

**REPORT TO THE HONORABLE GURBIR S. GREWAL,
ATTORNEY GENERAL OF NEW JERSEY**

PROPOSAL FOR A STATEWIDE CONVICTION REVIEW UNIT

FEBRUARY 2019

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I. INTRODUCTION

At the request of the Attorney General of the State of New Jersey, we convened a Working Group to study whether the Department of Law and Public Safety should establish a statewide conviction review unit (“CRU”) and a statewide cold-case unit. After careful analysis, the Working Group recommends that the Attorney General create only a Conviction Review Unit.¹

Over the years, there have been several efforts to estimate the frequency of wrongful convictions in the United States. Most such studies have placed the rate within a range of one to five percent.² However, a recent study by the Urban Institute, which was funded by the United States Department of Justice, estimated a wrongful conviction rate for rape and rape-murder cases as high as 11.6%.³

These estimates suggest that the number of wrongfully convicted and incarcerated defendants is alarming. There are approximately 1.5 million people currently incarcerated in state and federal prisons in the United States.⁴ Thus, even assuming only a 1% wrongful conviction

¹ See Press Release, N.J. Office of the Attorney General, Attorney General Grewal Announces Steps to Strengthen Confidence in the Criminal Justice System (April 13, 2018) (press release announcing establishment of a working group “to examine whether the Office of the Attorney General should create two new statewide units:” a “cold case unit” and a “conviction review unit”). The Working Group includes former and current judges, prosecutors, defense attorneys, academics, victims’ rights advocates, members of civil liberties and innocence organizations, and federal, state, county, and municipal law enforcement officials. Their substantial and diverse experience has been instrumental in developing this report and its recommendations. In addition to contributing their own expertise, the Working Group has reviewed leading studies and reports relating to CRUs and wrongful convictions.

² See, e.g., 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 & DELINQUENCY 436 (2007) (estimating that wrongful convictions occur in the United States in 1-3% of all felony cases); Samuel R. Goss, et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PNAS 7230 (2014) (estimating 4.1% wrongful convictions of all death-sentenced defendants). One recent study, which surveyed nearly 3,000 state prisoners convicted of both capital and non-capital crimes in Pennsylvania, found that 6% reported that they were actually innocent. The study’s authors have concluded that this number likely represents the upper range of such wrongful convictions across the entire prison population. See Charles E. Loeffler, et al., *Measuring Self-Reported Wrongful Convictions Among Prisoners*, J. QUANTITATIVE CRIMINOLOGY (Apr. 6, 2018), <https://doi.org/10.1007/s10940-018-9381-1>.

³ Kelly Walsh, et al., *Estimating the Prevalence of Wrongful Convictions*, THE URBAN INSTITUTE (September 2017), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf>.

⁴ See *Total Federal Inmates Statistics*, FED’L BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited Feb. 25, 2019); Peter

rate, there would be as many as 14,963 people in the United States currently serving prison sentences for crimes they did not commit.

Compared with that number, the current systems for review and redress are inadequate. In 2018, for example, there were 148 exonerations in the United States,⁵ and only 2,395 total exonerations in the United States have been reported since 1989.⁶ In the abstract, that number seems significant. And indeed, for those who have benefitted and for those who have been responsible for their exoneration, it is monumental. But measured against the potential population of those who have been convicted but may be innocent, the number of potentially unaddressed cases is staggering.

Projecting those statistics to the prison population in New Jersey is illuminating. According to the New Jersey Department of Corrections, the state prison population as of December 31, 2018 was 19,453. Assuming only a one-percent rate of wrongful conviction, almost 200 of those people currently in state prison are actually innocent.⁷ Yet there have been only 37 exonerations in the State of New Jersey since 1989.⁸

That disparity is very troubling. First, any wrongful conviction undermines individual justice and results in personal devastation for the defendant and his or her family, friends, and community. Second, unaddressed claims of actual innocence undermine public confidence in the criminal justice system and are inconsistent with our society's notion of justice. While no system will ever be perfect, our commitment to fairness requires a procedural avenue that provides a serious look at viable claims of such profound error.⁹ Finally, ignoring what may turn out to be

Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

⁵ *Exoneration Detail List: 2018*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=Exonerated&FilterValue1=8_2018 (last visited Feb. 25, 2019).

⁶ *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Feb. 25, 2019).

⁷ *Total Inmates in New Jersey State Correctional Institutions and Satellite Units*, N.J. DEP'T OF CORR. (2018), https://www.state.nj.us/corrections/pdf/offender_statistics/2018/Total%202018.pdf.

⁸ *Exoneration Detail List: New Jersey*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View=%7BFAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7%7D&FilterField1=ST&FilterValue1=NJ> (last visited Feb. 25, 2019).

⁹ The estimated wrongful conviction statistics appear roughly to correspond with the public perception of the frequency of wrongful convictions. In one study, the majority of survey respondents believed that wrongful convictions occur at least occasionally, and approximately

righteous claims of wrongful conviction compromises public safety. For every convicted person who is actually innocent, there is someone else who actually committed the offense, has not been caught and punished, and may pose a threat to the community.

Despite those statistics, and their tragic implications, New Jersey has not addressed them in a coordinated way. Typically, when defendants have raised claims of wrongful conviction or actual innocence in New Jersey, the practice has been that the county prosecutors' offices consider and investigate them. That approach has seemed logical because the claims typically arise in the context of a petition for post-conviction relief (*e.g.*, to vacate the conviction or for a new trial) in the courts of the county in which the conviction occurred. As a result, when those claims have surfaced, they have been addressed in the ordinary course of judicial business.

Although those practices are consistent with the approach of the vast majority of jurisdictions across the country, they are problematic. First, wrongful conviction claims are generally handled as part of the office's existing caseload, without a separate structure, personnel, or particular formal procedures. As a result, which cases receive attention, who handles them, and the rigor with which they are examined can and does vary widely. Second, it is often the case that responsibility for evaluating and responding to the claims has fallen to prosecutors and investigators who were involved in the original case, if they are still available to do so. Such a prominent role for law enforcement officers and lawyers who were responsible for the original conviction can lead to a perceived or actual lack of objectivity and the loss of public confidence in the process.

Recognizing those concerns, 31 jurisdictions across the country have now established CRUs.¹⁰ CRUs, sometimes known as Conviction Integrity Units ("CIUs"), are typically separate components of a prosecutorial office that address allegations of wrongful conviction, including claims of actual innocence. However, with four exceptions, each of those CRUs has been established by a district attorney with only countywide jurisdiction.¹¹ Although those efforts are

93% of respondents reported that wrongful convictions occur at a rate of at least 1%. Marvin Zalman, et al., *Citizens' Attitudes Toward Wrongful Convictions*, 37 CRIMINAL JUSTICE REV. 51 (2012).

¹⁰ These jurisdictions are Pima County, AZ; Los Angeles County, CA; Santa Clara County, CA; San Diego County, CA; Ventura County, CA; Yolo County, CA; 18th Judicial District, CO (which is comprised of Arapahoe, Douglas, Elbert and Lincoln counties); Boulder County, CO; Washington DC (U.S. Attorney's Office for the District of Columbia); Hillsborough County, FL; Cook County, IL; Lake County, IL; Middlesex County, MA; Suffolk County, MA; Baltimore City State's Attorney's Office, MD; Wayne County, MI; State of North Carolina; Clark County, NV; Kings County, NY; Nassau County, NY; New York County, NY; Oneida County, NY; Suffolk County, NY; Cuyahoga County, OH; Multnomah County, OR; Philadelphia County, PA; Bexar County, TX; Dallas County, TX; Harris County, TX; Tarrant County, TX; and Salt Lake County, UT.

¹¹ The four exceptions are: 1) the Conviction Review Unit of the 18th Judicial District of Colorado, which covers four counties; 2) the Conviction Integrity Unit of the U.S. Attorney's

admirable, and have resulted in dozens of exonerations, the narrowness of their reach – attributable to the limited jurisdiction of the district attorneys – has not addressed resulting issues of inconsistent standards.

New Jersey’s law enforcement structure offers the opportunity for a different and more comprehensive approach. Unlike other states, New Jersey vests its Attorney General, as the chief law enforcement officer of the state, with the responsibility to oversee all twenty-one County Prosecutors, as well as the statewide Division of Criminal Justice (“DCJ”). As a result, the Attorney General supervises all those who investigate and prosecute violations of the state’s criminal laws; has the jurisdiction to establish policy and supervisory measures; and has the authority to issue statewide guidelines and directives that apply to the prosecution of all cases throughout the state.

We recommend that the Attorney General take advantage of that power to establish a statewide CRU within the Department of Law and Public Safety that reports directly to his Office. That structure will provide coordinated and consistent case reviews, informed by a broader examination of a wider range of issues. In addition, statewide funding of the CRU will reduce or eliminate staffing or financial disparities among those handling such matters, particularly where some county prosecutors may lack the resources necessary for the thorough review that those cases require. A statewide unit would also systematize the review process, emphasize its importance, and facilitate cooperation by the various agencies involved in the original investigation and prosecution.

The proposed CRU would not, of course, displace or reduce the obligations of prosecutors and law enforcement to avoid, address, and remedy wrongful convictions in the first instance. For example, it remains the legal and ethical responsibility of investigators and prosecutors to disclose material, exculpatory evidence whenever or however it comes to their attention, even if long after

Office for the District of Columbia; 3) the Conviction Integrity Unit of the Baltimore City State’s Attorney’s Office; and 4) the North Carolina Innocence Inquiry Commission (“NCIIC”).

The NCIIC is the only CRU with statewide jurisdiction, and was created by that state’s legislature in 2006 as a statewide clearing house for the investigation of actual innocence claims. However, the NCIIC differs from most CRUs because it is independent of any prosecutor’s office, and its full-time staff is housed within the Administrative Office of the North Carolina courts. See Jessica A. Roth, *Legitimacy of Innocence Commissions and Reform Entities: A Comparative Perspective*, RUTGERS L. SCH.: THEORIZING CRIMINAL LAW REFORM CONFERENCE (Feb. 14, 2017), <https://law.rutgers.edu/sites/law/files/attachments/Roth%20-%20The%20Legitimacy%20of%20Innocence%20Commissions%20and%20Reform%20Entities-A%20Comparative%20Perspective.pdf>. Rather than make reports and recommendations to district attorneys, the NCIIC may refer a case to a panel of three superior court judges for consideration. *Id.* (citing N.C. Gen. Stat. § 15A-1460(1) (2015)). In order for the three-judge panel to grant relief, it must unanimously agree that actual innocence was established by clear and convincing evidence. *Id.* (citing N.C. Gen. Stat. § 15A-1469(h) (2015)).

conviction and the conclusion of the appellate process. Nor would the CRU usurp the authority of the courts to address such injustices under existing constitutional provisions, rules, and case law.

Rather, a statewide CRU would reinforce New Jersey's commitment to the highest standards of fairness in our criminal justice system by creating an accessible, transparent, and centralized process for investigating and reviewing claims of actual innocence, and by providing the resources and expertise necessary to do so adequately, thoroughly, and credibly. The creation and implementation of such a structure would set a national example of how states should address the unjust reality that innocent people continue to languish behind bars.

II. EXECUTIVE SUMMARY

The Working Group recommends that the Attorney General consider the following proposals, which are described in greater detail in Part III:

Organization and Structure

- The CRU should be an independent unit within the Office of the Attorney General.
- CRU leadership should report to the First Assistant Attorney General or another senior member of the Attorney General's executive leadership team specifically designated by the Attorney General.
- The CRU should be led by a Director and Deputy Director, one of whom should have substantial prosecutorial experience and the other of whom should have substantial experience in criminal defense.
- The CRU should work with other institutions, such as innocence organizations and law schools, that can provide meaningful assistance with case intake and screening.
- The CRU should have sufficient resources to provide meaningful review of all appropriate cases.
- The Attorney General should appoint a panel of experienced academics, public and private sector criminal law practitioners, and other experts to advise the CRU and recommend improvements to its procedures.

Jurisdiction

- The CRU should have statewide jurisdiction.
- The CRU's jurisdiction should be limited to petitioners who claim actual innocence.
- The CRU should consider referrals from any source as long as the petition includes a claim of actual innocence.
- Once the CRU accepts a case for full investigation, it may also consider any other related claims of procedural, constitutional, and other error.

- A centralized, statewide CRU should provide wrongful conviction review that is objective, consistent, and informed by substantial experience.
- The CRU should submit an annual report to the Attorney General generally describing the full breadth of its work and making any recommendations for necessary procedural or legal reforms.

Scope of Review

- A claim of innocence will trigger an initial review. A determination by the CRU that the claim is plausible will trigger a complete and thorough investigation. Such a review should, at a minimum, involve an examination of all investigative and prosecutorial files (including attorney work-product) as well as all materials available from defense counsel.
- Because the CRU's process is contemplated as collaborative, rather than adversarial, the CRU ordinarily should share with petitioner's counsel all information from the investigative and prosecutorial files that may be helpful to the full investigation of claims of innocence.¹²
- If, as a result of its investigation, the CRU concludes that there is a likelihood of actual innocence, or that it otherwise lacks confidence in the fairness of the conviction, the CRU should recommend that the Attorney General direct the appropriate prosecutorial authority to move or consent to vacate the conviction.
- The Attorney General, with the advice of the CRU, should determine which prosecutorial agency should represent the State's interests in any subsequent proceedings. In particular, the Attorney General should consider whether public confidence would be best served by reassigning the case to investigators and prosecutors who are independent from office(s) that originally had responsibility for the matter.
- A petitioner denied relief by the Attorney General, whether after the CRU's initial review or full investigation, may still be entitled to seek relief in the courts, and an adverse finding by the CRU should have neither preclusive effect nor evidential value.

Notifications

- The CRU should notify the petitioner at key stages in the review process, such as when the petition has been received, if and when the CRU proceeds to a full investigation, and when the CRU and Attorney General have reached their conclusions.
- The CRU should also inform any victims or survivors at least to the same extent as would be appropriate or required during the investigation and prosecution of a criminal

¹² This is the sole recommendation that the Working Group does not endorse unanimously. See note 22.

case. At a minimum, the CRU should advise victims and survivors when an initial review is concluded, and during and at the conclusion of a full investigation.

Procedural Hurdles

- Existing statutes and court rules may preclude or inhibit some of the post-conviction relief contemplated by this report.
- Accordingly, the CRU should expeditiously consult with the DCJ and the Supreme Court Criminal Practice Committee to review the rules, procedures, and case law that apply to post-conviction relief and recommend necessary amendments.

Statewide Cold Case Unit

- When a cold case results from an exoneration, the Attorney General should decide, with advice from the CRU, which investigative and prosecutorial agencies should assume responsibility for the matter. In particular, the Attorney General should consider whether reassigning the case to those independent from the original investigative and prosecutorial team would best serve public confidence.
- An independent, statewide cold case unit does not otherwise appear to be necessary and the majority of individual cold cases are best addressed by the investigators and prosecutors to whom they are currently assigned.

III. RECOMMENDATIONS

A. The Organization and Structure of the CRU

1. Direction and Oversight

Within the Department of Law and Public Safety, the DCJ has statewide responsibility for coordinating criminal justice issues and for exercising some supervisory authority over the county prosecutors. DCJ also has a broad perspective on the breadth of challenges that face investigators and prosecutors throughout the state. As a result, there are reasons for DCJ to assume responsibility for the CRU. At the same time, the Working Group recognizes that DCJ is an agency that already plays the lead or a major role in a substantial number of investigations and prosecutions. Aside from its own caseload, DCJ is often involved in matters that are handled by the county prosecutors and the law enforcement officers with whom they work.

The considerable extent of those responsibilities convinces the Working Group that the accountability and credibility of the CRU would be best served by assigning its functions outside DCJ.¹³ That structure will also reinforce the singular importance of the CRU's responsibility. To

¹³ The Working Group also believes that the CRU should be independent of the Appellate Bureau, which is housed within DCJ, because the CRU's review and investigative process is fundamentally distinct from the appellate function of preserving convictions. It is critical that

that end, the Working Group proposes that the CRU be established as an independent office under the umbrella of the Office of the Attorney General. Taking account of the significant demands already placed on the Attorney General, the Working Group further recommends that the leadership of the CRU report to the Attorney General through the First Assistant Attorney General or another member of the Attorney General's executive leadership team specifically assigned by the Attorney General. That structure balances the interests of legitimacy and accountability, which are served by the Attorney General's ultimate supervision of the CRU and its leadership, against the burdens that would result from requiring the Attorney General to serve as CRU's sole, direct supervisor. It also is consistent with the structure that applies to other components of the Department of Law and Public Safety overseen by the Attorney General.

2. Staffing

The Working Group recommends that the CRU be led by a Director and Deputy Director. Each should have substantial experience with the criminal justice system, one as a prosecutor and the other as a defense attorney. In addition, each should enjoy a reputation among the bench and bar for integrity, fairness, and a collaborative work ethic. That complementary blend of experience should provide the CRU and its staff with the perspectives that are essential to its work and critical to give confidence to the public, defendants, and others involved in the criminal justice system that the CRU is objective.

In addition to the CRU's leadership, the Working Group anticipates the following initial full-time personnel needs: between two and four attorneys, one or two investigators, and one or two administrative staff. That staffing is consistent with the Los Angeles County District Attorney's Office Conviction Review Unit and the NCIIC, each of which serves a population of relatively similar size and employs three full-time dedicated attorneys and one full-time investigator.¹⁴ Nevertheless, the Working Group is confident that the Attorney General will ultimately make appropriate staffing decisions in consultation with the CRU leadership, accounting for the CRU's needs and workload, as well as budgetary and other resource constraints. The Working Group also encourages the CRU to take advantage of the expertise and resources of other institutions, such as established exoneration/innocence organizations and relevant academic centers housed within law schools and universities, that can meaningfully participate or assist in case screening and review.

CRU personnel approach its work not as advocates, but with a neutral and flexible outlook, including the consideration of potential evidence and theories that would not necessarily support or warrant overturning a conviction on appeal.

¹⁴ John Hollway, *Conviction Review Units: A National Perspective*, PENN L. LEGAL SCHOLARSHIP REPOSITORY, Faculty Scholarship Paper 18 (2016) at 33; *About*, N.C. INNOCENCE INQUIRY COMM'N, <http://innocencecommission-nc.gov/about/> (last visited Feb. 25, 2019). We note that the unit established by the Kings County, NY (Brooklyn) District Attorney has a staff of nine attorneys despite the smaller population of that jurisdiction.

3. Training

The Working Group anticipates that the Attorney General and CRU leadership will select staff with relevant prior experience and will fully support the Unit with ongoing training. The Working Group also recommends that the CRU consult with other CRUs and innocence organizations, seek joint training opportunities, and take advantage of existing grant programs.

4. Reporting

The Working Group recommends that the CRU publish the results of its work on at least an annual basis. Reports should include statistics on the number of cases submitted, reviewed, and investigated; the outcomes of those reviews; and the sources of reviewed cases (whether individual application, supported by an innocence organization, etc.). The CRU should also identify areas in which its investigations have disclosed the need for systemic or procedural improvements in the investigation and prosecution of criminal cases. The Attorney General also should exercise discretion in appropriate cases to disclose publicly the results or details of any individual case reviewed by the CRU, consistent with other requirements of law.

5. Expert Advisory Panel

The Working Group proposes that the Attorney General appoint an advisory panel composed of prosecutors, criminal defense attorneys, members of the judiciary, and members of the criminal justice academic community to meet at least semi-annually to review the CRU's progress, advise the CRU on nationwide developments in the area of wrongful convictions, and address issues such as staffing, resource allocation, and victim notification.¹⁵ However, this advisory panel should not be responsible for reviewing specific cases or decisions of the CRU or the Attorney General except to the extent that they inform the evaluation of systemic issues.

B. Jurisdiction of Conviction Review Unit

Although the academic literature uses the phrase “wrongful conviction” to describe a variety of circumstances, the Working Group recommends that the CRU focus on reviewing and investigating claims of actual innocence – that is, claims that no crime was committed or, more commonly, that the crime was committed by someone else. However, the Working Group recognizes that effectively evaluating such claims of actual innocence may also involve or require consideration of claims of procedural or constitutional error that undermine the integrity of a conviction.¹⁶ Accordingly, the Working Group recommends that there be no limitation placed on

¹⁵ Although the model is subject to the Attorney General's discretion, one that appears to be working well is the Conviction Integrity Policy Advisory Panel, established by the Manhattan District Attorney's Office. *Id.* at 29; Press Release, New York County District Attorney's Office, District Attorney Vance Announces Conviction Integrity Program (March 10, 2010), <https://www.manhattanda.org/district-attorney-vance-announces-conviction-integrity-program/>, (last visited Feb. 25, 2019).

¹⁶ We do not suggest that the Attorney General lacks the discretion to assign to the CRU other matters that do not raise claims of actual innocence, but which may involve claims undermining

the scope of the CRU's review of a claim of actual innocence. Rather, once the CRU has determined that the petitioner's claim of actual innocence is plausible, the CRU should be permitted and encouraged to examine the totality of circumstances concerning a claim of wrongful conviction.

The Working Group recommends that all indictable offenses be eligible for consideration by the CRU; however, it also recommends that the CRU prioritize cases in which defendants remain in prison, and particularly those where the terms of incarceration are the most severe.

C. Initial Screening

The Working Group anticipates that the CRU will receive referrals from a variety of sources: organizations that advocate for potentially innocent defendants, defense attorneys, prosecutors, law enforcement agencies, courts, media, individuals claiming innocence *pro se*, and friends and family members. Petitions referred by innocence organizations and law school clinics may contain more evidentiary and documentary support, while petitions submitted by parties proceeding *pro se* and parties who are unfamiliar with the CRU procedure or do not have access to evidence may contain far less information and detail. Therefore, the CRU should maintain the flexibility necessary to gather any additional information it deems appropriate or necessary to determine whether the petition asserts a plausible claim of actual innocence.

To expedite this process, the Working Group recommends that the CRU use a uniform intake form describing the information it will require to screen a petition. The CRU should provide the intake form along with appropriate instructions to any party interested in submitting a petition. The CRU should also create a website, including a link to the intake form, that provides a clear explanation of the appropriate process for making a referral. Once presented with a petition and the intake form, and whatever support the petitioner may provide, the CRU should then determine the extent of additional inquiry necessary to evaluate the claim's plausibility.

The CRU should immediately acknowledge every referral in writing, and identify a point of contact for the petitioner. The Working Group recommends that the CRU establish a system for doing so, as well as one that will track all other notifications.

Although the petitioner must assert a claim of actual innocence, that requirement does not preclude the CRU's reviewing cases in which the defendant pleaded guilty, because there are occasions on which defendants have admitted or confessed to crimes that they did not commit. And while the Working Group advises against placing a limitation on the age of cases that come before the CRU, those in which the petitioner is still incarcerated should generally receive top priority. The CRU should also use its discretion to prioritize cases where it appears that certain investigative measures, including but not limited to forensic tests, could lead to a more expeditious resolution.

the legitimacy of one more convictions. Such matters could, for example, include issues such as the fabrication of evidence or widespread forensic errors. However, the Working Group recommends that such cases not ordinarily be the CRU's primary focus.

If the CRU determines that the petition asserts a plausible claim of actual innocence, the CRU should notify the petitioner and begin an examination of the petitioner's claims. If, on the other hand, the CRU determines following its initial review that the petition does not have sufficient merit, the CRU should either so notify the petitioner and provide a written summary of its rationale or provide guidance for further submissions by the petitioner. Depending on the duration of the initial review, the CRU should consider providing periodic updates to the petitioner.

The CRU necessarily must seek information at whatever stage of the process is appropriate from the prosecutors and investigators who were involved in the underlying conviction. However, the Working Group recommends that those individuals have no other responsibility for or involvement in the initial review of the claim. The Working Group agrees that any greater role could interfere with the perceived and actual independence of the CRU's initial review.

D. Full Investigative Review

1. Scope of Investigation

Once the CRU determines that a particular case may have merit, it should so notify the petitioner and should commence a thorough examination of the petitioner's claims, including a complete review of the original investigative and prosecutorial files (including attorney work-product), and consultation with the responsible law enforcement officials. In addition, the CRU should obtain from defense counsel as much information and documentation from the original case as possible.¹⁷

The CRU has plenary authority to conduct whatever investigation it deems appropriate to determine the *bona fides* of the petitioner's claim. That investigation could include for example, witness interviews, forensic analysis, and other investigative techniques. The extent of the investigation will depend on the specifics of the claim.

Because the investigation is intended to be a collaborative endeavor, the Working Group recommends that the CRU should ordinarily make the entire original investigative and prosecutorial files available to petitioner's counsel.¹⁸ There may be some concern or hesitation about sharing such work product with the petitioner, particularly to the extent that the material

¹⁷ The CRU should not require defense counsel to make available attorney-client privileged information, although the CRU is not precluded from considering such information if the petitioner chooses to share it. Indeed, there may be circumstances in which the petitioner's claim would be substantiated by material that is otherwise privileged. In those situations, the CRU may request that the petitioner waive the attorney-client privilege with respect to that material. A petitioner's failure to do so should not preclude the CRU from considering the petition, but it may limit the CRU's ability to fully evaluate the claim.

¹⁸ CRUs that share information with petitioners' counsel generally use collaborative agreements to control the use and dissemination of this information. See Barry Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 732 (2017).

goes beyond what was required to be (or what actually was) provided in discovery. However, the Working Group is strongly of the view that the benefits of doing so will usually outweigh the risks,¹⁹ particularly because petitioner's counsel may be in a better position to identify leads, new evidence, and other matters that may support the claim of actual innocence.

2. Victim/Survivor Notification and Involvement

New Jersey has a long history of protecting the rights of crime victims,²⁰ and it is critical for the CRU to continue that commitment. The reinvestigation of a crime and possible exoneration can have a profound impact on victims, survivors, and their families,²¹ who often achieved some measure of closure from the original prosecution and conviction. As a result, the CRU should keep the victim or the victim's survivors informed at least to the same extent as would be appropriate or required during the investigation and prosecution of a criminal case, unless there are compelling reasons not to do so.²² In particular, the CRU should advise victims and survivors when an initial review is concluded, as well as during and at the conclusion of a full investigation. Victims and their survivors also should be apprised promptly of the CRU's final recommendation, as well as the Attorney General's ultimate decision.

¹⁹ This is the sole recommendation on which the Working Group was not unanimous. A small number of Working Group members favor a procedure in which the CRU has discretion to share only material in the investigative and prosecutorial files that relate to facts, witnesses, and other evidence, but not attorney work-product. Those Working Group members believe the potential disclosure of work-product by the CRU could chill the creation of such material during an investigation or prosecution. Most members of the Working Group assess that risk as minimal and find it outweighed by the need for a full evaluation of all issues once the CRU has determined that a petitioner has presented a claim warranting such a comprehensive review.

There is also a concern that the defense's access to otherwise protected government work-product would inappropriately alter the landscape of post-conviction litigation. However, the majority of the Working Group determined that that risk is not as substantial as might appear because the defendant who sues will be able to recover damages only if the conviction turns out to be wrongful. *See Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994). Except in extraordinary circumstances, the CRU should not consider a petition unless and until the defendant has exhausted all direct appeals and all reasonable attempts to obtain post-conviction relief. Such a procedure will mitigate the concern about sharing of information and will ensure that the CRU does not intercede inappropriately early in the process.

²⁰ New Jersey Constitutional Amendment for Victims' Rights (N.J. Const., art. I, para. 22); Rights of Crime Victims and Witnesses (N.J.S.A. § 52:4B-36).

²¹ Seri Irazola, *et al.*, *Addressing the Impact of Wrongful Convictions on Crime Victims*, NAT'L INST. JUSTICE J., Dec. 2014, at 34, 35.

²² For example, the CRU should take into account whether disclosure could have an adverse impact on a pending investigation of either the defendant or someone else.

To implement this recommendation, the Working Group suggests that the CRU staff include, at least on a part-time or consultative basis, an expert in victim assistance. It may also be appropriate to include personnel who were involved in the underlying investigation or prosecution if they have maintained a relationship with a victim or the survivors.

In certain limited circumstances, it may be necessary or appropriate to delay victim notification until later in the investigation. However, in no event should notification occur later than a recommendation that the Attorney General consent or move to overturn a conviction.

3. Standard of Review; Final Recommendation to Attorney General; and Implementation of Final Decision

If the CRU concludes that there is a likelihood of actual innocence, or that it otherwise lacks confidence in the fairness of a conviction, it should recommend that the Attorney General direct the appropriate prosecutorial authority to move for or consent to the vacation of the conviction.²³ Any such recommendation must include a detailed justification. Similarly, if the CRU concludes that there should be no such action, it should provide a detailed explanation of its decision. In either instance, the Working Group recommends that the Attorney General personally make the final decision about the appropriate response to the petition.

If the CRU does not reach a conclusion that the petitioner is actually innocent, but believes that vacating the conviction and considering retrial may be appropriate, the CRU should provide that recommendation with a detailed explanation to the Attorney General. In that circumstance, the CRU should also recommend whether the case should be handled by the original office of prosecution, or whether the Attorney General should reassign the matter to a different county prosecutor or to DCJ.²⁴

After receiving a final recommendation from the CRU in any case, the Attorney General should personally and expeditiously determine whether the State will implement the recommendation and either move to vacate the conviction, join in or consent to a pending motion by the defendant, move to dismiss the underlying charges, move to retry the defendant, or oppose any relief. If the decision is based on considerations other than those in the CRU's recommendation, the Attorney General should memorialize the rationale in a final decision document. Regardless of the Attorney General's decision, the CRU should promptly notify the petitioner and provide the reasons for the Attorney General's decision. Similarly, in all circumstances, the CRU should notify the victim of the Attorney General's decision before it is publicized and provide the victim the opportunity to submit a victim statement to the Attorney General along with the CRU's recommendation.

²³ The Working Group considered whether the CRU should make its recommendations based on existing legal standards, such as the ones that apply to a violation of *Brady v. Maryland*, newly discovered evidence, or post-conviction relief. It is the Working Group's view, however, that those avenues are already available to defendants, and that the CRU's mission requires a more nuanced and comprehensive approach.

²⁴ See N.J.S.A. 52:17B-106; New Jersey Prosecutor's Manual, Section 13.4.2.

The Attorney General should determine which prosecutorial agency should represent the State's interests in any subsequent proceedings. A decision by the Attorney General that the State will continue to support the underlying conviction will not, of course, preclude the petitioner from seeking other relief available under the law including, but not limited to, a petition for executive clemency. Under those circumstances, an adverse finding by the CRU should have neither preclusive effect nor evidential value, although the petitioner may be entitled to discovery of the underlying investigative materials.

E. Procedural Hurdles

Some of the post-conviction relief contemplated by this Report might otherwise face procedural hurdles. For example, there are a number of rules or statutes that impose very specific time limits for seeking post-conviction relief. As a result, the Working Group recommends that the CRU, together with DCJ and the Criminal Practice Committee, immediately review the rules, procedures, and case law that apply to post-conviction relief and provide for their appropriate amendment in ways that support the recommendations set forth in this document. The CRU should also consider whether any legislative or rule changes are necessary to allow for accelerated vacation of judgment, exoneration, and discharge.

IV. The Need for a Statewide Cold Case Unit

In his original charter, the Attorney General asked this Working Group to consider whether he should establish a standalone "cold case unit," which would be charged with attempting to solve old crimes using new technology and other investigative tools. Cold cases can broadly be divided into two categories: crimes that have remained unsolved for a long period of time and crimes that become unsolved through the process of exoneration. The Working Group has concluded that those categories warrant distinct treatment.

As to the former category, there are a substantial number of such cases on the docket of every county prosecutor's office. Thus, the volume of cases that could be assigned to a centralized state unit could be overwhelming. The Working Group is of the view that each county prosecutor's office is best-suited to handle those matters. Investigators and prosecutors who are familiar with the evidence, the previous investigative leads, and the facts and circumstances of the crime are usually in the best position to evaluate additional information as it becomes available.

To be sure, there are circumstances in which a fresh perspective can be valuable, particularly if those responsible for an investigation have approached it from a specific point of view. But there are already ample resources available – through other prosecutors' offices or DCJ – to handle or consult on matters that would benefit from examination by an entirely new or augmented team. The Working Group recommends that the Attorney General use existing supervisory authority to implement an informal program that encourages prosecutors, investigators, and supervisory personnel to discuss their cold cases with other colleagues in other offices and to take advantage of their expertise. The State may want to consider a regional approach to do so.

When a cold case is generated by an exoneration, the Working Group recommends a different approach. Studies show that, in cases in which exoneration is based on DNA evidence, approximately 48% of those investigations also identify the person who actually committed the crime.²⁵ Many other exonerations, however, result in “cold cases.” In other words, some years later, law enforcement may find itself with a crime that has been newly reclassified as unsolved. In those circumstances, the CRU should recommend to the Attorney General whether to assign the case to the office that handled the original investigation and prosecution or whether to reassign it. That decision should turn on the circumstances of the case and the reasons for the exoneration. If, for example, the innocence finding is based on a faulty laboratory test, there may be no issue with returning the case to the original office. In other situations, however, the issues may have been of a character that credibility of the subsequent investigation or prosecution requires reassignment. In all circumstances following an exoneration, the decision should ultimately be made by the Attorney General.

Regardless of the Attorney General’s decision, the original file, as well as the CRU’s investigative file and any other potentially useful investigative material, should be shared with the new investigative and prosecutorial team. While the CRU will no longer be responsible for the case, it may be appropriate for the CRU’s victim specialist to maintain some involvement.

V. CONCLUSION

Although these recommendations represent the consensus views of the Working Group, after months of robust discussion, all who participated recognize and expect that the CRU’s structure, procedures, and approach to its complicated mission will evolve as its leadership and staff gain experience. We are confident that, with proper and adequate resources, and the support and commitment of the Attorney General, the CRU will play a vital role in our State.

New Jersey has long been a leader in the fair administration of criminal justice. The establishment of the statewide conviction review unit will highlight and enhance the State’s commitment to that principle. We commend the Attorney General for his thoughtful leadership and we thank him for the opportunity to participate in such an important process. We are also very grateful to the members of the Working Group for sharing their expertise, their passion, and their time.

Respectfully Submitted,

Hon. Virginia Long (ret.), Co-Chair
Hon. Paul J. Fishman, Co-Chair

²⁵ *Facts on Post-Conviction DNA Exonerations*, THE INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Feb. 25, 2019); James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1632 (2013).