

# THE SUPREME COURT *of* OHIO

## TASK FORCE ON CONVICTION INTEGRITY AND POSTCONVICTION REVIEW

---

November 19, 2020  
Meeting Minutes

### Task Force Members in Attendance

**Hon. Gene Zmuda (Chair)**  
Sixth District Court of Appeals

**Sara Andrews**  
Director, Ohio Sentencing Commission

**Hon. Pierre Bergeron**  
First District Court of Appeals

**Hon. Rocky Coss**  
Highland County Common Pleas Court

**Hon. Michael P. Donnelly**  
*Ex-officio member*  
Supreme Court of Ohio

**Douglas Dumolt, Esq.**  
*Non-voting Designee of Dave Yost*  
Ohio Attorney General's Office

**John Martin, Esq.**  
Cuyahoga County Public Defender's Office

**Hon. Stephen McIntosh**  
Franklin County Common Pleas Court

**Elizabeth Miller, Esq.**  
*Non-voting Designee of Tim Young*  
Office of the Ohio Public Defender

**Hon. Lindsay Navarre**  
Lucas County Common Pleas Court

**Meredith O'Brien, Esq.**  
Ohio Association of Criminal Defense Lawyers

**Joanna Sanchez, Esq.**  
*Non-voting Designee of Tim Young*  
Wrongful Conviction Project  
Office of the Ohio Public Defender

**Hon. Nick Selvaggio**  
Champaign County Common Pleas Court

### Approval of November 5, 2020 Meeting Minutes

Task Force Chair Judge Gene Zmuda opened the meeting by requesting a motion for approval of the November 5, 2020 meeting minutes. Judge Stephen McIntosh moved to approve the minutes and the motion was seconded by Judge Lindsay Navarre. The minutes were then passed unanimously by a show of hands.

## **Presentation by Philadelphia District Attorney, Larry Krasner, and Head of Philadelphia District Attorney's Conviction Integrity Unit, Patricia Cummings**

Judge Zmuda introduced guest speakers Larry Krasner and Patricia Cummings.

Larry Krasner was elected as the Philadelphia District Attorney in 2017 after campaigning on a platform to reform elements of the criminal justice system. Before taking public office, Krasner had a 30-year career as a criminal defense and civil rights attorney and public defender.

Patricia Cummings is the head of the Philadelphia District Attorney's Conviction Integrity Unit ("CIU"). Cummings previously headed the CIU at the Dallas County District Attorney's Office in Texas, which is credited as the first in the nation. She is known as a top expert on innocence and exoneration.

District Attorney Krasner's portion of the presentation included the following:

### *Politics of Prosecution*

- Krasner began the presentation by giving some background on the current political landscape surrounding prosecution in the United States and his own beliefs about a prosecutor's duties. He said that there is increasing support for progressive prosecutors across the country, with 24 elected this cycle. Krasner stated that voters, across party lines, are looking for modern approaches to criminal justice and prosecution.
- Under Krasner, the Philadelphia District Attorney's Office ("DAO") withdrew from the Pennsylvania District Attorneys Association ("PDAA") due to differences in opinion on a number of policy issues. Krasner felt that the political lobbying efforts of the PDAA did not represent the views of the Philadelphia DAO and therefore he did not want his office to be involved in those efforts.

### *Prosecutorial Duties*

- Krasner believes conviction integrity should be an important issue to any prosecutor, as it represents a fundamental belief in the accuracy of the system. Finality of convictions, he said, is at odds with a prosecutor's oath to uphold justice when there are unsolved crimes and wrongful convictions. Prosecutors must exonerate those who are innocent.
- Krasner told the stories of two men whom he met last year – Theodore Donahue, a Philadelphia pizza deliveryman who was arrested in 2019 for the 1991 cold-case murder of his former girlfriend, Denise Kulb, and Chester Hollman, a man who was released from prison in 2019 after serving 28 years for a murder he did not commit. These stories help illustrate the responsibility that Krasner believes prosecutors have to prosecute cold cases and to exonerate those whose convictions lack integrity.

### *Philadelphia's Conviction Integrity Unit*

- When Larry Krasner was elected, the Philadelphia DAO had maintained a Conviction Review Unit for several years. This unit, Krasner said, did not exist to review the accuracy or integrity of convictions but to protect the DAO from outside scrutiny. When Krasner took office, the CRU had a single exoneration on its record and hundreds of unopened letters from inmates claiming innocence.
- After Krasner took office, he changed the name of the Conviction Review Unit to the Conviction Integrity Unit and brought Patricia Cummings on as its head. They hired experienced staff from outside the DAO and raised the unit's work capacity. The CIU now has 15 exonerations to its credit and judges have reviewed and approved all 15 of the exonerations.
- Since 2017, 4% of the petitions/cases submitted to the Philadelphia CIU are supported and 96% are rejected after review.
- Krasner believes CIUs have an obligation to recognize patterns of misconduct that lead to wrongful convictions and to investigate accordingly. Krasner recalls learning of a pattern of coerced confessions that eventually led to 15 exonerations in a single day in Chicago. This example informs the work of Philadelphia's CIU.

DA Krasner then introduced Patricia Cummings, whose presentation covered the following:

### *The Michael Morton Case*

- Cummings began by telling the story of Michael Morton, Texas man who was convicted of murdering his wife, Christine Morton, in the 1980s. Cummings worked as a pro-bono attorney with the Innocence Project on Morton's case. Morton was ultimately exonerated in 2011 based on DNA evidence, but *Brady* violations by prosecutors were also discovered over the course of the investigation. The DNA evidence that exonerated Morton subsequently led to the successful prosecution of Christine Morton's true killer, Mark Alan Norwood. Norwood was also convicted of a second murder using DNA evidence.
- Working on Morton's case ingrained in Cummings' mind the importance of conviction integrity and inspired her work in the innocence movement.

### *Terminology*

- Cummings noted that, when discussing the topic of wrongful convictions, it is important to have an understanding among all involved parties of the definitions and the terminology that is being used. Cummings chose to use the term "exoneration" as defined by The National Registry of

Exonerations (“NRE”). The NRE defines “exoneration” as a situation where there is newly discovered evidence of innocence that has led to the vacatur, the reversal, and ultimately the dismissal of charges against a person who was convicted of a crime.

- The use of terminology is important, Cummings said, due to the differences in how laws in different states handle this issue. Pennsylvania law, for example, does not recognize that a person who is charged with a crime has a due process right to not be convicted if they are factually innocent.
- In contrast, there exists in Texas a standalone claim for relief for those who were given a constitutionally fair trial, but who can establish innocence through clear and convincing evidence. This definition of factual innocence is also tied to eligibility for compensation in the state of Texas.

### *Occurrence of Wrongful Convictions*

- When someone is wrongfully convicted of a crime, the damage is widespread. Much of the attention often goes to the defendant who was wrongfully convicted, but significant damage is also done to the victim of the crime and to the integrity of the system as a whole. Cummings says victims of crimes in these instances are forced to experience the trauma all over again.
- Official misconduct, eyewitness misidentification, false confessions, forensic evidence, and perjury or false accusation are the leading causes of wrongful conviction. Oftentimes, several of those factors will be involved in a single case.
- DNA exonerations are seen as the “gold standard” because the evidence can conclusively rule out the defendant while also leading to the identification of the person who is actually responsible for the crime. Many times, that DNA evidence can also connect the guilty party to additional crimes.
- Because many cases involve false confessions, it is important to review not only cases that went to trial, but also cases involving pleas.

### *Rules and Statutes*

- Existing statutes and rules can present a significant barrier to addressing wrongful convictions in some states. Based on her experience, Cummings believes the statutes and rules in Ohio and Pennsylvania present more difficulty in addressing wrongful convictions than in places like Texas and New York.
- After seeing the work done by the CIU in Dallas, the Texas legislature passed a significant number of laws that made it easier to exonerate innocent people in the state. For example, Texas

law allows judges to appoint counsel in potential wrongful conviction cases. In addition, the Michael Morton Act provided for open file discovery.

- In New York, prosecutors have great discretion in postconviction cases to vacate and dismiss cases in the interest of justice. This allows prosecutors to look at old cases through a more informed, modern lens and dismiss those cases that lack integrity based on a number of factors.
- In Ohio, postconviction discovery currently only applies to death penalty cases. Cummings believes open file discovery should apply to all postconviction cases, with certain limitations.
- Cummings also indicated that she believes motions for new trial should be available without time or jurisdictional bars.
- Statutes allowing relief based on changes in science have been used to remedy wrongful convictions in some states. Texas has section 11.073 of the Texas Code of Criminal Procedure, which allows for cases to be looked at again based on new science or revisions to existing science.

### *Ethics*

- Several states (not including Ohio) have embedded in law a rule similar to the American Bar Association's ("ABA") Model Rule 3.8, which pertains to the special duties of a prosecutor. The rule includes a section requiring a prosecutor to disclose any new, credible and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense.
- While Cummings believes the adoption of such a rule would be a valuable tool in fighting wrongful convictions, she does not believe it would be sufficient to address the problem on its own.
- Cummings also recommends that the task force look into the ABA's Standards for Prosecutorial Function.  
[\(https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/\)](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/)

### *Education and Training*

- Education and training are important tools in promoting conviction integrity. Texas, for example, passed a law mandating yearly *Brady* training for all prosecutors who prosecute cases that could result in incarceration.
- Cummings believes that it is useful to have defense attorneys involved in *Brady* training for prosecutors because they present a different perspective on *Brady* that can be helpful to prosecutors.

### *Who Should Address the Problem?*

- Early on in the innocence movement, it was commonly thought that prosecutors should not be the ones to address the issue of wrongful convictions. The argument was often made that this would be akin to “the fox guarding the henhouse.” Cummings believes the creation of the North Carolina Innocence Inquiry Commission was a result of this line of thinking.
- Independent review boards were seen as the way forward in the early days of the innocence movement, but when you compare exoneration data from the North Carolina Innocence Inquiry Commission with that of CIUs, it seems to be less effective. To date, no other states have adopted the North Carolina model.
- Since it began operations in 2007, the North Carolina Innocence Inquiry Commission has received 2,881 claims of innocence. It has closed 2,828 of those claims as being without merit. It has held hearings on 17 of the claims, and the hearings have resulted in 12 exonerations. This is an average of 1 exoneration per year since it began operating.
- Michigan, Pennsylvania, and New Jersey have recently established CIUs within their Attorney General’s offices. Cummings believes that the jury is still out on the effectiveness of this model, but she has some concerns. The statewide units sometimes require a county’s permission to investigate or require referral from the county directly.
- In Pennsylvania, the Attorney General does not have the jurisdiction needed to choose cases for its CIU to review. The Attorney General’s CIU must rely on elected prosecutors to send over cases.
- Some in the innocence movement thought that CIUs would be short-lived and not useful outside of DNA cases. Instead, Cummings says, even as CIUs have worked through DNA cases, other issues have continued to arise and CIUs have achieved non-DNA exonerations.
- There has been an explosion in the number of CIUs in recent years. Cummings believes that CIUs will be seen as a necessary part of any prosecutor’s office in the future, just as internal affairs divisions have become commonplace in police departments.

### *What Problems Should Be Addressed and When?*

- Most CIUs only look into credible claims of actual innocence. The Philadelphia CIU looks at actual innocence, other wrongful convictions, and sentencing inequities because Krasner and Cummings want their CIU to have as wide a “funnel” as possible.

- Some units look at cases immediately after conviction, while others wait until all appeals have been exhausted. Cummings says the answer to this question will depend on the rules and statutes of a particular jurisdiction. In states where postconviction claims are jurisdictional, this will often mean a CIU needs to get involved sooner.

### *Lessons Learned*

- The Dallas Conviction Integrity Unit learned a lesson about the importance of the independence of CIUs when a new District Attorney was elected. The new DA did not follow best practices to keep the CIU above the appellate section in the organizational hierarchy and this caused internal friction. This resulted in a slowdown of exonerations and bad publicity for the office.
- The Philadelphia Conviction Review Unit that existed before Krasner's election opposed DNA testing for Anthony Wright, who was eventually acquitted after a new trial. The Philadelphia CRU's opposition resulted in Wright spending an additional 10 years in prison. The city of Philadelphia later settled a lawsuit with Wright for ten million dollars.
- Cummings pointed out that while John Hollway emphasizes avoiding blame in his model of conviction review, other experts, like Barry Scheck, believe blame is necessary in order to hold accountable those officials who commit misconduct.

### **Discussion of Larry Krasner and Patricia Cummings Presentation**

Discussion of the presentation included the following topics:

#### *Conviction Integrity Units and the Courts*

- Judge McIntosh asked when would be the most appropriate time for a CIU to approach a court regarding a possible exoneration, noting that Krasner had mentioned that some judges were initially resistant to the CIU's work.
  - Krasner answered that some members of the judiciary were hesitant when the CIU began to work in agreement with defense attorneys because the Philadelphia DAO had become known for always working in opposition to the defense. Over time, he said, judges became more open and willing to listen to the CIU's requests. Cummings added that, in terms of the timeline of a case, this is often a local issue or even an individual judge issue. It's important, she said, to perform thorough and collaborative investigation and briefing in order minimize skepticism when the issue is presented to the court.

- Judge Zmuda wanted to know what mechanism the Philadelphia CIU uses to get before a judge (motion for new trial, postconviction stipulation, etc.)
  - Cummings replied that, in Pennsylvania, the defense must first file a postconviction relief petition in order for the CIU to do anything. She indicated that sometimes it is better to pursue a case in federal court.
- Judge Zmuda followed up by questioning how the CIU deals with cases in which the appeal process has not concluded.
  - Cummings stated that because the CIU often has a long queue of cases, it is sometimes better to look into the older cases first. However, when the CIU looks into a class of cases based on a pattern of misconduct, newer cases can come up first. In those cases, the CIU can ask the appellate court to remand the case back to the trial court.

### *Accepting Cases for Investigation*

- Judge McIntosh asked for examples of the common issues involved in the four percent of cases accepted by the Philadelphia CIU.
  - Cummings responded that false confessions, eyewitness misidentification, and *Brady* violations have been common issues in Philadelphia. She said that she tends to see these as red flags when looking at cases.

### *Waiver of Attorney-Client Privilege*

- Douglas Dumolt inquired about the policy reasons behind not requiring a waiver of privilege in cases of actual innocence.
  - Cummings said she doesn't see the benefit of requiring a complete waiver upfront to look at a case. In some cases, it is necessary to use a limited waiver to be able to interview a defendant or to investigate a *Brady* violation. Sometimes, she added, a case can initially present as an actual innocence case, but the evidence leads the CIU to pursue other problems with the conviction. If a full waiver is required upfront, the CIU may not gain access to the case if the defense does not agree to the waiver.

### *The Plea Process*

- John Martin referenced a debate in Ohio about requiring a factual basis for guilty pleas and asked Krasner and Cummings whether they believed a factual basis should be required for guilty pleas or if they know of another procedure that could increase the efficacy of the plea process.

- Krasner responded that he believes it is better to have a factual basis required, but that requirement alone doesn't solve the problem. In Pennsylvania, a factual basis is required for guilty pleas, but they still see innocent people who plead guilty for various reasons. Cummings added that law and policies to extend a defendant's *Brady* and *Giglio* rights to the plea process would be important tools in reducing wrongful convictions.

### *Small Jurisdictions*

- Douglas Dumolt asked how conviction integrity work has been addressed in jurisdictions that are too small to support their own CIUs.
  - Cummings answered that there has been a conversation among those working in CIUs about how they can assist smaller, more rural jurisdictions. So far, the answer has been to educate and train prosecutors in those jurisdictions in order to change the culture surrounding conviction integrity. Krasner added that there can be a political dimension to the issue and thus getting support from a statewide prosecutor to bring the smaller jurisdictions on board can be helpful.

### *CIU Internal Processes*

- Joanna Sanchez asked for an explanation of the internal process for making a recommendation to DA Krasner.
  - Krasner responded that he often accepts the recommendations made to him by Cummings and the CIU because they have proven themselves to be credible and competent. If he thinks more investigation is needed, he will ask for it. Cummings added that she is not in support of having a board or another layer of review before going to the DA. She said that the CIU tends to require multiple prosecutors to work on a case to ensure different perspectives are represented. The CIU will also consult experts when needed to increase confidence in a recommendation before taking it to DA Krasner.
- Judge McIntosh questioned what minimum resources are required by a CIU and whether attorneys with criminal defense backgrounds are needed.
  - Krasner said that he would recommended hiring attorneys from outside the prosecutor's office who do not have relationships with staff in other sections of the office. Ideally, he said, a candidate would have both prosecutorial and defense experience. He said a wide breadth of trial experience is especially important and that law enforcement experience can be useful as well. Cummings added that minimum staff requirements for a CIU would include two prosecutors, an investigator, and a paralegal. She said that CIUs

should not be afraid to do the work if the money is not there to hire experts. Grants are widely available and experts tend to be very willing to help when asked.

**Next Meeting – Thursday, December 10, 2020 from 10:00 a.m. to 12:00 p.m. – Presentation by Maurice Possley, Senior Researcher at the National Registry of Exonerations**

Judge Zmuda informed members that he has secured a presentation from Maurice Possley of the National Registry of Exoneration for the task force's next meeting. Possley will present on exoneration data specific to Ohio, starting at 11:00 a.m. The first hour of the meeting before the presentation will be dedicated to discussing insights gained from Krasner's and Cummings's presentation and how they will inform the task force's plans to move forward.

The next meeting of this task force is scheduled for December 10, 2020 from 10:00 a.m. to 12:00 p.m.