sup>120</sup> began by referencing a specific case experience. These questions generated responses about the step-by-step process leading to the exoneration. For example, questions probed how prosecutors initially became aware of the innocence claim, the nature of the communication between prosecutors and defense attorneys, and the elected prosecutor's role in the exoneration case. The interview then elicited details about participants' postconviction experiences beyond that individual case, specifically, the criteria that the office used to decide how to respond to postconviction evidence of innocence, and the processes involved in decision-making as cases progressed from intake to review to resolution. Additionally, prosecutors were asked to recall a case that had not culminated in exoneration, and defense attorneys were asked to share experiences working on cases in which prosecutors had not agreed to relief.

Though all attorneys could speak broadly about their practices and experiences in the postconviction stage, not all of them chose to provide details about a specific exoneration case. Some attorneys spoke in more general terms out of confidentiality concerns, out of caution about potential civil litigation involving the exonerated defendant, or because they preferred to reference a larger set of exoneration cases (for example, all those handled by the CIU). See Table 3 for case characteristics of the twenty-eight cases for which detailed information was provided.

---

<sup>120</sup> Interview guides are available from the author upon request. The defense attorney guide contains thirty-nine questions and the prosecutor guide contains forty-three. These guides are intended to be exhaustive so that they might anticipate all of the various types of cases and processes under discussion. For example, prosecutor guides include a separate set of questions for CIU prosecutors ("About how many cases has the CIU reviewed?") and also for non-CIU prosecutors ("Does your office have a procedure for investigating claims of actual innocence?"). Not every question applies to every respondent. Moreover, time constraints of some respondents precluded the opportunity to answer every question. Rather, a grounded theory style of interviewing is "open-ended yet directed, shaped yet emergent, and paced yet unrestricted." See KATHY CHARMAZ, *CONSTRUCTING GROUNDED THEORY* 85 (2d ed. 2014).

Table 3. Exoneration Cases (N = 29)

<i>Defendant Race</i>		<i>Exonerating Evidence*</i>	
White	11	DNA	12
Black	16	Non-DNA Forensic	9
Hispanic/ Other	2	New witness	3
<i>Defendant Gender</i>		Recantation	8
Male	29	Alt suspect identified	5
Female	0	Other	6
<i>Defendant Prior Criminal History</i>		<i>Postconviction Review</i>	
No	1	<i>Type</i>	
Yes	26	CIU	2
Unknown	2	CIU + Innocence Org	5
<i>Case Disposition</i>		Innocence Org	10
Plea	5	Other	12
Trial	24	<i>Geographic Region</i>	
<i>Offense</i>		Northeast	6
Murder	14	Midwest	8
Sexual Assault	9	South	11
Other	6	West	4
<i>Year Exonerated</i>		<i>Jurisdiction Size</i>	
2005 – 2009	6	Small (< 500k)	8
2010 – present	23	Medium (500k > 1 mil)	9
		Large (> 1 mi)	12

\* Will Not Total to 29

#### A. STRENGTHS AND LIMITATIONS

Existing research reflects an interest in official prosecutor-led efforts, such as CIUs, thus overlooking smaller, more episodic efforts.<sup>121</sup> The current study samples purposively according to attorney affiliation, seeking respondents working out of official exoneration shops—such as innocence organizations and CIUs—but also those responding to individual innocence claims. Gathering a range of perspectives and experiences from attorneys in different-sized jurisdictions results in a broader range of practices to assess and to generate postconviction innocence review models for other jurisdictions. The current study seeks to establish a broad understanding of

<sup>121</sup> See generally Boehm, *supra* note 80; Hollway, *supra* note 95, at 1; Kroepsch, *supra* note 94; Scheck, *Professional and Conviction Integrity Programs*, *supra* note 92; Scheck, *Conviction Integrity Units Revisited*, *supra* note 92; NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE, *supra* note 94; NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE, *supra* note 4.

the advantages and pitfalls of different processes so that practitioners might learn from their counterparts in similarly situated jurisdictions. During this time of CIU adoption and innovation, the desire to develop best practices must be moderated by the risk of pushing prosecutors' offices into the same mold. The present study seeks to recognize diversity, thus resisting "a generic portrait of prosecution."<sup>122</sup>

The study design offers three points of comparison: between prosecuting attorney respondents and defense attorney respondents, among prosecuting attorneys, and among defense attorneys. These multiple points of comparison allow for an examination of the similarities and differences in the unique types of postconviction actions, processes, and practices employed in the postconviction arena by public, private, and innocence organization attorneys and also by CIU chiefs, elected prosecutors, and line prosecutors. This study analyzes how defense attorneys describe successful postconviction collaborations compared to how prosecutors envision them. Prosecutor respondents may naturally wish to emphasize strengths and minimize shortcomings when describing their work and decision-making. Defense attorneys' responses can provide additional context. For example, defense attorneys' explanations of the hierarchical constraints that prosecutors face provided valuable insights that would not have emerged from the prosecutor interviews alone. Perhaps prosecutor respondents hesitated to question the internal policies established by their superiors. Therefore, defense attorney perspectives helped contribute a multi-dimensional view of postconviction innocence review processes. Though prosecutor and defense attorney respondents did not work together on the same exoneration case, they were able to reference the same types of processes. Defense attorneys described their perceptions from the outside looking in, while the prosecutors provided a subjective internal view. These different perspectives contributed a more balanced accounting.

The research endeavor was aided by the use of "grounded theory" methods.<sup>123</sup> The researcher applying grounded theory develops tentative "sensitizing concepts"<sup>124</sup> in advance that may be based on existing theories and scholarship, but also allows new concepts to emerge through data

---

<sup>122</sup> Ronald Wright et al., *The Many Faces of Prosecution*, 1 STAN. J. CRIM. L. & POL'Y REV. 27, 27 (2014).

<sup>123</sup> See generally CHARMAZ, *supra* note 120, at 85 (providing more information about grounded theory methods).

<sup>124</sup> HERBERT BLUMER, SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD 147 (1969).

collection.<sup>125</sup> Grounded theory requires an inductive, iterative process of simultaneous data collection and analysis “to make early stops to analyze what you find along your path.”<sup>126</sup> The grounded theory style of intensive interviewing works to provide a positive experience for the interviewee and to close the interview on a positive note.<sup>127</sup> Speaking about positive examples of the postconviction process helped put respondents at ease and encouraged open-ended responses.

The study takes a broad-brush approach to exploring a nascent area of research. These findings represent a first step in understanding prosecutors’ postconviction processes and decisions but only among those prosecutors who have already demonstrated a willingness to help overturn false convictions. It does not illuminate the decision-making, motivations, or postconviction practices of prosecutors who have never assisted with an exoneration case. Nevertheless, by initiating the inquiry with this subset of responsive prosecutors, we are then free to evaluate the efficacy of practices that might be assumed to represent the very best of prosecutors’ postconviction efforts to remedy false convictions.

However, when an exoneration escapes attention—as many surely do—the prosecution’s efforts cannot be taken into account. NRE Exoneration cases selected may vary from the larger universe of all exoneration cases in non-random ways. The NRE compiles cases when either 1) new exonerations appear in the news and are publicized by legal advocacy groups, or 2) low-profile exoneration cases that have not been publicized are discovered by NRE researchers through internet media research, legal research, or outreach to public officials. Jurisdictions do not maintain systematic records of exonerations. For this reason, the dataset may over-represent those cases from jurisdictions that better publicize exonerations, as well as those capturing the attention of the media and of innocence organizations.<sup>128</sup> Exonerations represent a small sample of false conviction

---

<sup>125</sup> See generally BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967) (developing grounded theory methods of qualitative data collection and analysis).

<sup>126</sup> CHARMAZ, *supra* note 120, at 1 (describing how grounded theory methods incorporate initial coding and focused coding of the qualitative data).

<sup>127</sup> See *id.* at 70.

<sup>128</sup> See Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 761 (2017) (“With no practical way to identify exonerations from official records, most of the ones we know about are those that get substantial attention in the media and on the internet. That’s unlikely to happen if the participants are not interested in attention or actively seek to avoid it. For many exonerations, avoiding attention may be a goal of all of the professional participants in the case: police, prosecutors, judges, and defense attorneys.”).

cases, and the NRE does not discover every exoneration. Nevertheless, it represents the most comprehensive and reliable source of exoneration data presently available.

The low response rate among prosecutors requires further explanation as well. While a handful of respondents were known to me through professional contacts, most were recruited “cold,” resulting in a response rate of 86% for defense attorneys (nineteen of twenty-two contacted) and 50% (twenty of forty contacted) for prosecutors.<sup>129</sup> The low response rate for prosecutors may illustrate a selection bias. These results cannot be generalized to all prosecutors, or even all prosecutors assisting with exoneration claims. Instead, findings represent that subset of prosecutors who not only have assisted, but were also willing to talk about their postconviction processes at length. They might, therefore, be more receptive to innocence claims than the average prosecutor. They may also be more experienced or at least enjoy enough “vertical autonomy”<sup>130</sup> to agree to an interview without requiring their supervisors’ permission. Of the twenty prosecuting attorney respondents interviewed, eleven were assistant district attorneys who made recommendations about a case for their superiors to decide, four were veterans reporting directly to the elected district attorneys, and five described experiences as the elected district attorneys.

The need to obtain the approval of supervisors may have prevented some prosecutors from participating in the study. Some who suggested interest explained that they would need to clear it with their boss first or “run it up the chain.” Communication often ceased after that. None of the defense attorney respondents—whether innocence organization attorneys, public defenders, or private attorneys—mentioned needing to check with their boss first.<sup>131</sup> Therefore, line prosecutors at the lowest levels of the office hierarchy are underrepresented in this study. Insights about line prosecutors’

---

<sup>129</sup> Low response rate for prosecutors is not inconsistent with previous studies. See Ramsey & Frank, *supra* note 17, at 448 (reporting a 47% response rate for prosecutors responding to a survey that asked for estimates of the false conviction error rate); Marvin Zalman et al., *Officials’ Estimates of the Incidence of ‘Actual Innocence’ Convictions*, 25 JUST. Q. 72, 82 (2008) (reporting 28% response rate among Michigan prosecutors and a 47% response rate among Ohio prosecutors).

<sup>130</sup> Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1147 (2013) (“By vertical autonomy, we mean the degree of independence each prosecutor feels from his boss (or supervisor) when it comes to making decisions on his own cases.”).

<sup>131</sup> A few of these defense attorney respondents were known to me through professional relationships forged in my former position at the Innocence Project. Nevertheless, like prosecutor respondents, the majority were recruited without any previous contact or referral.

postconviction role in innocence review was supplemented by the many defense attorney respondents who had worked with these prosecutors.

### III. FINDINGS

In reporting the findings, I follow the route that an innocence claim takes through the prosecutor's office, highlighting a series of salient decisions: 1) which individual, or which unit, will be tasked with reviewing postconviction innocence claims; 2) how cases will be screened and evaluated upon arrival; and 3) how outcome decisions will be made (e.g. whether the case will be dismissed, the innocence claim denied, or some other form of relief will be granted). I take each in sequential order and describe how several levels of discretion shape these decisions.

#### A. SELECTING THE PROSECUTOR TASKED WITH INNOCENCE REVIEW

Whether a district attorney is responding to a single wrongful conviction claim or proactively interested in reviewing a set of claims, her first step will be to decide who should be tasked with the review. Will the district attorney seek to create a CIU, or direct innocence claims to an existing appellate division, the original trial prosecutor, or someone else? Such decisions necessarily involve the district attorney's vision for how the review process should be conducted. With the exception of those jurisdictions that have publicly announced creation of a CIU, little is known about how prosecutors' offices receive innocence claims.<sup>132</sup>

Among the prosecutor respondents, some believed that innocence claims should be reviewed in the appellate division, while others argued that they should be distinguished as a separate type of claim entirely.<sup>133</sup> The prosecutors represented here have all already demonstrated a willingness to remedy false convictions; therefore, we might reasonably expect postconviction processes in these offices to be more successful at identifying errors than those in the typical prosecutor's office. Most prosecutor respondents reported that innocence claims in their office were routed either

---

<sup>132</sup> See Green & Yaroshefsky, *supra* note 2, at 494 ("Little information is publicly available about how prosecutors' offices respond, because little, if any, of their internal processes is exposed to public view.").

<sup>133</sup> To protect respondents' confidentiality, all interviewees have been assigned a number and will be designated by this number in direct quotes. When prosecutors are referenced, but not quoted, the citation omits interviewee numbers in the interests of confidentiality.

to CIUs (N=10)<sup>134</sup> or to appeals divisions (N=4).<sup>135</sup> CIU attorneys, and the defense attorneys who worked with them, regularly contrasted the CIU approach with the appeals approach. While these two structures dominated, prosecutors working outside of either CIU or appeals revealed a variety of alternative approaches. Among the six remaining prosecutors' offices (those who did not follow either CIUs or appellate divisions to review innocence claims), two routed innocence claims to the original trial prosecutor, two to a veteran member of the executive team, and in two offices they went directly to the district attorney.<sup>136</sup>

### *1. Conviction Integrity Units*

The nine prosecutors working in CIUs offered a variety of explanations for why the district attorney had established their CIUs: a desire for “good community juju”<sup>137</sup> (or fostering community goodwill), to keep pace with a neighboring jurisdiction, in response to a high-profile exoneration, in response to new legislation,<sup>138</sup> or in response to an increase in actual innocence claims from the defense bar. The development of the CIU, therefore, adapted to a shifting legal landscape, marked by new expectations of prosecutors from the public, legislators, and defense attorneys. CIUs are a recent phenomenon, only emerging in the last fifteen years,<sup>139</sup> due to their novelty, chief prosecutors, or the CIU attorneys they appointed, described processes of establishing the CIU shape and structure. Nearly every CIU

---

<sup>134</sup> Some CIUs did not handle innocence claims exclusively but also routinely reviewed traditional appellate claims. For the purposes of categorization, if the office had established a CIU, it is counted as such, even if CIU attorneys also handled appeals or if their innocence review work was only part-time.

<sup>135</sup> Because some interviews were conducted with upper management who spoke about innocence claims as handled by a staff attorney, these numbers will not always correspond with the type of attorney interviewed. Rather, district attorneys and members of the executive team reported on standard office practices.

<sup>136</sup> Defense attorney respondents shared a wide variety of experiences working with CIUs, appeals, original trial prosecutors, supervising trial prosecutors, and elected district attorneys.

<sup>137</sup> Interview with Prosecutor 6 (confidential unpublished interview) (on file with author).

<sup>138</sup> For example, a district attorney may wish to create a conviction integrity unit in response to the passage of a postconviction new evidence statute in their state, which could facilitate defendants' ability to file postconviction legal challenges, thus increasing the volume of innocence claims.

<sup>139</sup> NEWKIRK CTR. FOR SCI. & SOC'Y, U. CAL. IRVINE, *supra* note 4, at fig. 1, (reporting “Number of Conviction Integrity Units in Operation by Year”). This figure charts the first CIU in 2003, with a steady incline beginning in 2009.



attorney described an adjustment period in establishing protocols.<sup>140</sup> One referred to her CIU as a “work in progress.”<sup>141</sup>

About half of the defense attorney respondents could share experiences working directly with a CIU (or even multiple CIUs) or in collaboration with prosecutors just prior to the establishment of the CIU. Three defense attorneys who had ongoing relationships with a CIU observed the same work-in-progress element of its evolution, or as one innocence organization attorney put it, “they have significant growing pains.”<sup>142</sup> Two others believed that the creation of the CIU had not changed much about how the office conducted postconviction business, either because the office conducted legitimate innocence review already (“I can’t believe there’s that much difference, they’re just calling it ‘integrity’”<sup>143</sup>), or because they believed that the unit was a CRINO. A few defense attorney respondents called out the hypocrisy of offices that they believed had created a CRINO for political purposes (“It’s not real. It doesn’t exist, they just say they have it.”)<sup>144</sup> Nevertheless, most defense attorneys acknowledged a qualitative difference in the CIU approach, or at least, a genuine attempt to approach innocence claims differently. For example, one public defense attorney offered qualified praise: “Here, within a relatively short period of time . . . there were actual innocent people getting out. As much as we say we’d like more to have been done, no other district attorney’s office in the state would have done what they did.”<sup>145</sup>

As reflected in this defense attorney’s statement, some respondents cited exonerations as proof of a CIU’s success. At the same time, as we will see, the distinction between CIU review and more traditional postconviction review was often spoken about more in terms of mindset than of process or outcome. In particular, CIU prosecutors and defense attorney respondents distinguished the CIU approach from the appeals approach.

---

<sup>140</sup> I describe any respondent prosecutor working in a CIU as a “CIU attorney” or “CIU prosecutor.” However, in practice, some of these prosecutors balanced a mixed caseload including more traditional appeals as well.

<sup>141</sup> Interview with Prosecutor 33 (confidential unpublished interview) (on file with author).

<sup>142</sup> Interview with Defense Attorney 36 (confidential unpublished interview) (on file with author).

<sup>143</sup> Interview with Defense Attorney 2 (confidential unpublished interview) (on file with author).

<sup>144</sup> Interview with Defense Attorney 7 (confidential unpublished interview) (on file with author).

<sup>145</sup> Interview with Defense Attorney 12 (confidential unpublished interview) (on file with author).

## 2. *Appellate Divisions*

Half of the prosecutor respondents did not have a CIU in their office, though their offices may have been large enough to accommodate such a unit. Two of the prosecutors expressed doubts that their office needed any large-scale conviction review because of its strong history<sup>146</sup> or reputation.<sup>147</sup> Two others believed resources were better allocated towards the front end, preventing false convictions.<sup>148</sup> The four prosecutors working in offices where appellate divisions handled their innocence claims believed that appeals served that function already and that establishing a CIU would merely duplicate existing efforts.<sup>149</sup>

Attorneys in different jurisdictions referred to the division as “appeals,” “postconviction review,” “PCR,” “habeas,” or “writs.” CIU prosecutors and defense attorneys regularly characterized the work of appellate prosecutors to be at cross purposes with innocence review. The exact terms of the inter-office relationship between CIU prosecutors and appellate prosecutors emerged as a theme in interviews with these respondents. For example, when I asked a CIU attorney to imagine the appeals division in her office playing a larger role in innocence review, she said, “It’s a great idea. Is it a realistic idea? Maybe at some point in the future, but I don’t think we’re going to get there for a long time. Appellate prosecutors are trained so differently . . . It’s almost like this huge cognitive bias.” She added:

People talk in terms of appellate lawyers go in with a presumption that the conviction is valid. They don’t go in with a presumption, they go in with absolute confidence . . . . They see a conviction, and there’s not going to be, “Oh, this person may not be guilty.” They’re going to say: “This person is guilty.”<sup>150</sup>

---

<sup>146</sup> Interview with Prosecutor 17 (“I think that’s a decision that the elected DAs have to make when they look at their office and what their history is, and whether it is needed. I don’t know if it is needed everywhere, but . . . if the public for some reason is having some issues with decisions by the elected DA and her assistants, then maybe it’s a good idea to have someone give a little oversight. I don’t think it is necessarily required.”) (confidential unpublished interview) (on file with author).

<sup>147</sup> Interview with Prosecutor 34 (“That’s part of our job. I don’t need a conviction integrity unit to do that. I think our record speaks for itself.”) (confidential unpublished interview) (on file with author).

<sup>148</sup> *E.g.*, Interview with Prosecutor 19 (“I think we’ve come in on the front end, we have things in place to prevent that from happening[.]”) (confidential unpublished interview) (on file with author); Interview with Prosecutor 20 (“I think the more fertile ground is not conviction review units but prosecution integrity units. That is to make sure that we are going forward against the right person.”) (confidential unpublished interview) (on file with author).

<sup>149</sup> Appeals can also be handled externally by the Attorney General’s office. Among respondents, three stated that at least some appellate claims were handled externally.

<sup>150</sup> Interview with Prosecutor 5 (confidential unpublished interview) (on file with author).

This CIU attorney suggests that prosecutors accustomed to appellate review approach postconviction innocence review with a fundamentally different mindset. Rather than consider the innocence claim on its merits, they identify procedural reasons (or “procedural landmines” as they were described by one innocence organization attorney)<sup>151</sup> to justify rejecting it.<sup>152</sup>

As for the suggestion that individual appellate prosecutors experience cognitive bias, an appellate prosecutor responded to this suggestion:

At the end of the day I have the same interest as anybody else does. I don't want the wrong person in jail, nor do I want the actual killer out on the street. So, I mean, I care about my cases and I care about what goes on with them . . . . And at some point, you have more knowledge of the case than a traditional person. Some of my cases...I've been involved for over ten years. I mean, you can't replace that. But, of course, by the same token, somebody could say, “Oh, you looked at it for ten years, you're jaded by that.” And I would disagree only knowing who I am. I'm not built that way.<sup>153</sup>

While this prosecutor asserts his own impartiality, he simultaneously raises the source of his potential bias. Having already reviewed previous versions of the defendant's appeal, he has “more knowledge,” but his knowledge stems from having rejected the appeal in the past.

Other CIU prosecutors spoke not of cognitive biases, but rather of rigid adherence to the adversarial nature of appellate procedure. From this perspective, appellate prosecutors' myopic behavior could be characterized without value judgment. One described the attitude of the appeals division in her office as “How can I make this claim go away? How can I defeat this claim? How can I stand by the conviction?”<sup>154</sup> Another explained: “You don't have a [CIU] actually just kind of being an appellate unit or habeas unit. They need to be distinct to look at different things a little bit more

---

<sup>151</sup> Interview with Defense Attorney 1 (confidential unpublished interview) (on file with author).

<sup>152</sup> For example, arguing that the evidence of innocence could have been discoverable at the time of trial. An innocence organization attorney explained: “When we're talking about new evidence of innocence that wasn't considered previously, there's a lot of emphasis on, ‘Well, it's new, but couldn't you have found this earlier?’ That kind of thing . . . . The only reason it wouldn't have been brought out earlier is because you had a bad attorney. Otherwise somebody would have brought it out, or else it wasn't find-able, one or the other. Either way, why should the person continue sitting in prison if either of those two happened?” Interview with Defense Attorney 4 (confidential unpublished interview) (on file with author); *see also* Brooks et al., *supra* note 31, at 1050 (providing more on how this appellate strategy fails innocent defendants).

<sup>153</sup> Interview with Prosecutor 21 (confidential unpublished interview) (on file with author).

<sup>154</sup> Interview with Prosecutor 6 (confidential unpublished interview) (on file with author).

holistically.”<sup>155</sup> A third CIU prosecutor pointed to appellate deadlines, raising the possibility that appellate prosecutors may not have time to “look at different things a little bit more holistically.” She explained:

In some ways, I think it would be nice to be able to transition to an environment where Post-Conviction was cognizant of a lot of the same things that CIU does and had the ability to look at something a little harder. But they’ve got timetables and deadlines . . . we have more time to work on them.<sup>156</sup>

Several defense attorney respondents also acknowledged the daily realities of the appeals division in a prosecutor’s office. For example, an innocence organization attorney said of appellate prosecutors, “They get thousands of postconviction petitions by prisoners. Most of them are frivolous. They’re trying to find procedural ways to make them go away. That’s the main thing that they do.”<sup>157</sup>

Furthermore, several prosecutor respondents characterized appeals as an undesirable assignment. One appellate prosecutor said, “I try to explain to my friends what I really do. It’s like ‘so you do what? You’re looking at what? These are old cases? Who cares about these things?’”<sup>158</sup> Another confessed, “I was actually hired under the no-whining clause. I had to agree to do appeals without whining for two years—without wanting to do trial work.”<sup>159</sup> This common preference for trial work was substantiated when I asked a prosecutor who works in trials whether he had ever worked in appeals, and he responded, “No, thank goodness.”<sup>160</sup>

Such comments suggest that appellate prosecutors’ work is not regarded in the office as exciting or rewarding. Rather, appellate prosecutors are professionally socialized to “defeat the claim” and make it “go away.”<sup>161</sup> From this perspective, their rejection of innocence claims is less about psychological bias and more about meeting the demands of the appellate structure and schedule and responding to the expectations of their superiors.

---

<sup>155</sup> Interview with Prosecutor 26 (confidential unpublished interview) (on file with author).

<sup>156</sup> Interview with Prosecutor 37 (confidential unpublished interview) (on file with author).

<sup>157</sup> Interview with Defense Attorney 4 (confidential unpublished interview) (on file with author).

<sup>158</sup> Interview with Prosecutor 21 (confidential unpublished interview) (on file with author).

<sup>159</sup> Interview with Prosecutor 32 (confidential unpublished interview) (on file with author).

<sup>160</sup> Interview with Prosecutor 22 (confidential unpublished interview) (on file with author).

<sup>161</sup> See *supra* note 135 and accompanying discussion.

If the goal of the appellate unit is to find legal arguments to undermine the appeal and maintain the conviction, then the CIU stands in direct contrast. The stated goal of the CIU is to identify and correct false convictions.<sup>162</sup> While CIU and defense attorneys accepted that these two units should serve separate functions, the case review processes that they described revealed complications in implementing this separation. Such complications included difficulty transitioning cases between units and difficulty establishing the hierarchy of leadership between appeals and CIU.

First, CIU prosecutors and defense attorney respondents spoke about the challenges of negotiating workflow between CIU and appellate divisions. When CIUs are first established, certain categories of postconviction innocence claims may be rerouted from appellate units to the new CIU. In some offices, the CIU is developed as an extension of the appellate division. Two CIU prosecutors said that they continued to handle other types of postconviction claims, such as habeas petitions. The main distinction is that traditional postconviction claims would be processed through the courts, whereas a CIU would also regularly handle claims out of court by working directly with defendants and their counsel. A defense attorney respondent reported that the CIU attorneys in her jurisdiction brought their appellate caseload with them when they transferred to the CIU. (CIU teams, including the chief prosecutor of the unit, were often culled from appellate divisions.) Respondents also described the opposite scenario, in which the appellate unit had retained some types of postconviction innocence claims even after the implementation of the CIU. For defense attorneys, such seemingly bureaucratic decisions could portend the outcome of a claim. As an innocence organization attorney lamented, “I have a case that went to the appeals unit, and they’re opposing us. Whereas if it had gone to the new [CIU], we would have a much better chance and opportunity.”<sup>163</sup> This inability to redirect her client’s case to the newly established CIU ultimately led her to conclude that she would have to continue to pursue the appeal, and then submit it to the CIU if it failed in litigation.

Difficulty transitioning cases between units endured after the CIU implementation as well. In large jurisdictions with fully staffed CIUs, postconviction claims were maintained on a separate track. CIU prosecutors spoke of sending rejected innocence claims to the postconviction section but rarely of having received claims from postconviction. Advocating for a separation between the two units, prosecutors expressed concern for

---

<sup>162</sup> See *supra* note 5.

<sup>163</sup> Interview with Defense Attorney 3 (confidential unpublished interview) (on file with author).

duplicating each other's work. Two CIU prosecutors explained that they would not, as a matter of office policy, consider claims that were simultaneously under review on appeal. For example:

We have a requirement that if your case is currently on appeal or currently in habeas, that we won't look at it because you're essentially splitting your office by having some people looking at it with the possibility of vacating a conviction while you have other people looking at it to uphold a conviction.<sup>164</sup>

Meanwhile, the second CIU prosecutor voiced concern about this policy because "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."<sup>165</sup> These responses suggest that how and when a claim arrives in the office might influence a prosecutor's response as much as the actual merit of the claim. In the words of one public defense attorney, "Unless it gets in their little [CIU] they're still fighting tooth and nail to save those convictions."<sup>166</sup> Innocence organization attorneys and others who regularly litigate postconviction claims might strategize exactly where in the prosecutor's office they want their case to land; yet pro se defendants filing behind bars are much less likely to be able to predict the best course.

Secondly, leadership hierarchies between the CIU and the appeals unit may undermine the independence of the CIU. According to one innocence organization respondent, a "structural problem" arises when the CIU chief reports to the same person who supervises the appeals division. This defense attorney reported that the chain of command ultimately resulted in appellate division review of innocence claims, regardless of CIU involvement. As she described it, "If we just sat down at a table, I'm pretty confident we could do good work. [The CIU is] part of an institution, and there's such institutional resistance."<sup>167</sup> The institutional resistance manifests in the executive decision about how to staff and supervise the CIU, which, in turn, influences the decision about the outcome of the claim.

### 3. *Other Approaches*

The size of the jurisdiction mattered in the prosecutors' handling of innocence claims but did not appear to dictate the approach. Prosecutors from small jurisdictions (population 500,000 or less), and medium

---

<sup>164</sup> Interview with Prosecutor 26 (confidential unpublished interview) (on file with author).

<sup>165</sup> Interview with Prosecutor 6 (confidential unpublished interview) (on file with author).

<sup>166</sup> Interview with Defense Attorney 12 (confidential unpublished interview) (on file with author).

<sup>167</sup> Interview with Defense Attorney 36 (confidential unpublished interview) (on file with author).

jurisdictions (population between 500,000 and one million) generally lacked the resources or the caseload to staff a full-time CIU<sup>168</sup> or even a separate appellate division. Instead, these respondents reported that postconviction innocence claims were either reviewed by the original trial prosecutor involved in the false conviction, a supervising trial attorney, or the elected district attorney. In short, a variety of approaches were applied that demonstrated considerable ingenuity in structuring postconviction innocence review. Clear guidelines had been established in some of these jurisdictions, while others' responses to innocence claims were developed in response to a specific case and applied episodically. Regardless of the approach, the office's handling of innocence claims clearly reflected the decision-making and management style of the elected prosecutor.

In the two smallest jurisdictions, the elected district attorney chose to personally review innocence claims. As one of these elected prosecutors, a former defense attorney, explained, "I'm the one assigning my work, and to be honest, the cases intrigue me."<sup>169</sup> More commonly, district attorney respondents reported reviewing innocence claims on an ad hoc basis. For example, one expressed an open-door policy for defense attorneys on postconviction claims, saying, "If there is a defense attorney that felt our appellate team wasn't giving them the due diligence they should get, they can always bring it to a supervisor or my attention, too."<sup>170</sup>

Similarly, several defense attorneys described taking claims directly to the elected or to upper management—but only in the most extraordinary circumstances with the most meritorious cases. For example, one public defense attorney had a personal connection to the district attorney and was able to approach him informally. In another such example, the private defense attorney who submitted the case used to work at the prosecutor's office. He explained:

Again, having worked in the district attorney's office it is based upon almost a military chain of command. The prosecutors, the trial lawyers are lieutenants. And there are division chiefs, which are captains. Then there are majors who are over things. Then the District Attorney is like go and see the general or the president . . . . When you get

---

<sup>168</sup> Three of the ten CIU prosecutor respondents worked in medium-sized jurisdictions, but these units did not handle wrongful conviction claims exclusively with full-time CIU attorneys.

<sup>169</sup> Interview with Prosecutor 20 (confidential unpublished interview) (on file with author).

<sup>170</sup> Interview with Prosecutor 34 (confidential unpublished interview) (on file with author).

a case like [defendant]'s . . . you want to go to the top and talk with the top people about it.<sup>171</sup>

Still, this straight-to-the-top strategy may backfire depending on the elected prosecutor's own involvement with the original conviction.

Indeed, two prosecuting attorney respondents reported that, in their office, innocence claims would be directed to the prosecutor who handled the underlying conviction. In the face of a lack of data about how postconviction innocence claims are directed, some scholars have speculated that they might typically go to the trial attorney involved in the false conviction.<sup>172</sup> Therefore, the practice could be more widespread than the two offices in this sample would suggest. Indeed, five defense attorney respondents related experiences in which the trial prosecutor had been tasked with responding to a claim of innocence. A few of the cases resulted in exoneration but only after being removed from the trial prosecutors' review. Several additional defense attorneys encountered the trial prosecutor in other contexts, for example, at meetings in the district attorney's office. This public defense attorney raises one of the challenges of working with the original trial prosecutor on an innocence claim:

The original trial prosecutor, who didn't turn over the Brady material, who made arguments that were not supported by the evidence, was the one who was tasked to respond. Now that's number one bad practice . . . . You really should not be having the trial prosecutor who worked on the case be the one who responds in the collateral proceeding.<sup>173</sup>

This respondent highlights the potential conflict of interest inherent to assigning trial prosecutors to review their own cases. Prosecutorial misconduct that does not appear on the trial record—such as concealing exculpatory evidence—is considered new evidence to be submitted during postconviction.<sup>174</sup> One third of the prosecutor and defense attorney

---

<sup>171</sup> Interview with Defense Attorney 28 (confidential unpublished interview) (on file with author).

<sup>172</sup> *E.g.*, MEDWED, *supra* note 7, at 128 (writing that many small prosecutors' offices may assign postconviction petitions to the lawyer that handled the trial); Green & Yaroshefsky, *supra* note 2, at 494 (suggesting that prosecutors' offices ordinarily refer new evidence of innocence to the trial prosecutor).

<sup>173</sup> Interview with Defense Attorney 25 (confidential unpublished interview) (on file with author).

<sup>174</sup> *See* King, *supra* note 34, at 258 (explaining how direct appeal does not review claims like ineffective assistance of counsel or the state's failure to disclose exculpatory evidence, both of which are common contributors of wrongful conviction).



respondents described handling postconviction innocence claims involving *Brady* allegations.<sup>175</sup>

In one medium-sized jurisdiction, the responsibility for reviewing innocence claims had recently been reassigned from the original trial prosecutor to a supervising trial prosecutor. As the supervising trial prosecutor explained, “If I did something wrong the first time, to ask me to take a look at it and see if I did anything wrong, I’m probably going to say, ‘Well no.’ Because I’m making the same mistake I made the first time.”<sup>176</sup>

For this prosecutor, innocence review also functioned as a tool for evaluating the work product of the line prosecutors under him. His direct communication with the elected district attorney provided him with decision-making autonomy, and his status as the most experienced prosecutor in the office had prepared him to take on the responsibility. In addition, he handled all postconviction innocence review claims, including those filed directly by prisoners as well as those submitted by defense attorneys.

Another supervising trial prosecutor described a similar approach in his office but stipulated that he only reviewed claims received from innocence organizations. In this system, the supervising trial prosecutor acts more as innocence organization liaison than reviewer of innocence claims. Such processes appeared to be initiated in response to a particular case rather than guidelines developed as part of a systematic effort to identify false convictions. In these processes, the supervising trial prosecutor became involved only after the claim had been vetted by an outside entity.

Similarly, two innocence organization respondents reported that elected prosecutors had appointed a special prosecutor to handle innocence claims “with fresh eyes” on a case-by-case basis.<sup>177</sup> One of the case reviews was assigned to a team of two prosecutors, one from the trial division and one from the appellate division. In the other case, a supervising trial prosecutor conducted the investigation. Both defense attorneys described appreciating the refreshing emphasis on factual, rather than procedural, issues:

---

<sup>175</sup> A private defense attorney estimated that about 80% of his postconviction case load included a *Brady* allegation. He explained the prosecutors’ response: “If a *Brady* violation occurred, it has to be dealt with. You can’t just sweep it under the rug. I think it does put [prosecutors] in an almost immediate defensive mode because they’re sitting there thinking, okay, a *Brady* case. We’re going to have to start gathering the troops now.” Interview with Defense Attorney 2 (confidential unpublished interview) (on file with author).

<sup>176</sup> Interview with Prosecutor 19 (confidential unpublished interview) (on file with author).

<sup>177</sup> Interview with Defense Attorney 8 (confidential unpublished interview) (on file with author).

They actually were charged with independently reviewing whether this was a valid conviction and really focused on the evidence. He wanted to know, do you think that [the defendant] did it or not?<sup>178</sup>

Let me say, it's very similar to what conviction integrity units do, right? Because... the conviction integrity units, they're not worried as much about whether there are claims of ineffective assistance of counsel. They're saying like, what are our facts? Do the facts portray a potential mistake here?<sup>179</sup>

Therefore, even in jurisdictions that lacked the resources (or the caseload) to devote to a standing CIU, prosecutors were able to achieve objective postconviction innocence review processes. Nevertheless, such processes must be distinguished from CIUs by their episodic nature. Although the actual investigation and case review may resemble the processes implemented by CIU—and in fact, innocence review investigations predate the creation of the first CIU<sup>180</sup>—they may not share the same systematized approach or public transparency of a good faith CIU. A district attorney's decision to initiate such an investigation would still be highly discretionary.

One district attorney respondent from a medium-sized jurisdiction described how he had attempted to create postconviction innocence review practices that would be both systematized and unbiased. His solution involved soliciting feedback from volunteer, external legal professionals on all cases under consideration for innocence review by his office. His comments highlight the obstacles to achieving impartiality in many jurisdictions. As he explained:

I see some concerns in terms of the bias issue because in my office, there's [a small number of] attorneys. Everybody knows each other, respects each other. We function like a big family here, which is all good. The downside to that is if I'm called upon to review a case from somebody that I know personally, I'm going into that review biased. It's a natural thing. It's hard to get around that in over probably 90% of prosecutor's offices in the country.<sup>181</sup>

---

<sup>178</sup> *Id.*

<sup>179</sup> Interview with Defense Attorney 1 (confidential unpublished interview) (on file with author).

<sup>180</sup> See Medwed, *supra* note 1, at 126 (describing the proactive assistance of the St. Paul, Minnesota, District Attorney Susan Gaertner in a 2002 DNA exoneration. He writes, "for the first time, a local district attorney's office had initiated the process that led to the exoneration rather than members of the defense team."); see also Chandler, *supra* note 91, at 14 (citing an even earlier effort out of San Diego County when a Deputy District Attorney and DNA expert there sent letters to "hundreds of convicted persons, offering to test the DNA evidence in their disposed cases").

<sup>181</sup> Interview with Prosecutor 35 (confidential unpublished interview) (on file with the author).

This respondent was unique for addressing his own potential for bias in postconviction case review so directly. His previous experience litigating appeals as a defense attorney may have contributed to this perspective.

In summary, both prosecutors and defense attorney respondents underscored the salience of the decision about who should conduct postconviction innocence review.<sup>182</sup> The size of the jurisdiction influenced the options available but did not predict the decision.<sup>183</sup> Most prosecutors from large jurisdictions reported having implemented CIUs or handling innocence claims through their appellate divisions. Prosecutor respondents from small and medium-sized jurisdictions described a wider variety of approaches, though these approaches were more likely developed in response to a specific innocence claim (or set of claims) rather than established as protocols to follow as systematically.<sup>184</sup> Among the approaches overall, some acknowledged the potential for bias more than others.<sup>185</sup> Prosecutors in large jurisdictions described the risk for cognitive bias among appellate prosecutors or an appellate mindset reflective of professional socialization and the constraints of the postconviction appeals process.<sup>186</sup> Reconciling the relationship between innocence review and the traditional appellate postconviction process emerged as a primary point of differentiation between processes.<sup>187</sup> Some jurisdictions sought to establish a strict separation between the two types of review but found the separation difficult to maintain in practice.<sup>188</sup> In small and medium jurisdictions, where small staffs produced greater familiarity among prosecutors, bias was described more in terms of a personal conflict of interest.<sup>189</sup> At the same time, elected prosecutors had developed a variety of creative solutions to establish objective review: appointing special prosecutors to review cases on an ad hoc basis, tasking supervisory trial prosecutors with innocence review, and seeking feedback from external reviewers.<sup>190</sup>

Respondents described how the route chosen for postconviction innocence claims shaped the handling of the claim—chiefly, CIUs as compared to appellate divisions, and appellate divisions as compared to

---

<sup>182</sup> See *supra* Section III.A.

<sup>183</sup> See *supra* Section III.A.3.

<sup>184</sup> See *supra* Section III.A.3.

<sup>185</sup> See *supra* Section III.A.

<sup>186</sup> See *supra* Section III.A.2.

<sup>187</sup> See *supra* Section III.A.2.

<sup>188</sup> See *supra* Section III.A.2.

<sup>189</sup> See *supra* Section III.A.3.

<sup>190</sup> See *supra* Section III.A.3.

district attorney or supervising trial attorney review.<sup>191</sup> Therefore, before a claim even arrives in the office, important decisions influencing its success or failure have already been made by the elected prosecutor and the executive team.<sup>192</sup> Once processes have been established, individual prosecutors then decide whether or not to pursue any given claim.<sup>193</sup>

## B. SCREENING DECISIONS

While executive decisions clearly determined which prosecutor would be tasked with reviewing innocence claims, individual “worker” prosecutors had more discretionary power to determine screening decisions, such as whether an innocence claim would be pursued for investigation and review. Still, even these individual decisions were shaped by the expectations of the executive team and the constraints imposed by the postconviction appeals system. The estimated number of postconviction innocence claims that prosecutors received varied from one office to the next and, indeed, was seldom tracked. The difficulty in keeping track—particularly for those offices lacking a CIU—arose partially from the ambiguity about what was meant by “post-conviction innocence claim.” Prosecutors’ in these offices often defined an innocence claim as one that had transcended the postconviction haystack—having been received by an innocence organization, for example. Therefore, a *pro se*, postconviction motion claiming innocence would not uniformly be considered an innocence claim.

Prosecutors reported innocence claims as deriving from a wide variety of sources: prisoners and parolees, family members and other advocates, defense attorneys, judges, other prosecutors, and reporters. Four of the prosecutor respondents also described reviewing cases for forensic error or police misconduct in the wake of some discovery of wrongdoing. According to prosecutor respondents, however, the majority of innocence claims took the form of *pro se* appeals or a letter sent directly from a prisoner or prisoner’s family member. The shorthand for this type of intake, “jail mail,”<sup>194</sup> reveals the potential stigma attributed to the return address. Since defendants in the postconviction stages are not entitled to defense counsel in most states,<sup>195</sup> a large volume of *pro se* claims is inevitable. Moreover, it stands to reason that such claims will have increased along with the increasing length of custodial

---

<sup>191</sup> See *supra* Section III.A.

<sup>192</sup> See *supra* Section III.A.

<sup>193</sup> See *infra* Section III.B.

<sup>194</sup> Interview with Prosecutor 6 (confidential unpublished interview) (on file with author).

<sup>195</sup> See Findley, *supra* note 40, at 605.

sentences; prisoners may now be more likely to reach the postconviction stage while still behind bars.<sup>196</sup>

Only the CIU prosecutors described the processes involved in actually responding to every claim. They provided examples of the types of claims that could be quickly screened out, such as requests for assistance with a conviction outside the jurisdiction and requests for a sentence reduction rather than an innocence investigation. All CIU prosecutors received requests like these that fell outside the purview of the unit. Some CIU prosecutors also described limiting case selection in various ways, such as by imposing the following requirements: that cases must have gone to trial; that cases must involve serious, violent felonies; that defendants must still be in custody; that defendants must have defense counsel; and that cases must have a forensic hook. Claims not meeting these eligibility criteria could be screened out. All other requests for assistance, “jail mail” or otherwise, would receive some type of response, usually a request for more information or a recommendation that the defendant secure counsel. Rather than provide estimates of the total number of postconviction innocence claims received, CIU prosecutors in smaller jurisdictions offered the total number of cases that had been reviewed since the CIU’s implementation (these ranged from four<sup>197</sup> to “less than 30 or 40”<sup>198</sup>). CIU prosecutors in larger jurisdictions offered the number currently being reviewed (these ranged from forty-four<sup>199</sup> to 200<sup>200</sup>). However, not all prosecutors were able to provide these numbers.

CIU attorneys’ descriptions of intake processes in large jurisdictions revealed the logistical challenges of pursuing pro se claims. Despite the large number of requests from prisoners claiming innocence, respondents reported that few followed up after their initial inquiry. When pro se claimants did respond, the process was still inevitably delayed due to the lagged

---

<sup>196</sup> As one public defense attorney explained: “With the stiffening of the sentences both at the federal levels and the 1986 sentencing commission and the big uptick in the federal sentences and similarly in the states. Now the sentences were getting much longer all the way across the board. So the number of cases went way up . . . So everybody was really scrambling just to keep up with those two surges[.]” Interview with Defense Attorney 30 (confidential unpublished interview) (on file with author).

<sup>197</sup> Interview with Prosecutor 29 (confidential unpublished interview) (on file with author).

<sup>198</sup> Interview with Prosecutor 35 (confidential unpublished interview) (on file with author).

<sup>199</sup> Interview with Prosecutor 24 (confidential unpublished interview) (on file with author).

<sup>200</sup> Interview with Prosecutor 27 (confidential unpublished interview) (on file with author).

communication. In theory, all claims were treated fairly; in practice, some claims could be handled more readily than others.

Several CIU prosecutors in large jurisdictions receiving a high volume of postconviction innocence claims spoke of a triage system<sup>201</sup> in which defense attorney claims took priority: “Part of me when I first started is like, ‘I’m going to look at every single case and I’m going to give everyone the same kind of consideration.’ You really can’t do that just because the resources aren’t available, and you have to learn how to triage the cases.” She added:

I still think it’s kind of unfair that just because someone has an attorney that maybe their cases jump to the front of the line. We used to do things as they came in, but then we had to triage things more because we had so much coming in, we have to look at the ones . . . where we might be doing something on the case, giving relief.<sup>202</sup>

As this CIU prosecutor explained, time spent on meritless claims came at the cost of delaying review for those actually innocent people waiting to have their claims considered. Put simply, “if you get too bogged down in every case, you’re never going to find the ones that matter.”<sup>203</sup> Such statements suggest the CIU prosecutors’ willingness to identify false convictions, even if they are not able to provide the same level of review to every claim.

In contrast, some non-CIU prosecutors openly expressed skepticism about pro se innocence claims: “Unfortunately, everyone claims they didn’t do it;”<sup>204</sup> “The vast majority of these claims are filed pro se by defendants, and they have absolutely no merit to them, and you can tell that they’ve traded some cigarettes to somebody for a form that they’ve filled in the blanks on;”<sup>205</sup> “When I say merit, I mean it’s not a laughably ridiculous position.”<sup>206</sup>

---

<sup>201</sup> The practice of prioritizing certain cases over others, or triaging, has been a subject of legal research on public defenders in earlier stages of criminal justice system processing. See generally L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 *YALE L.J.* 2626 (2013) (presenting a framework for public defender triage that seeks to minimize implicit bias).

<sup>202</sup> Interview with Prosecutor 27 (confidential unpublished interview) (on file with author).

<sup>203</sup> Interview with Prosecutor 37 (confidential unpublished interview) (on file with author).

<sup>204</sup> Interview with Prosecutor 21 (confidential unpublished interview) (on file with author).

<sup>205</sup> Interview with Prosecutor 19 (confidential unpublished interview) (on file with author).

<sup>206</sup> Interview with Prosecutor 32 (confidential unpublished interview) (on file with author).

Compare the challenges and frustrations that prosecutors described with pro se claims to the relative ease they experienced when receiving cases from trusted defense attorneys. These defense attorneys had already vetted the case, they could anticipate questions and challenges, and they could present the legal arguments in a cogent, skilled manner. Prosecutors could readily meet with defense attorneys, share information, and learn about the status of the case through qualified counsel proficient in legal negotiations. Eleven respondents (both defense attorneys and prosecutors) said that the defense had presented their cases to prosecutors in person. Most often, the defense team came to the prosecutors' offices to pitch the cases rather than hosting the prosecutors. At this pitch meeting, defense could identify credible potential errors in the conviction; they could share results of their initial reinvestigation; and they could answer prosecutors' questions on the spot. Such opportunities are simply not available to defendants and their family members. The distinction is made clear in this private defense attorney's description of his presentation to prosecutors:

Prosecutors are going to think that every defendant is going to profess and claim his innocence over and over again. If it were just based upon [the defendant] coming back and saying, "yeah, I didn't do this and somebody else did it." But again, this was a lot of detective work. When you lay all this out to them, showed them the pictures . . . and laid this out in a cognitive, organized, objective analysis, they came pretty quickly to the conclusion that this needed to be undone.<sup>207</sup>

The private defense attorney in this case was well known to the prosecution through his previous professional experience as a prosecutor. In fact, the defendant had previously filed a pro se postconviction motion, but these appeals had failed. Without the means to afford a private defense attorney, the defendant likely would not have prevailed, and the error would have never been discovered.

The limitations of postconviction processes for actually innocent defendants led one CIU prosecutor to describe the work of CIUs as a "last resort."<sup>208</sup> She explained:

If all else fails, you've got the [CIU]. That's really where I see us going at this point is that we are really a last resort option. Because if you think about it, if you follow a postconviction, that's adversarial. We're there to defend our conviction. It's adversarial by nature. Not everything can be resolved outside of the courtroom. However, let's say that the information or the evidence that you have doesn't fit squarely in that postconviction arena, as in maybe you've already had your postconviction. Maybe your

---

<sup>207</sup> Interview with Defense Attorney 28 (confidential unpublished interview) (on file with author).

<sup>208</sup> Interview with Prosecutor 33 (confidential unpublished interview) (on file with author).

attorney, while their performance wasn't something that was super star worthy, you're not entitled to the best defense possible.<sup>209</sup>

By the time this CIU learned about the case through innocence organization attorneys, the defendant had exhausted his appeals. His postconviction petition had been denied. To its credit, the CIU devoted an extraordinary amount of attention to this case. However, by then, many years had passed since the defendant's false conviction and failed appeals. If innocence claims are those that do not "fit squarely in that postconviction arena,"<sup>210</sup> then every stage prior to innocence review will initiate an adversarial response. Thus, CIU review is established in opposition to traditional postconviction review. The danger here is that prosecutors engaged in CIU review may reflexively perceive procedural claims—such as ineffective assistance of counsel—as falling into the appellate/postconviction/habeas pool rather than the actual innocence pool. Defendants can, of course, be factually innocent *and also* have suffered from procedural flaws at trial.

Prosecutor respondents rarely mentioned the time or procedural hassles involved for defendants. However, two non-CIU veteran prosecutors acknowledged that defendants they helped exonerate had been writing to their office for years prior to any substantial consideration. One said, "[he] had been writing to me for, oh my god, 20 years. 'I'm innocent. I'm innocent,' all this stuff . . . anyway, I took the case."<sup>211</sup> Another described the defendant as "a fairly active pro se litigant . . . I actually recognized his name just because he filed lots of papers."<sup>212</sup> In both instances, falsely convicted defendants spent years trying to prevail upon the prosecutors' office before their claim was reviewed. A less persistent defendant, especially one who had been released in the intervening years, might have been overlooked entirely. These three prosecutor respondents suggest that the persistence of the defendant, as demonstrated through his failure to receive consideration on appeal, had become a de facto requirement for review.

Still, a few prosecutors, both CIU and non-CIU, related efforts that they had taken on behalf of pro se claimants that had fizzled out.<sup>213</sup> A few others

---

<sup>209</sup> Interview with Prosecutor 33 (confidential unpublished interview) (on file with author).

<sup>210</sup> See *supra* note 173.

<sup>211</sup> Interview with Prosecutor 17 (confidential unpublished interview) (on file with author).

<sup>212</sup> Interview with Prosecutor 9 (confidential unpublished interview) (on file with author).

<sup>213</sup> For example, a prisoner asked CIU Prosecutor 29 to interview a witness that he claimed would substantiate his claim of innocence. Instead, the witness admitted that the prisoner had



independently helped exonerate pro se defendants. A closer look at these three exoneration cases, however, reveals that each provided an external incentive to assist, which may have allowed the claim to supersede the usual reluctance to engage pro se claimants. For example, in one of the cases, the district attorney happened to be engaged in the prosecution of the actual perpetrator of the crime when he received the innocent prisoner's letter. The claimant's description of the evidence led him to realize that the case may have been connected to the one that he was currently prosecuting. In another case, the defendant's innocence claims had already been reported in the media, generating popular support for the defendant. In the third case, a credible victim—who had no previous relationship to the defendant—regretted her testimony and recanted her statements.

In summary, the context of the appellate structure, specifically, the lack of representation for postconviction claimants leading to a profusion of pro se claims, appeared to shape prosecutors' case selection decisions.<sup>214</sup> Further, prosecutors tended to direct their role obligation towards those claimants who had already exhausted alternative options.<sup>215</sup> Although CIU prosecutors demonstrated a greater sense of responsibility in responding to requests, all prosecutor respondents expressed the strong preference to work with trusted defense attorneys or innocence organization attorneys and described the challenges of working with pro se claimants as nearly insurmountable.<sup>216</sup>

### C. DETERMINING THE OUTCOME

In contrast to the rapid decision-making of earlier stages—for example, charging and plea bargaining—individual “worker” prosecutors are not empowered to determine the outcome of an innocence review or innocence investigation. As one appellate prosecutor respondent explained, “Letting somebody out of prison is not something a line prosecutor has the power to do.”<sup>217</sup> An innocence organization respondent described the “line prosecutor” position:

Not a supervisor, not the elected person, but someone who's on the front lines doing the cases. When you look at a legal brief, usually if you see a bunch of names on it,

---

asked him to fabricate the story to get his mother off his back. Interview with Prosecutor 29 (confidential unpublished interview) (on file with author).

<sup>214</sup> See *supra* Section III.B.

<sup>215</sup> See *supra* Section III.B.

<sup>216</sup> See *supra* Section III.B.

<sup>217</sup> Interview with Prosecutor 32 (confidential unpublished interview) (on file with author).

the top person is the highest in the office hierarchy, the bottom person is the one who actually did the work, that's usually the line attorney.<sup>218</sup>

In the context of the postconviction arena, even a CIU chief may lack discretion.

Defense attorney respondents often characterized the limited discretion as a hindrance that caused delays in case resolution and complicated communication with the district attorneys' office. As the following quotes demonstrate, some defense attorneys regretted having to gain the approval of upper management whom they believed to be less likely to agree to relief:

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 . . . They're not going to tank the prosecution because then they'll get fired.<sup>219</sup>

He may actually see the merits in the cases, but he's constantly trying to figure out how he's going to defend his action of "letting somebody go"—is the way they see it—to his higher ups.<sup>220</sup>

The associate DAs that you're going to deal with are very fearful of the elected DA and they don't want to cross them . . . Their job is at the whim of the elected DA whether they're going to keep their job or not.<sup>221</sup>

To summarize the three, line prosecutors may want to "do the right thing" by "letting somebody go" but their job security depends on the elected DA's "whims." These defense attorneys believed that job insecurity and a desire to satisfy the boss drove the prosecutors' responses rather than their genuine impressions about the merits of the innocence claim.

A public defense attorney conveyed similar sentiments. In this case, he suspected that the challenges he experienced communicating with the CIU prosecutor may have been a reflection of the inconsistent messages she received from higher ups:

She's like, 'I still got to talk to my supervisors, but I don't think anything is gonna happen.' I'm like, 'okay fine.' So, then the next call I get from her is much more positive . . . It was basically like which higher up she spoke to that day. You know,

---

<sup>218</sup> Interview with Defense Attorney 4 (confidential unpublished interview) (on file with author).

<sup>219</sup> Interview with Defense Attorney 12 (confidential unpublished interview) (on file with author).

<sup>220</sup> Interview with Defense Attorney 36 (confidential unpublished interview) (on file with author).

<sup>221</sup> Interview with Defense Attorney 2 (confidential unpublished interview) (on file with author).

maybe one higher up was in favor of [reinvestigating the case] and one higher up wasn't. I don't know, but she went back and forth. It was really crazy.<sup>222</sup>

Defense attorneys often expressed frustration with the need to relay communication through the line prosecutor, and the delays that this caused in resolving the case. Some wished that they could go above the line prosecutors and communicate directly with the executive team. For example, one private defense attorney explained, "In this business, you just have to recognize that you're dealing with a person who has no authority to make a decision, and there's nothing to be gained by trying to get mad at them or put them in a spot."<sup>223</sup>

While this attorney suggests the need for collegiality when dealing with line prosecutors, he also acknowledges the tendency to "get mad" when "dealing with a person who has no authority to make a decision."<sup>224</sup>

Prosecutor respondents accepted that the final decision would be left to the district attorney. Supervising, senior trial prosecutors tasked with innocence review voiced a greater sense of vertical autonomy than did CIU prosecutors or appellate prosecutors. As one stated, "I acknowledge that I work for someone else, but he gives me an awful lot of authority and discretion."<sup>225</sup> CIU prosecutor respondents explained that after leading the reinvestigation or case review, they would make a recommendation about the best course of action.<sup>226</sup> According to this CIU attorney, "These decisions concerning exoneration are always a big deal. And they usually are going to involve multiple points of view. We've had internal disagreements in cases . . . and ultimately the DA will then make the decision of what he or she wants to do."<sup>227</sup>

CIU prosecutors, like this one, reported making outcome decisions with a team of attorneys. Typically, this took the form of an extended meeting (or even series of meetings) involving a group of attorneys selected and

---

<sup>222</sup> Interview with Defense Attorney 25 (confidential unpublished interview) (on file with author).

<sup>223</sup> Interview with Defense Attorney 31 (confidential unpublished interview) (on file with author).

<sup>224</sup> Interview with Defense Attorney 31 (confidential unpublished interview) (on file with author).

<sup>225</sup> Interview with Prosecutor 19 (confidential unpublished interview) (on file with author).

<sup>226</sup> Hollway, *supra* note 95, at 24 (Each of the nineteen offices in this study of CIUs reported that their elected district attorney made the final decision in felony cases. "[A]ll 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.") (emphasis added).

<sup>227</sup> Interview with Prosecutor 16 (confidential unpublished interview) (on file with author).

assembled by the district attorney. Respondents described meetings involving the CIU attorney, deputy attorneys, appellate attorneys, the trial prosecutor, and even the defense attorney.<sup>228</sup> This meeting, termed “DEFCON 5”<sup>229</sup> by one CIU attorney,<sup>230</sup> culminated in a decision about whether or not the prosecution would agree to dismiss the defendant’s conviction or grant some other form of relief. “Internal disagreements” can be explored through DEFCON 5. In the following description of the process, the CIU prosecutor reported that the district attorney had assembled the entire CIU, the executive staff, a team member specializing in policy, and a team member specializing in ethics:

The district attorney is going to want all the facts. She’s going to have questions. Let’s say it’s an investigation I ran. I’ll be sitting there just answering questions, giving my opinion and obviously my recommendation. We don’t always agree . . . . These discussions are very beneficial . . . . It’s a lot of thinking. It’s a lot of caring. I don’t think anyone realizes how much of that is done.<sup>231</sup>

For this CIU prosecutor, the critical analysis of the evidence and the recommendation—under the strong leadership of the district attorney—helped ensure full deliberation in the final decision.

However, other CIU prosecutors and defense attorney respondents described how disagreements over cases could lead to office discord. These prosecutors feared that their recommendations for relief would not survive the dissent within the ranks. One innocence organization attorney who had attended a DEFCON 5 meeting described how the decision was resolved in spite of the trial prosecutor’s objection. The prosecutor who had originally tried the case “was very adamant that she had not gotten the wrong guy.”<sup>232</sup> Likewise, two CIU prosecutors reported that the trial prosecutor was always invited to weigh in at the final decision meeting. Others reported that attorneys from the appellate division would be invited to attend. Therefore, team meetings may put the CIU attorney in the position of justifying her recommendation to dismiss the conviction to colleagues who have a stake in upholding the conviction. For example, one CIU prosecutor spent months

---

<sup>228</sup> Two defense attorney respondents described attending a meeting at which an outcome decision was expected to be made. Interviews with Defense Attorney 3, 25 (confidential unpublished interviews) (on file with author).

<sup>229</sup> DEFCON 5 refers to “DEFense readiness CONdition,” a system employed in the military to determine levels of alertness.

<sup>230</sup> Interview with Prosecutor 27 (confidential unpublished interview) (on file with author).

<sup>231</sup> Interview with Prosecutor 27 (confidential unpublished interview) (on file with author).

<sup>232</sup> Interview with Defense Attorney 3 (confidential unpublished interview) (on file with author).

investigating an innocence claim (for which her office invested considerable resources) only to have the appellate division attorneys nearly succeed in undermining her recommendation that the defendant be exonerated.<sup>233</sup>

In all but four of the jurisdictions,<sup>234</sup> the prosecutor and members of the executive team made the final decision about the outcome of a postconviction innocence claim, while line prosecutors conducted the case review and the reinvestigation. In every CIU case decision described here, multiple attorneys—some with countervailing interests—were consulted in the final decision. Therefore, these prosecutors who were consulted for the final review also had the potential to influence the final outcome. Relatedly, the limited decision-making power among line prosecutors—including CIU attorneys—frustrated some defense attorneys who communicated mainly with these line prosecutors, and not with the final decision-makers. Some defense attorneys attributed the opacity of prosecutors' decision-making processes to these hierarchical dynamics.

#### IV. DISCUSSION

This study examines postconviction innocence review practices among a sample of prosecutors' offices where false convictions have been successfully identified and remedied. It has explored how multiple levels of decision-making—from the courts and lawmakers, to district attorneys and their executive teams, to individual line prosecutors—guide salient decisions such as who will be tasked with innocence review,<sup>235</sup> how cases will be screened,<sup>236</sup> and how outcomes will be determined.<sup>237</sup> In light of the difficulty discovering criminal justice system accidents as compared to other high-risk fields,<sup>238</sup> and compounded by the failings of judicial review for factually innocent defendants,<sup>239</sup> prosecutorial ability to identify error takes on special significance. The ability of the individual prosecutor—the worker—to identify such errors can best be understood within the context of workplace practices and organizational principles.<sup>240</sup>

The study draws from a sample of both CIU and non-CIU attorneys, therefore enabling comparisons between CIU processes and non-CIU

---

<sup>233</sup> Interview with Prosecutor 5 (confidential unpublished interview) (on file with author).

<sup>234</sup> Exceptions lie in the two jurisdictions where district attorneys conducted their own reinvestigations and the two jurisdictions where supervising trial prosecutors did so.

<sup>235</sup> See *supra* Section III.A.

<sup>236</sup> See *supra* Section III.B.

<sup>237</sup> See *supra* Section III.C.

<sup>238</sup> See *supra* Section I.

<sup>239</sup> See *supra* Section I.A.

<sup>240</sup> See *supra* Section I.

processes. While CIU offers a more systematized approach through case screening and the ability to handle large-scale case reviews, small and medium-sized jurisdictions accomplished objective innocence review on a case-by-case basis.<sup>241</sup> Both CIU and non-CIU processes reflected the influence of the appellate process as manifested in the challenges of separation between innocence review and appellate review,<sup>242</sup> the risk of appellate attorney bias,<sup>243</sup> and the disadvantage to pro se defendants.<sup>244</sup> The appellate structure influenced how prosecutors perceived their role obligations towards postconviction innocence claims.<sup>245</sup> The profusion of pro se claims and the belated consideration of new evidence shaped a preference for cases handled by innocence organizations and other trusted defense attorneys in both types of offices. In sum, prosecutors' postconviction efforts overall did not appear likely to benefit pro se defendants or to identify false convictions that had not already been identified by capable defense and/or adopted by journalists.<sup>246</sup> Prosecutors conducting innocence claim reviews, or establishing structures for others to conduct such reviews, do so in the context of a system that emphasizes procedural errors over factual ones and that allows for a narrow and belated discovery of false convictions.<sup>247</sup> Although every one of the prosecutors' offices described here contributed to an exoneration, some workplace organizational structures seemed to enable more sustainable and unbiased innocence review than others.<sup>248</sup>

Some offices appeared to rely upon the postconviction model, even when conducting innocence review.<sup>249</sup> Selecting the original trial prosecutor to review her own case mirrors the process for judicial review.<sup>250</sup> Despite the potential for bias, appellate practice has normalized this course by directing postconviction claims to the trial judge.<sup>251</sup> Such actors may be subject to cognitive bias such as hindsight and outcome bias<sup>252</sup>—having believed in the defendant's guilt once, they are more likely to view the outcome of his

---

<sup>241</sup> See *supra* Section III.A–III.B.

<sup>242</sup> See *supra* Section III.A–III.B.

<sup>243</sup> See *supra* Section III.A–III.B.

<sup>244</sup> See *supra* Section III.B.

<sup>245</sup> See *supra* Section III.

<sup>246</sup> See *supra* Section III. Or, less often, through other advocates of the defendant such as prosecutors, judges, or reporters.

<sup>247</sup> See *supra* Section I.A–I.B.

<sup>248</sup> See *supra* Section III.

<sup>249</sup> See *supra* Section III.A.3.

<sup>250</sup> See *supra* Section III.A.

<sup>251</sup> See *supra* note 45 and accompanying discussion.

<sup>252</sup> See Findley & Scott, *supra* note 22, at 319–20.

conviction as correct.<sup>253</sup> They may also be presented with conflicts of interest in the form of *Brady* allegations or other types of prosecutorial misconduct in which the trial prosecutor reviewing the claim would have a vested interest in denying the allegation and upholding the conviction.<sup>254</sup> When trial prosecutors do not conduct the case review, but are nonetheless consulted about a potential false conviction case,<sup>255</sup> these same conflicts may also arise.

CIU prosecutors and defense attorney respondents also suggested that the appellate prosecutor can be limited in their outlook through their professional focus on procedural errors and biased through their personal familiarity with individual appellants.<sup>256</sup> Rather than being empowered with a sense of their role obligation as a safeguard against false convictions, a righter-of-wrongs, or a “minister of justice,”<sup>257</sup> appellate prosecutors are assumed to adopt an adversarial posture.<sup>258</sup> Respondents’ statements suggest that appellate prosecutors fail to identify factual errors because their professional socialization discourages objective case review.<sup>259</sup>

For their part, CIU attorneys argue that they serve a distinct function that is not met through traditional postconviction review.<sup>260</sup> Indeed, recommendations for CIU best practices suggests maintaining separation from the appeals division.<sup>261</sup> However, the challenges of implementing this separation in practice became apparent through respondents’ remarks.<sup>262</sup> Office structure and hierarchy, supervision of the CIU, and interoffice case flow each served to threaten the independence and efficacy of the CIU.<sup>263</sup>

Therefore, despite respondents’ misgivings, it may be worthwhile to consider the possible benefits of involving appellate attorneys in

---

<sup>253</sup> See *supra* Section I.C.

<sup>254</sup> See Swisher, *supra* note 1, at 188 (“The serious conflict is between justice and the prosecutor’s personal interest. The prosecutor has an interest, however subconscious or shortsighted, in not attacking her previous work product.”); INNOCENCE PROJECT, *supra* note 100 (recommending that cases involving prosecutorial misconduct be redirected to an independent agency for review. “Cases involving substantial, non-conclusory allegations of prosecutorial misconduct involving prior or former members of the office should be referred to an independent authority for investigation and review. This referral should include both the allegations of misconduct as well as the claims of innocence and constitutional violations.”).

<sup>255</sup> See *supra* Section III.A.

<sup>256</sup> See *supra* Section III.A.

<sup>257</sup> See MODEL RULES OF PROF. CONDUCT, *supra* note 3 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”)

<sup>258</sup> See *supra* Section III.A.

<sup>259</sup> See *supra* Section III.A.

<sup>260</sup> See *supra* Section III.A.

<sup>261</sup> See Hollway, *supra* note 95, at 23–24.

<sup>262</sup> See *supra* Section III.A.

<sup>263</sup> See *supra* Section III.A.

postconviction innocence review. Could improved communication between postconviction units and CIUs facilitate discovery of potential false convictions under the right circumstances? Appellate prosecutors might have an advantage through their knowledge of the relevant case law and their experience with the judicial review process. They may more readily identify common, underlying problems across petitions, including bad actors or bad procedures. They may recognize persistent defendants who steadfastly maintain innocence. They may signal problem cases sooner, under direct appeal, reducing the delay between false conviction and exoneration.

For inexperienced prosecutors, appeals could provide an opportunity to learn about courtroom dynamics before arguing cases in court.<sup>264</sup> If such prosecutors are rewarded for objectively considering the merits of postconviction claims, rather than encouraged to consistently assume an adversarial response, they may serve the important function of flagging cases for innocence review.<sup>265</sup> A rigidly hierarchical structure may, in fact, stifle the discovery of errors if subordinates are afraid to come forward.<sup>266</sup> In small jurisdictions lacking an appellate division, line prosecutors could be encouraged to bring false conviction claims to the attention of their superiors, whether these were received through “jail mail” or originated from innocence organizations.

#### A. REFORMS FOR PROSECUTORS’ OFFICES

Chief prosecutors bear the responsibility for the final outcome decision in a postconviction innocence reinvestigation. Since few chief prosecutors are able to spearhead reinvestigations personally, they must delegate responsibility to staff attorneys who have no stake in the final outcome and, ideally, no prior experience with the claims either in the appellate or trial context. In CIU offices, appellate prosecutors could help identify potential false convictions and file for extension if more time is needed to pursue the

---

<sup>264</sup> The career path of respondent prosecutors varied considerably, however, three of them reported that their initial placement in the district attorney’s office had been in an appellate division.

<sup>265</sup> See Levenson, *supra* note 52, at 550 (“[I]t is important to examine what we are trying to accomplish by postconviction review. If it is just a continuation of the adversarial process of trial, it may be less likely to uncover mistakes that tainted the original proceedings. However, if it is a collaborative effort between defense lawyers and prosecutors, it has the potential to expose failures in the criminal justice system.”).

<sup>266</sup> For example, aviation industry practices of “crew resource management” empowers subordinates to bring issues to their supervisor when they discover something amiss. See Bob Barrett, #1354: “*The Aviation-Medicine Connection*”, *THE BEST OF OUR KNOWLEDGE* (Sept. 1, 2016), <http://wamc.org/post/1354-aviation-medicine-connection> [<https://perma.cc/9Q2F-KUHM>].



claim out of court. This arrangement need not require appellate prosecutors to be further involved in the case review. In non-CIU offices, postconviction innocence review could be assigned to a supervising trial prosecutor—provided that she did not secure the original conviction and so long as she did not default to reviewing only those claims pre-vetted by innocence organizations.<sup>267</sup>

Therefore, in both CIU and non-CIU offices, appellate and other line prosecutors reviewing postconviction claims could be trained to recognize correlates of false conviction. These correlates may vary by jurisdiction and need not be limited to the canonical list offered by innocence organizations (eyewitness misidentification, false confessions, forensic error, etc.).<sup>268</sup> Rather, jurisdictional variation may produce patterns such as misuse of specific informants, reliance on outdated forensic disciplines, testimony of discredited police officers, and more.<sup>269</sup> Prosecutor-initiated internal case audits have exonerated dozens of wrongfully convicted men and women following exposure of police misconduct.<sup>270</sup> Local prosecutors' offices are well positioned to identify problematic actors, conduct internal reviews, and create “no call” lists so that discredited officers and analysts will not be asked to testify.<sup>271</sup> Prosecutors' heightened attention to these potential errors on a systematic, ongoing basis makes excellent use of the prosecutorial function as a safeguard.

First, prosecutors should recognize the possibility of a meritorious pro se claim, not just those claims receiving the extraordinary advocacy of

---

<sup>267</sup> See Webster, *supra* note 69, at 340 (finding a positive correlation between innocence organization involvement and prosecutor's assistance in exoneration).

<sup>268</sup> See Samuel Gross, *Convicting the Innocent*, 4 ANN. REV. L. & L. & SOC. SCI. 173, 186–87 (2008) (referring to the “canonical list of factors that lead to false convictions” and adding “they are not factors that we can use to identify, or predict, or prevent false convictions, and it's not clear how much they contribute to the processes that produce these miscarriages of justice.”).

<sup>269</sup> See Scheck, *Conviction Integrity Units Revisited*, *supra* note 92, 721–26 (discussing how prosecutors have conducted internal reviews, e.g. the Brooklyn conviction review unit's review of police misconduct and the Houston conviction review unit review of backlogged cases from the forensic drug lab).

<sup>270</sup> See for example Cook County, Chicago, where the Foxx administration has overturned sixty-three convictions to date related to the misconduct of a corrupt officer. See Christine Hauser, ‘A Stain on the City’: 63 People's Convictions Tossed in Chicago Police Scandal, N.Y. TIMES, Feb. 13, 2019, <https://www.nytimes.com/2019/02/13/us/chicago-exonerations-drug-sentences.html> [<https://perma.cc/5Y9D-8BH6>].

<sup>271</sup> See generally Rachel Lippmann, *Gardner Blocks 28 St. Louis Police Officers from Bringing Cases to Court*, ST. LOUIS PUBLIC RADIO (Aug. 30, 2018), <https://news.stlpublicradio.org/post/gardner-blocks-28-st-louis-police-officers-bringing-cases-court#stream/0> [<https://perma.cc/WJ4U-6RW5>].

innocence organizations and other specialized postconviction attorneys. While it may be true that most postconviction pro se claims will lack merit, it is also true that many exonerated defendants have filed such claims and failed, in spite of their innocence.<sup>272</sup> Prosecutors screening postconviction claims might be trained in the objective triage practices recommended for public defenders by Richardson and Goff.<sup>273</sup> These practices include avoiding preconceptions about the possibility of factual innocence, creating checklists to use when evaluating cases, and collecting data about their own decision-making.<sup>274</sup> Given the heavy volume of cases that each attorney receives, written guidelines about how to screen and how to track decisions may help prevent bias and promote more purposeful, consistent decision-making.<sup>275</sup>

Boehm suggests that prosecutors take up the triage approach by handling claims from those with the most serious offenses or the longest sentences first.<sup>276</sup> By prioritizing claims from innocence organizations and postconviction defense attorneys, however, this is not quite what prosecutors are doing. Although innocence organizations themselves tend to prioritize serious convictions with lengthy sentences, not every case with this urgent level of need will be accepted by the innocence organization. Some states do not have a resident innocence organization,<sup>277</sup> and the one that they do have may barely be able to keep up with the demand. Some innocence organizations only accept certain types of cases, for example, those with the possibility of exculpatory postconviction DNA testing.<sup>278</sup> Although some

---

<sup>272</sup> See GARRETT, *supra* note 41, at 196 (studying the subset of the first 250 DNA exonerations in which written judicial opinions could be located—165 cases. Of these 165 cases, 43% of defendants filed postconviction petitions and 21% filed federal habeas petitions).

<sup>273</sup> Richardson & Goff, *supra* note 201, at 2644–45 (recommending establishing objective triage standards and maintaining accountability by tracking data about cases).

<sup>274</sup> See *id.* at 2641–48.

<sup>275</sup> See *id.*

<sup>276</sup> Boehm, *supra* note 80, at 663.

<sup>277</sup> See MAP OF INNOCENCE NETWORK MEMBER ORGANIZATIONS, <https://innocencenet.org/members/#map> [<https://perma.cc/FDR5-Z4EU>] (showing Innocence Network member directory map for states with an Innocence Network member organization). The Innocence Network is an international affiliation of innocence organizations. As of this writing, states without members appear to include North Dakota, South Dakota, Iowa, Nebraska, Kansas, Nevada, South Carolina, Tennessee, Alabama, Arkansas, Delaware, Maine, Vermont, New Hampshire, and Rhode Island.

<sup>278</sup> See, e.g., INNOCENCE PROJECT, SUBMIT A CASE, <https://www.innocenceproject.org/submit-case/> [<https://perma.cc/M77B-YLYY>] (providing a list of restrictions on case acceptance, including: “The Innocence Project does NOT review claims where DNA testing cannot prove innocence.”).

prosecutor respondents asserted that their state innocence organizations could be relied upon exclusively, such conditions are sure to be regional and conditional upon funding. Some innocence organizations struggle to make ends meet through grants and private donations.<sup>279</sup> Innocence organizations cannot always be depended upon as a fail-safe for innocent defendants in most states,<sup>280</sup> and private attorney fees are out of reach for most defendants.<sup>281</sup>

Whatever practices prosecutors' offices employ, internal and external transparency is critical. A wide range of variables such as jurisdiction size,<sup>282</sup> existing state remedies for postconviction innocence review,<sup>283</sup> role of the Attorney General,<sup>284</sup> budgetary constraints,<sup>285</sup> presence of local innocence organization(s),<sup>286</sup> and more, will necessarily produce a heterogeneity of

---

<sup>279</sup> See MEDWED, *supra* note 7, at 136 (“The very survival of an innocence project may depend on luck, on the goodwill of a smattering of donors and law school deans.”).

<sup>280</sup> See *supra* notes 277, 279.

<sup>281</sup> One of the five private defense attorneys interviewed approached the topic of private attorney fees for postconviction clients, saying, “One thing I found out from wading into this [postconviction] work is that it’s extremely time consuming if you’re trying to do it as a solo practitioner. When I first got into this, the minimum fee I kept getting quoted is \$25,000. I thought, I can do it for less than that but really, that would be foolhardy. Of course, most people in these situations don’t have \$25,000. I told a lot of people to call the [LOCAL INNOCENCE ORGANIZATION] or here and there. They get full up, you know, they can’t take anymore.” Interview with Defense Attorney 2 (confidential unpublished interview) (on file with author).

<sup>282</sup> For example, smaller jurisdictions may not have the resources or the caseload to justify creating a CIU. Holloway, *supra* note 95, at 21 (“It should be noted, though, that many smaller state or local prosecutors’ offices may lack the resources to separately staff a CRU.”).

<sup>283</sup> For an overview of the variation in state remedies, see Brooks et al., *supra* note 31, at 1078 (recognizing states such as California, Connecticut, Illinois, New Mexico and New York which “have explicitly recognized the right to a freestanding claim of actual innocence” and noting that still other states treat postconviction newly discovered evidence claims as synonymous to actual innocence claims); Leventhal, *supra* note 31, at 1477 (discussing the states that recognize “freestanding claims of actual innocence,” and the limitations of these measures, including Illinois, New Mexico, and Maryland).

<sup>284</sup> In some states the Attorney General’s office may conduct most postconviction review or initiate wrongful conviction case review processes. See COLO. DEP’T OF LAW, ATTORNEY GENERAL ANNOUNCES COLORADO’S RECEIPT OF \$1.2 MILLION IN FEDERAL FUNDS TO START A DNA-BASED EXONERATION PROGRAM, <https://www.denverda.org/wp-content/uploads/news-release/2009/Justice-Review-Project.pdf> [<https://perma.cc/U7UU-3PAV>].

<sup>285</sup> In response to budgetary constraints, some jurisdictions may apply for federal grant funds to support a CIU. See BUREAU OF JUST. ASSISTANCE, UPHOLDING THE RULE OF LAW AND PREVENTING WRONGFUL CONVICTIONS PROGRAM FY 2019 COMPETITIVE GRANT ANNOUNCEMENT, <https://www.bja.gov/funding/URLPWC19.pdf> [<https://perma.cc/XNX7-FCML>].

<sup>286</sup> See generally MAP OF INNOCENCE NETWORK MEMBER ORGANIZATIONS, *supra* note 277 and accompanying text.

approaches. Therefore, it is to be expected that postconviction innocence review practices will vary across states and even within states. When chief prosecutors clearly communicate these practices internally, they can provide line prosecutors conducting postconviction case review with a greater sense of discretion and facilitate collaboration with defense attorneys. By clearly communicating policies externally, they assist defense attorneys and pro se defendants in strategizing about how to proceed with their claims. This will conserve prosecutors' resources and assist state lawmakers in identifying potential gaps in postconviction innocence review that could be filled through a state innocence commission, statewide appellate office, or other mechanism. CIUs will experience growing pains through trial and error as they implement systematic innocence review practices.<sup>287</sup> Transparency, even throughout these periods of trial and error, may ultimately result in more sustainable solutions.

#### B. REFORMS FOR THE POSTCONVICTION APPEALS PROCESS

Without commensurate reforms to the postconviction appeals process, the individual efforts of prosecutors to correct false convictions are unlikely to improve outcomes for postconviction claimants who cannot find representation among innocence organizations or afford private counsel, and they will almost certainly fail to shorten time to exoneration. In some states, structural reforms to the appellate process are long overdue.<sup>288</sup> The findings reported here suggest that prosecutors rarely review innocence claims until the defendant has already exhausted every other option.<sup>289</sup> This inefficiency taxes the appellate system as much as it harms the falsely convicted. In order to "narrow the error correction gap," Nancy King recommends allowing defendants to file a postconviction motion before completing the direct appeal.<sup>290</sup> Some states already do this;<sup>291</sup> others have created a loophole for

---

<sup>287</sup> See *supra* Section III.A.

<sup>288</sup> See generally Findley, *supra* note 40, at 592 (exploring reforms to the appellate process that will address failings "to protect against wrongful convictions"); Hartung, *supra* note 57, at 252 (arguing for the need for retrospective policy change directed towards postconviction procedure); Leventhal, *supra* note 31, at 1486 (arguing that "a freestanding claim of actual innocence on constitutional grounds would overcome the procedural hurdles to postconviction relief"); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (proposing that appellate attorneys be able to file claims of ineffectiveness on direct appeal in certain circumstances).

<sup>289</sup> See *supra* Section III.B.

<sup>290</sup> King, *supra* note 34, at 267 (suggesting "steps to narrow the error correction gap").

<sup>291</sup> See Findley, *supra* note 40, at 611 (comparing Wisconsin's postconviction system with those in other states. Petitioners often tried to raise postconviction issues on direct appeal, taxing the system. "The advantage of Wisconsin's process from an innocence protection

defendants to file ineffective assistance of counsel claims sooner.<sup>292</sup> Such remedies are necessary to ensure that defendants can raise postconviction innocence claims in a timely manner and before they are deprived of the assistance of defense counsel.

State legislatures may also establish or strengthen new evidence statutes for defendants to file “freestanding” actual innocence claims based on new evidence. In the past two decades, postconviction DNA statutes have been adopted in every state,<sup>293</sup> and some of these statutes include a provision for appointing defense counsel.<sup>294</sup> The options for falsely convicted defendants who lack DNA evidence are much more limited.<sup>295</sup> Legislative and court remedies recognizing non-DNA-based new evidence of innocence provide prosecutors with the legal mechanism to dismiss false convictions as well as the institutional support to do so.

Defendants may introduce new evidence in a new trial motion, but most states impose a statute of limitations ranging from a month to three years, and as short as ten days from the entry of judgment.<sup>296</sup> In many states, after the filing deadline for the new trial motion has passed, defendants cannot present facts outside the court record until the postconviction stage, when they will not be provided with counsel. In contrast, New York and New Jersey allow inmates to challenge their conviction based on newly discovered evidence at any time.<sup>297</sup> Other states might follow suit and eliminate this arbitrary statute of limitations. New evidence, such as the confession of an

---

perspective is that it provides a mechanism for introducing new evidence of innocence, and new facts underlying claims of innocence-related error, into the direct appeal process.”).

<sup>292</sup> See Primus, *supra* note 288, at 710 (summarizing and suggesting improvements upon existing state structures for ineffective assistance of counsel claims).

<sup>293</sup> See ACCESS TO POST-CONVICTION DNA TESTING, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/access-post-conviction-dna-testing/> [<https://perma.cc/2GAJ-9X6E>] (“Today every state has enacted a post-conviction DNA statute because the traditional appeals process was often insufficient for proving a wrongful conviction.”).

<sup>294</sup> See, e.g., TEX. CODE CRIM. PROC. ANN. ART. 64.01 (West 2017) <https://www.innocenceproject.org/wp-content/uploads/2016/05/TX-CRIM-PRO-Art.-64.01-et-seq.-TX-pc-dna-a-md.-2015.pdf> [<https://perma.cc/676S-G7FU>] (“A convicted person is entitled to counsel during a proceeding under this chapter. The convicting court shall appoint counsel for the convicted person if the person informs the court that the person wishes to submit a motion under this chapter, the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent.”).

<sup>295</sup> See Medwed, *supra* note 38, at 658 (“Without a doubt, non-DNA cases are difficult for defendants to overturn through state court proceedings given the subjectivity involved in assessing most forms of new evidence and the absence of a method to prove innocence to a scientific certainty.”).

<sup>296</sup> See Brooks et al., *supra* note 31, at 1071.

<sup>297</sup> See *id.* at 1074.

alternate suspect, evidence concealed by police or prosecutors, or even a new forensic discovery, may emerge at any time.

### CONCLUSION

The postconviction stage, though often overlooked, serves a critical function in criminal justice system processing as the final safeguard before false convictions escape correction.

Prosecutors' discretion empowers them to discover and dismiss false convictions amidst a dearth of available options. Prosecutors' offices that have successfully facilitated an exoneration can serve as a model for other jurisdictions of various sizes, caseloads, and resources. However, appellate rules and workplace hierarchies can influence and constrain prosecutors' postconviction efficacy. Both CIU and non-CIU offices faced challenges in implementing objective postconviction review procedures. Therefore, prosecutors' efforts should still be supported through legal and legislative reforms. In the absence of these reforms, prosecutors can facilitate exonerations, but they are less likely to discover false convictions. Future legal research may consider, holistically, the complementary functions of prosecutorial review and judicial review to provide a late stage safeguard against false convictions. By analyzing the interconnection between prosecutors, courts, and legislative decisions, researchers may identify how best to direct reform solutions.