

OHIO TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

District Attorney Larry Krasner

Patricia Cummings, Supervisor, Conviction Integrity Unit

Philadelphia District Attorney's Office

November 18th, 2020

OVERVIEW

- Identifying the Problem - Wrongful Convictions Occur
- Addressing the Problem - Who, What, Where, When, and How
- Solving the Problem - CIUs and Lessons Learned



IDENTIFYING THE PROBLEM – WRONGFUL CONVICTIONS OCCUR

- Wrongful convictions occur.
 - *According to the National Registry of Exonerations, there have been 2,686 exonerations since 1989.*
 - *As of January 2020, The Innocence Project reported 365 DNA exonerations*
- Innocent persons have been imprisoned for lengthy periods of time.
 - *According to the National Registry of Exonerations, **exonerees spend, on average, 9 years in prison.** In total, the 2,500 exonerees since 1989 have spent **more than 24,000 years in prison.***
- *In Ohio, there have been 85 exonerations since 1989. Exonerees have spent 890 years in prison.*
- When wrongful convictions occur, the damage is widespread.
 - *To the defendant*
 - *To the victim*
 - *To the system as a whole (public opinion / safety)*

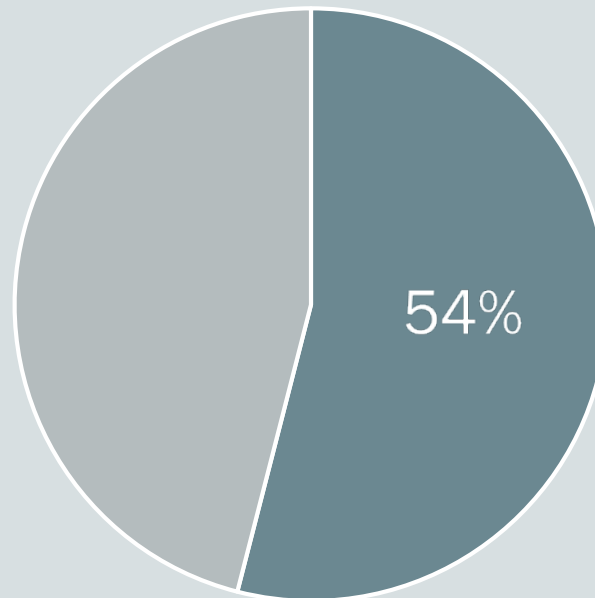
IDENTIFYING THE PROBLEM - WRONGFUL CONVICTIONS OCCUR

Leading Causes of Wrongful Convictions

- Official Misconduct
- Eyewitness Misidentification
- False Confessions
- Forensic Evidence
- Perjury of False Accusation

IDENTIFYING THE PROBLEM - WRONGFUL CONVICTIONS OCCUR

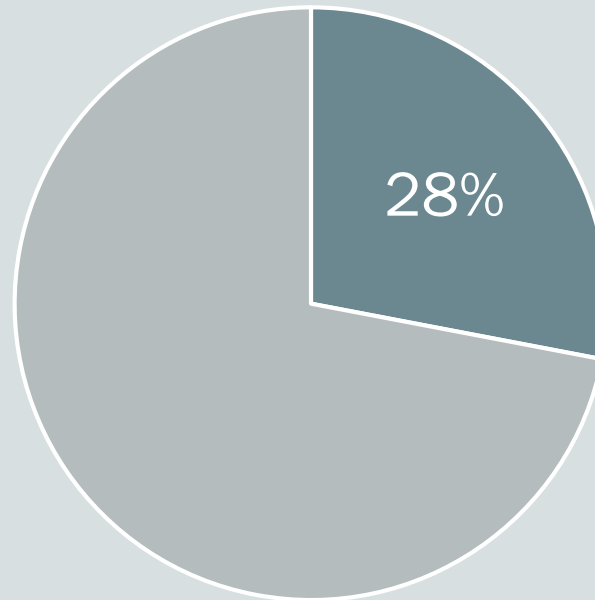
OFFICIAL MISCONDUCT



*Statistic from the National Registry of Exonerations as of November 18th, 2020

IDENTIFYING THE PROBLEM - WRONGFUL CONVICTIONS OCCUR

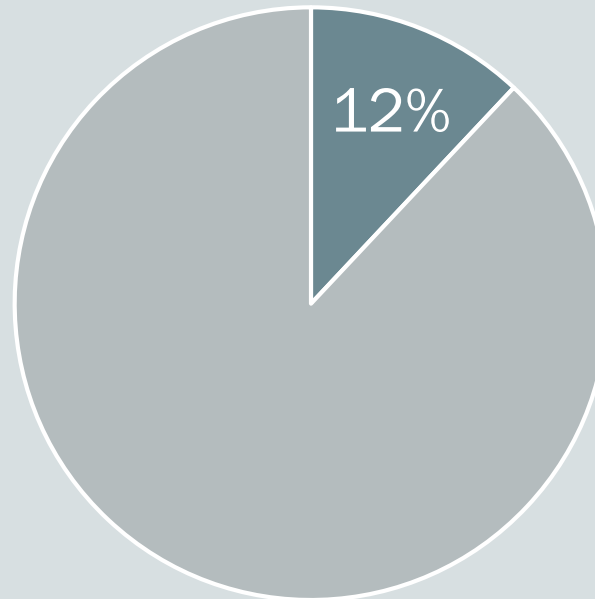
MISTAKEN WITNESS ID



*Statistic from the National Registry of Exonerations as of
November 18th, 2020

IDENTIFYING THE PROBLEM - WRONGFUL CONVICTIONS OCCUR

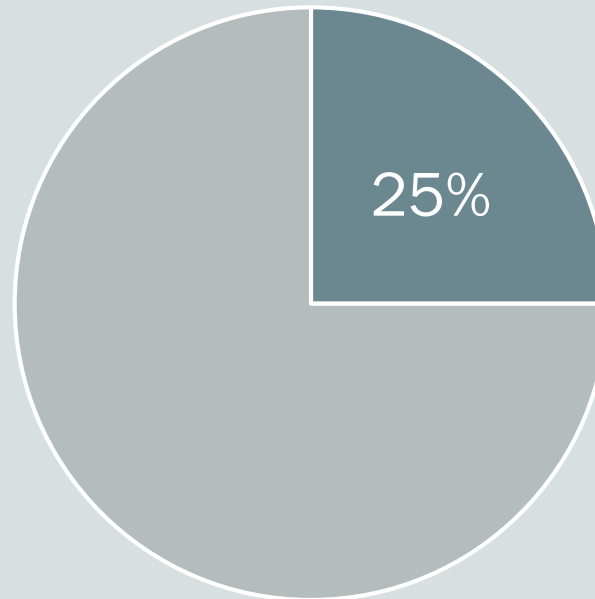
FALSE CONFESSION



*Statistic from the National Registry of Exonerations as of
November 18th, 2020

IDENTIFYING THE PROBLEM - WRONGFUL CONVICTIONS OCCUR

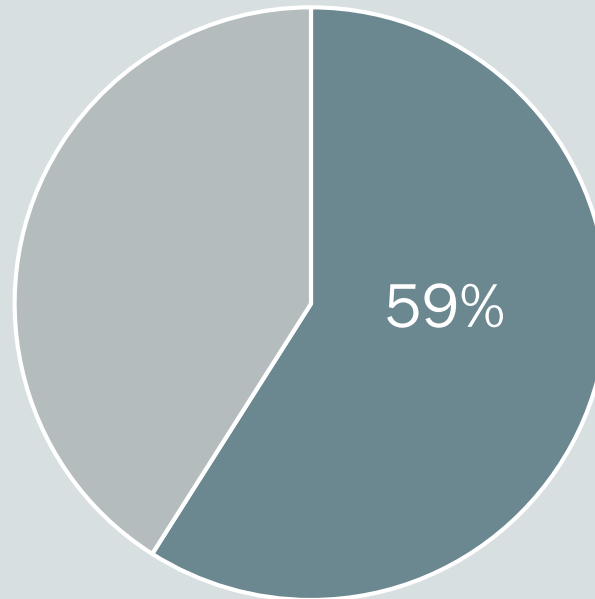
FALSE OR MISLEADING
FORENSIC EVIDENCE



*Statistic from the National Registry of Exonerations as of
November 18th, 2020

IDENTIFYING THE PROBLEM - WRONGFUL CONVICTIONS OCCUR

PERJURY OR FALSE
ACCUSATION



*Statistic from the National Registry of Exonerations as of
November 18th, 2020

IDENTIFYING THE PROBLEM - WRONGFUL CONVICTIONS OCCUR

DNA Exonerations – The Gold Standard

- 40 of 356: Pled guilty to crimes they did not commit
- 71%: Involved eyewitness misidentification
- 32% of these cases involved multiple misidentifications of the same person
- 45%: Involved misapplication of forensic science
- 28%: Involved false confessions
- 16%: Involved informants
- **155: True suspects and/or perpetrators identified. Those actual perpetrators went on to be convicted of 150 additional violent crimes, including 80 sexual assaults, 35 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses.**

HOW TO ADDRESS THE PROBLEM?

- Toolkit
 - Ethics
 - Education and Training
 - Legal Rules and Statutes
 - Science
- States have different toolkits
 - Difficult to obtain relief (PA and OH)
 - Difficult but not impossible (TX)
 - Lucky ducks (NY – “in the interest of justice”)

HOW TO ADDRESS THE PROBLEM?

American Bar Association Model Rules of Professional Conduct, Rule 3.8:

Rule 3.8 section (g):

“[w]hen a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1) promptly disclose that evidence to an appropriate court or authority, and...
- (2) if the conviction was obtained in the prosecutor’s jurisdiction,(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

HOW TO ADDRESS THE PROBLEM?

American Bar Association Model Rules of Professional Conduct, Rule 3.8

Rule 3.8 section (h):

- also requires a prosecutor to seek to remedy a conviction when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit.

HOW TO ADDRESS THE PROBLEM?

States that have adopted a rule similar to Model Rule 3.8

- Colorado
 - <https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-38-Special-Responsibilities-of-a-Prosecutor>
- Massachusetts
 - <https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-38-special-responsibilities-of-a>
- New York
 - <https://www.nysba.org/DownloadAsset.aspx?id=50671>
- Wisconsin
 - <https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf>
- California: November 2018 rule: http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.8_Exec_Summary-Redline.pdf
 - That rule was superseded in June 2020: http://www.calbar.ca.gov/Portals/0/documents/rules/Rule_3.8.pdf
- Michigan
 - <https://courts.michigan.gov/courts/michigansupremecourt/rules/documents/michigan%20rules%20of%20professional%20conduct.pdf>
- Montana
 - <https://www.montanabar.org/news/443124/Extensive-updates-to-Montana-Rules-of-Professional-Conduct-adopted-effective-Jan.-1-2020.htm>
- Oklahoma
 - <https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=481037>
- Pennsylvania
 - <https://www.padisciplinaryboard.org/for-attorneys/rules/rule/3/the-rules-of-professional-conduct>
- South Dakota
 - https://sdlegislature.gov/#/Statutes/Codified_Laws/2044876

HOW TO ADDRESS THE PROBLEM?

States that have adopted variations of Model Rule 3.8

- North Carolina
 - State's version of Rule 3.8 does not specifically provide for disclosure post-conviction. However, because its requirement that a prosecutor disclose “all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense’ is not limited to the pretrial stages of a case,” it might apply post-conviction. <https://nccriminallaw.sog.unc.edu/does-brady-apply-after-a-conviction/>
- Texas
 - Michael Morton Act requires the disclosure of “any exculpatory, impeachment, or mitigating” information “at any time before, during, or after trial.” <https://statutes.capitol.texas.gov/Docs/CR/htm/CR.39.htm>

HOW TO ADDRESS THE PROBLEM?

ABA's Standards for Prosecutorial Function

- Standard 3-7.1 Post-trial Motions
 - “The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly and respectfully. The prosecutor should not oppose motions at any stage without a reasonable basis for doing so.”
- Standard 3-8.1 Duty To Defend Conviction Not Absolute
 - “The prosecutor has a duty to defend convictions obtained after fair process. This duty is not absolute, however, and the prosecutor should temper the duty to defend with independent professional judgment and discretion. The prosecutor should not defend a conviction if the prosecutor believes the defendant is innocent or was wrongfully convicted, or that a miscarriage of justice associated with the conviction has occurred.”
- Standard 3-8.3 Responses to New or Newly-Discovered Evidence or Law
 - “If a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted or sentenced or is actually innocent, the prosecutor should comply with ABA Model Rules of Professional Conduct 3.8(g) and (h). The prosecutor’s office should develop policies and procedures to address such information, and take actions that are consistent with applicable law, rules, and the duty to pursue justice.”

https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/

HOW TO ADDRESS THE PROBLEM?

Education and Training

MANDATORY BRADY TRAINING

- **This one-hour online training course on a prosecutor's duty to disclose exculpatory and mitigating evidence and information satisfies the mandatory training requirement pursuant to §41.111, subject to approval by the Court of Criminal Appeals. Under that section, every attorney prosecuting a criminal case other than a Class C misdemeanor must complete one hour of instruction on a prosecutor's duty to disclose such evidence and information. In addition, every attorney completing this online course will receive one hour of MCLE – Ethics from the State Bar of Texas.**
- **This course has been approved by the Texas Court of Criminal Appeals for one hour credit towards the training required to satisfy Texas Government Code §41.111. Any opinions or interpretations expressed in the course are those of the maker and are not endorsed by the Court of Criminal Appeals. If you are in doubt in a particular fact scenario, the Court of Criminal Appeals strongly suggests that you seek independent legal advice or clarification regarding your duty to disclose information.**

TDCAA
Texas District & County
Attorneys Association

Legal & Ethical Ramifications

HOW TO ADDRESS THE PROBLEM?

Legal Rules and Statutes

- Open File Discovery
- Motion for New Trial
- Post-Conviction Statutes
- Actual Innocence Writ
- New Science
- Right to Post-Conviction Counsel
- Dismissal in the Interest of Justice

HOW TO ADDRESS THE PROBLEM?

Using Science to Solve Cases

- Percentage of DNA exonerations with invalidated forensic science? 47%

NAS Report – 2009

PCAST – 2016

- Forensic science is NOT black and white
- “Match” is a very bad word
- Forensic evidence is not always accurately presented or successfully challenged in court
- Need for more validation studies
- Need for independence in crime laboratories
- Need for standard terminology

HOW TO ADDRESS THE PROBLEM?

Using Science to Solve Cases

- Forensic disciplines called into question:
 - Friction ridge analysis (fingerprints)
 - Bitemark comparisons
 - Hair comparison
 - Fiber comparisons
 - Shoeprints
- Toxicology and DNA have generally faced higher scrutiny, so generally more reliable.
 - But what about no controlled substance cases?
 - New DNA mixture interpretation protocols?

WHO SHOULD ADDRESS THE PROBLEM AND WHERE?

The North Carolina Innocence Inquiry Commission

First of Its Kind In The Nation

The North Carolina Innocence Inquiry Commission is the first of its kind in the nation. The Commission was created by the North Carolina General Assembly in 2006 and began operating in 2007. Since then, the Commission has reviewed over 2,000 innocence claims and conducted multiple hearings.



THE NORTH CAROLINA
INNOCENCE
INQUIRY COMMISSION

WHO SHOULD ADDRESS THE PROBLEM AND WHERE?

Attorney Generals

AP

Michigan attorney general launches Conviction Integrity Unit

April 10, 2019

The Philadelphia Inquirer

Pennsylvania's top prosecutor has a new unit to look at possible wrongful convictions across the state

by [Samantha Melamed](#), Updated: February 12, 2020

The Philadelphia Inquirer

New Jersey AG announces new conviction-review, cold case units

by [Tommy Rowan](#), Updated: April 11, 2019

WHO SHOULD ADDRESS THE PROBLEM AND WHERE?

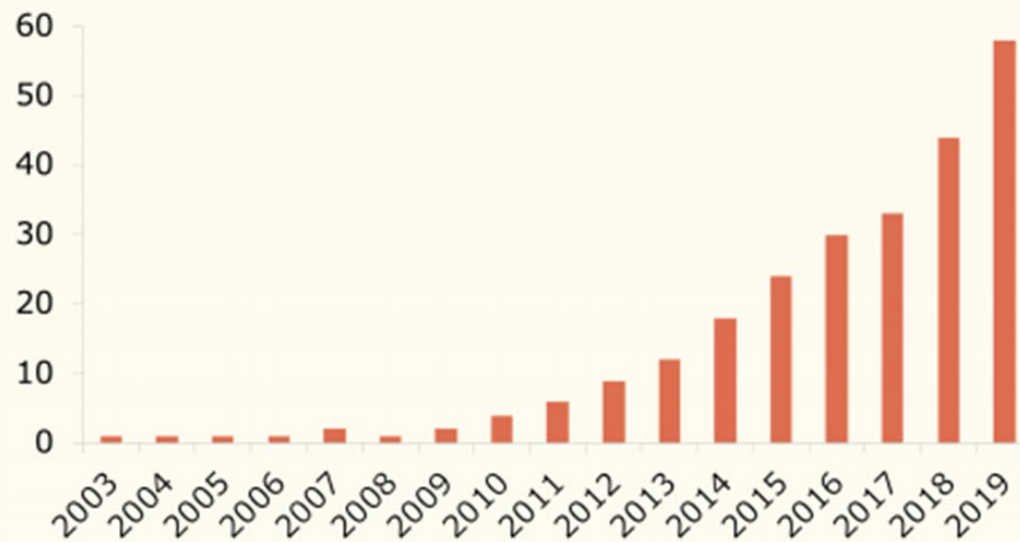
Connecticut State's Attorney

- Task Force has completed its work and policy / best practice recommendations have been sent to Chief State's Attorney Colangelo.
- Task Force contemplates a staff comprising at least two prosecutors, two Inspectors (our sworn law enforcement officers), a paralegal and a secretary.
- There is no need for legislation to create the unit but there will need to be legislative approval of additional funding for DCJ to implement CSA Colangelo's vision for the unit.
- Task Force is now in the process of attempting to secure legislative backing for proposal and is discussing the concept with the Governor's Office.

WHO SHOULD ADDRESS THE PROBLEM AND WHERE?

CIUs

Figure 1: CIUs in Operation



According to the National Registry of Exonerations, there were 59 CIUs in operation by the end of 2019. Latest reports as of 2020 puts the number closer to 75 units.

WHAT PROBLEM SHOULD BE ADDRESSED?

- Actual Innocence
- Wrongful Convictions
- Sentencing Inequities

WHEN TO ADDRESS THE PROBLEM?

- After conviction
- After all appeals have been exhausted

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Dallas CIU

- In 2001, the Texas Legislature enacted a post-Conviction DNA statute that allowed convicted persons, who met certain requirements, to request DNA testing.
- When inmates began making requests for DNA testing in 2001, these requests were handled by the appellate section.

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Dallas CIU



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

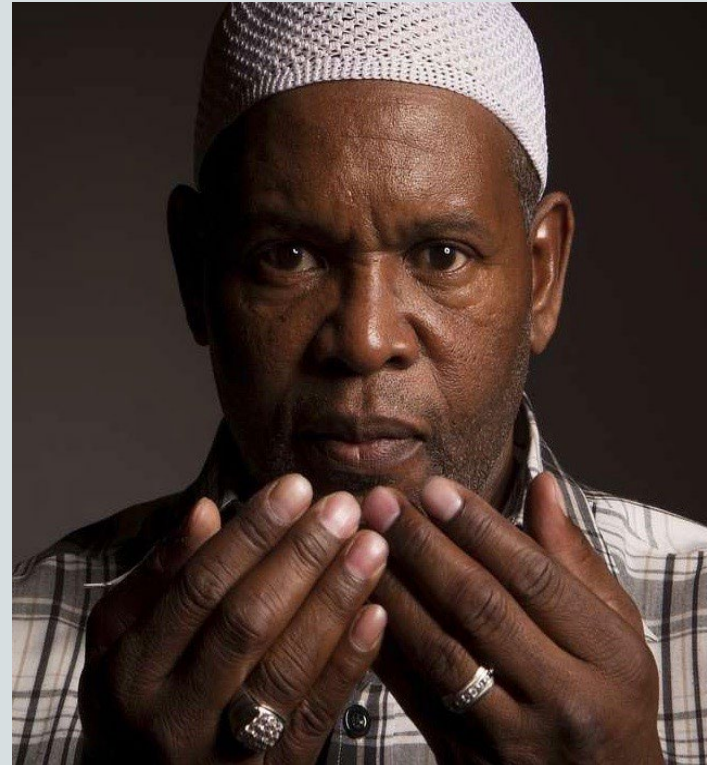
Dallas CIU



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Dallas CIU

- In 2017, Billy Smith, one of the Dallas County DNA exonerees died. After his death, Gary Udashen did some research on his case, as well as the other Dallas County DNA exonerees to determine what they had to go through to obtain a DNA test.
- What Gary Udashen learned about Smith's case was that the DA's office opposed his request for DNA testing and kept him in prison for an additional 5 years until he received his test, which proved his innocence.



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Dallas CIU

- This was the same thing that happened to Patrick Waller, who the DA's Office kept in prison an extra 7 years by fighting his DNA testing request. Once Waller received his test he was also proven to be innocent.



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Dallas CIU

- Ultimately, Gary Udashen determined that of the 26 Dallas County DNA exonerees, 17 had applied for testing between 2001 and 2006.
- Of these 17, prosecutors opposed testing in 13 cases, and agreed in only 1 (records have not been obtained in the other 3 cases).
- Each one of these people spent more time in prison before they received their test and were exonerated as a result of the DA's office opposition.

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Dallas County:

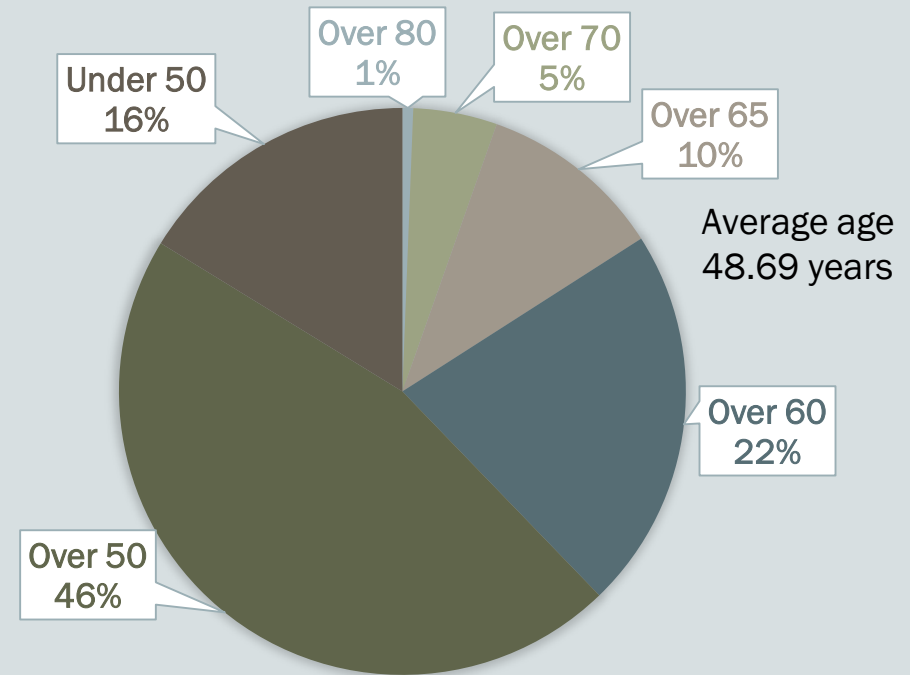
- *Exonerations since 2001: 59*
- *DNA: 32*
- *Non-DNA: 27*

*Statistics from the National Registry of Exonerations as of November 13th, 2020

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

LWOP in Philadelphia

- Philadelphia accounts for more than 5% of LWOP inmates in the entire United States (~2600 inmates)
- Philadelphia accounts for more than 1/2 of Pennsylvania's LWOP
- Only 5 states have more people serving LWOP than Philadelphia (FL, CA, MI and PA)
- ~600 are serving LWOP for 2nd Degree Murder (Felony Murder)



AGE OF LWOP INMATES

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Philadelphia CIU

According to the National Registry of Exonerations...

- Philadelphia County CIU was founded in 2014, but had just one part-time staff member and produced no exonerations until 2016, despite having reviewed hundreds of cases.
- In 2016, the prosecutor assigned to the unit even pursued the unsuccessful retrial of exoneree Anthony Wright, whose murder conviction was reversed based on new DNA testing.

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Philadelphia CIU

- In 2005, Anthony Wright sought DNA testing of the evidence in his 1991 case. The state opposed this and the judge denied the motion. That was upheld on appeal. In 2011, the state Supreme Court reversed. Testing was finally done in 2013 and he was excluded. The DA agreed to vacate the conviction, but refused to agree this was exculpatory. Wright went to trial and was acquitted in 2016.
- Had the appellate division (or real CIU) agreed to the testing and then accepted the results, he possibly would have been exonerated in 2006.
- Wright spent 10 years in prison because of the state's opposition.

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Philadelphia CIU



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Philadelphia CIU



THE APPEAL

NEW PHILADELPHIA DA LARRY KRASNER HITS RESET ON THE OFFICE'S TROUBLED CONVICTION REVIEW UNIT

Christopher Moraff

Feb 15, 2018

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Philadelphia County:

- *Exonerations since 2001: 39*
- *DNA: 2*
- *Non-DNA: 37*

*Statistics from the National Registry of Exonerations as of November 13th, 2020

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

“The World as it Should Be” – Where the Legal System:

- Prevents misconduct and ensures timely defense access to exculpatory evidence
- Gives a path to relief to those whose convictions were tainted by misconduct
- Holds prosecutors (and their employers) accountable for serious misconduct

The New York Times

Opinion



An Innocent Man Who Imagined the World as It Should Be

Editorial Observer

By JESSE WEGMAN OCT. 5, 2017



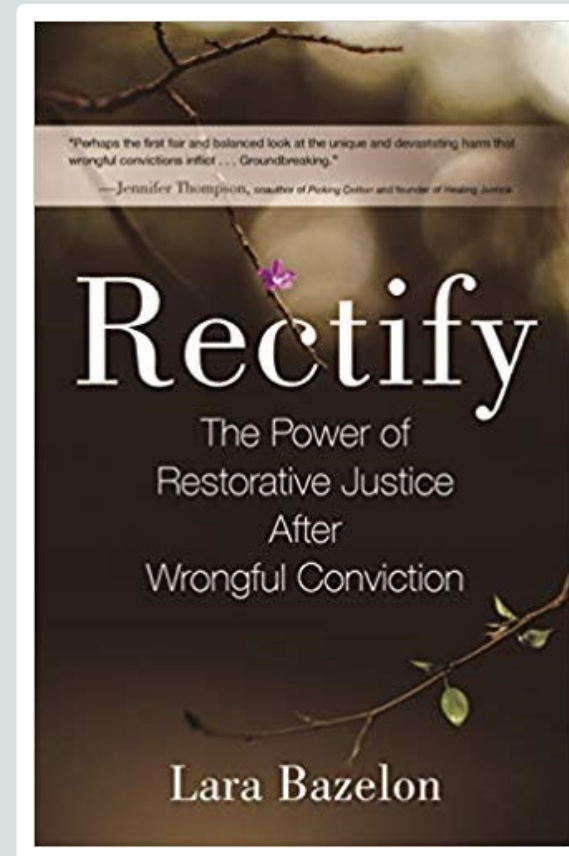
John Thompson in 2011. Patrick Semansky/Associated Press

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Concept of Independence

“It’s like being in internal affairs in the police department. They are all going to be hated because they are second-guessing their colleagues.”

–Jim Figorski, Esquire



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Concept of Independence

- “You’re not reviewing my case, are you?”
- “What metric are you using?”
- “And I’m not going to give you the file.”



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Experts



SOLVING THE PROBLEM - CIUS AND
LESSONS LEARNED

The Experts

SCHECK &
HOLLWAY ARE BOTH
RIGHT

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Experts

- “There is a fundamental and important difference between the kind of granular, deep dives into problematic cases that inevitably occur in a good non-adversarial CIU investigation and the adversarial post-conviction review pursued on appeal or collateral attack.”
- *Conviction Integrity Units Re-Visited* by Barry Scheck, Professor of Law, Cardozo Law School, Co-Director, Innocence Project
December 26, 2016

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Experts

- “Many attorneys – both defense and prosecutors – view the role of an appellate attorney within a DA’s office as fundamentally different from the underlying goal of a CRU. As one veteran prosecutor stated, “They, beginning with the appeal through the post-conviction process, are trained and tasked to defend the conviction””
- “...the prosecutorial mindset of an appellate lawyer presupposes guilt and relies on the appellate court to review the conviction and identify and potential errors.”
- “Structurally and philosophically, then, sincere CRUs define their mission as separate and apart from the mission of the Office’s appellate unit.”

- *Conviction Review Units: A National Perspective* by John Hollway, University of Pennsylvania Law School

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Experts

- “It is also important to consider the appropriate organizational location and reporting structure of the unit. Specifically, there are good reasons to have the unit report directly to the district attorney... It is also critical that the unit is not headed by or merged with the appellate unit. Some offices that have followed this latter approach have encountered difficulties with the appellate unit being much more oriented toward protecting the underlying conviction, as opposed to the open and searching mindset required for effective conviction review.”

- *Conviction Integrity Units and Internal Accountability Mechanisms* by Fair and Just Prosecution

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Experts

- “The head of the CIU or, in jurisdictions without a formal unit, the person responsible for review of a conviction, should report directly to the District Attorney or to a designee who bears no responsibility for other appellate or post-conviction review in the office.”
- *New York State Bar Association Approves Report Calling for Creation of Conviction Integrity Units in Every Jurisdiction – April 22, 2019*

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Experts

- The approach of a CIU and that of the appellate section is **mostly irreconcilable**. The primary goal of a CIU is to determine **what is the right thing** to do and **then find a way to get it done**. The approach of an appellate section is to find a way to argue that something the defendant is asking for cannot and should not be done.

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

The Experts

Community trust can and does come from a strong, independent CIU, and that trust can be, or is, lost when a community learns that the appellate section has input on CIU cases.

SOLVING THE PROBLEM - CIUS AND
LESSONS LEARNED

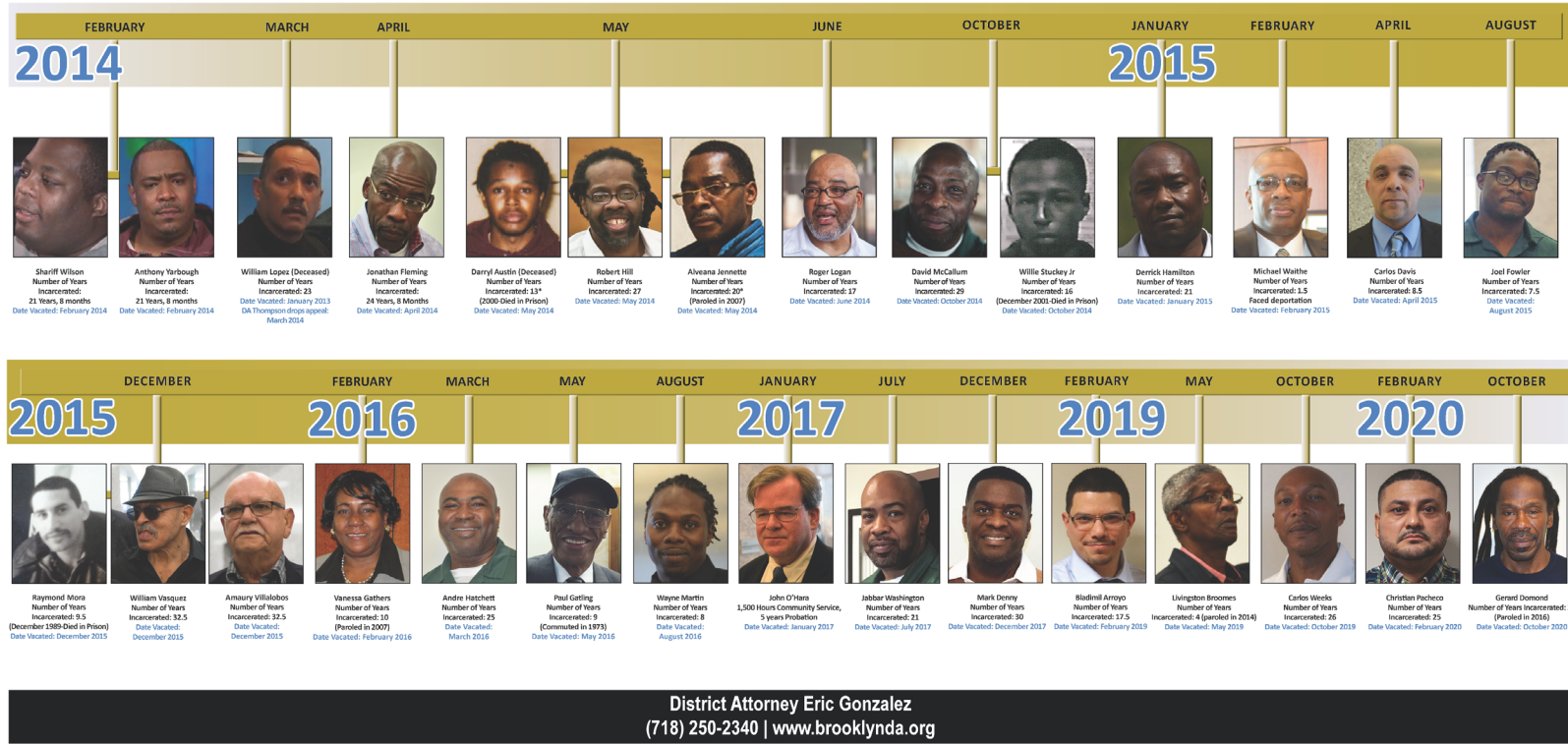
While exonerations are important...

SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Kings County CRU Exonerations



CONVICTION REVIEW UNIT EXONERATIONS



SOLVING THE PROBLEM - CIUS AND LESSONS LEARNED

Philadelphia County CIU Exonerations



CONVICTION INTEGRITY UNIT

2018

May



Dontia Patterson
of Years Incarcerated: 11
Date Vacated: May 2018

December



Jamaal Simmons
of Years Incarcerated: 9
Date Vacated: December 2018

2019

March



Dwayne Thorpe
of Years Incarcerated: 11
Date Vacated: March 2019

April



James Frazier
of Years Incarcerated: 7
Date Vacated: April 2019

May



Sherman McCoy
of Years Incarcerated: 6
Date Vacated: May 2019

June



Terrance Lewis
of Years Incarcerated: 22
Date Vacated: May 2019

July



Johnny Berry
of Years Incarcerated: 25
Date Vacated: June 2019

Chester Hollman III
of Years Incarcerated: 28
Date Vacated: July 2019

2020

October



John Miller
of Years Incarcerated: 22
Date Vacated: July 2019

December



Willie Veasy
of Years Incarcerated: 27
Date Vacated: October 2019



Christopher Williams
of Years Incarcerated: 30
Date Vacated: December 2019

January



Theophalis Wilson
of Years Incarcerated: 28
Date Vacated: January 2020

June



Walter Ogrod
of Years Incarcerated: 28
Date Vacated: June 2020

October



Andrew Swainson
of Years Incarcerated: 32
Date Vacated: June 2020



Antonio Martinez
of Years Incarcerated: 31
Date Vacated: October 2020

*Prior to 2018, Shaurn Thomas and Marshall Hale were exonerated by the Conviction Review Unit.

SOLVING THE PROBLEM - CIUS AND
LESSON LEARNED

Ohio Exonerations:

CRUs were only involved in 6 Ohio
Exonerations

SOLVING THE PROBLEM - CIUS AND
LESSONS LEARNED

Exonerations cannot be the only measure
of success

SOLVING THE PROBLEM - CIUS AND
LESSONS LEARNED

**YOU MUST HAVE
SUPPORT FROM
THE TOP**

SOLVING THE PROBLEM - CIUS AND
LESSONS LEARNED

**YOU WILL NOT
BE POPULAR**