

MASSACHUSETTS CONVICTION INTEGRITY WORKING GROUP

Convened by the Massachusetts Bar Association

CONVICTION INTEGRITY PROGRAMS: *A GUIDE TO BEST PRACTICES FOR PROSECUTORIAL OFFICES*

MARCH 2021



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INTRODUCTION

The role of prosecutors is to ensure justice in all their criminal cases.¹ This duty includes the responsibility to take special precautions to prevent and rectify the conviction of innocent persons and other miscarriages of justice that undermine the integrity of the criminal legal system.² While no ethical prosecutor intends to convict an innocent person or defend a conviction they know to be erroneous or unjust, it is undisputed that wrongful convictions occur (and are frequently upheld on appeal), even where prosecutors are well-intentioned and act in good faith.

Miscarriages of justice are not limited to cases in which a defendant is factually innocent. How a case is handled by forensic labs and/or law enforcement officers may lead to a corruption of, or lack of confidence in, the integrity of the process that results in a conviction. In addition, racial disparities exist at all stages of the Massachusetts criminal legal system,³ including among those wrongfully convicted.⁴ The Justices of the Supreme Judicial Court (SJC) rightfully have called on "[all] members of the legal community," including prosecutors, "to reexamine why, too often, our criminal justice system fails to treat African-Americans the same as white Americans, and recommit

¹ *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"); MASS. R. PROF. C. 3.8, cmt. 1 (2020) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

² MASS. R. PROF. C. 3.8(i) & (j) & cmt. 1 (2020); *infra* note 24.

³ See ELIZABETH TSAI BISHOP ET AL., HARVARD LAW SCH., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM: SUBMITTED TO CHIEF JUSTICE RALPH D. GANTS, SUPREME JUDICIAL COURT OF MASSACHUSETTS (2020), <https://hls.harvard.edu/content/uploads/2020/11/Massachusetts-Racial-Disparity-Report-FINAL.pdf> (quantifying racial disparities in Massachusetts from initial charging decision to incarceration).

⁴ According to the U.S. Census and the National Registry of Exonerations (hereafter "NRE"), Black people make up just 9.0% of the population of Massachusetts, but, since 1989, are 36% of those found to have been wrongly convicted, and 45% of those found to have been wrongly convicted of murder. White people make up 80.6% of the Commonwealth's population, but are less than half of those found to have been wrongly convicted.

ourselves to the systemic change needed to make equality under the law an enduring reality to all."⁵

During the past decade, numerous prosecutorial offices across the United States, including several in Massachusetts, have formed Conviction Integrity Units (“CIUs”)⁶ or made other structural arrangements to review and address claims of wrongful conviction or other miscarriages of justice.⁷ Some of these offices have also utilized their CIUs to provide training and leadership to prevent wrongful convictions and other injustices before they occur.⁸ Well-designed, structurally independent CIUs, along with other conviction integrity initiatives, can improve significantly the ability of prosecutorial offices to review, investigate, remedy, and prevent wrongful convictions and miscarriages of justice.⁹

⁵ Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020), <https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and>.

⁶ According to data collected by the NRE, as of January 2021, there were 78 known CIUs nationwide, 34 of which had produced exonerations. As of September 2019, 385 of the 2,492 exonerations listed in the NRE, or 15 per cent (15%), involved a CIU. In 2019, 55 of the 143 exonerations, or 38 per cent (38%), involved a CIU. The NRE, defines an “exoneration” as, “[in] general, [occurring] when a person who has been convicted of a crime is officially cleared based on new evidence of innocence.” NRE, *Glossary*, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (lasted visited Feb. 19, 2021).

⁷ “Wrongful convictions” and “miscarriages of justice” as used herein include, but are not limited to, cases involving the conviction of a person who was factually innocent (e.g., one who did not commit the offense of conviction), as well as convictions resulting from flawed forensic evidence or repudiated forensic science, misconduct by a government official, false testimony, constitutional violations, racial bias occurring in the investigation or prosecution, ineffective assistance of defense counsel, or other grounds creating a lack of confidence in the integrity of the investigation, prosecution, or conviction.

⁸ Prosecutors are well poised to prevent wrongful convictions. SAMUEL R. GROSS ET AL., NAT’L REGISTRY OF EXONERATIONS, GOV’T MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT iii (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

⁹ There are recommendations herein to which readers may respond by asking how, in the current challenging budgetary cycle, prosecutorial offices will afford to implement change. Some recommendations may require resource reallocation. That challenge is addressed below. This

MASSACHUSETTS CONVICTION INTEGRITY WORKING GROUP'S

MANDATE AND INITIATIVE

In May 2018, the Massachusetts Bar Association (“MBA”), through its House of Delegates,¹⁰ unanimously approved a Resolution titled, “SUPPORTING CONVICTION INTEGRITY PROGRAMS IN MASSACHUSETTS PROSECUTORIAL OFFICES.”¹¹ The Resolution sets forth, in relevant part, the creation of the Massachusetts Bar Association-convened “Massachusetts Conviction Integrity Working Group” (“MCIWG”).

RESOLVED, . . . All prosecutorial offices in Massachusetts, including District Attorneys’ Offices and the Office of the Attorney General, establish a ‘Conviction Integrity Program’ through an internal ‘Conviction Integrity Unit, Division, Committee or Panel’ (unless and until a fully functional statewide Innocence Commission is created and supplants the need for office-based programs), to provide independent internal reviews, analysis, and re-investigation of cases involving a post-conviction claim of actual innocence, and to assess and investigate allegations of prosecutorial error and misconduct that resulted in wrongful convictions.

FURTHER RESOLVED, That the Massachusetts Bar Association will seek to convene or participate in a working group of representatives of state prosecutorial offices and other key stakeholders, including the Massachusetts ‘Innocence Network’, to study and make recommendations about ‘best practices’ for conviction integrity programs, and about the most effective structure(s) to promote conviction

Guide, and the sources cited herein, recommend that conviction integrity programs be prioritized with existing resources to promote ethical and effective prosecution and to avoid the harms to persons and communities impacted by wrongful convictions.

¹⁰ The MBA’s House of Delegates includes the officers of the MBA, the leadership of its 20 Section Councils, its regional delegates, and the Presidents of Affinity Bar Associations and County Bar Associations in Massachusetts.

¹¹ The MBA’s Resolution on Conviction Integrity was part of a package of five criminal justice reform Resolutions approved by the MBA’s House of Delegates in May 2018, generated through a year-long collaboration of the MBA’s Civil Rights and Social Justice Section Council and its Criminal Justice Section Council. In addition to triggering the formation of the MCIWG, the MBA Resolutions played an important role in the passage of sweeping criminal justice reform legislation by the state legislature in 2018.

integrity and prevent and remedy wrongful convictions and miscarriages of justice; for example, through county-based programs and/or the establishment of a statewide Innocence Commission.

To realize the Resolution's goals, during the summer of 2018, the MBA, through attorneys Richard W. Cole, then Chair of the MBA's Civil Rights and Social Justice Section Council, and Martin Healy, the MBA's Chief Legal Counsel and Chief Operating Officer, collaboratively with Middlesex County District Attorney Marian Ryan, the Office of the Attorney General, and the Committee for Public Counsel Services, identified and enlisted a group of leading Massachusetts stakeholders to participate in the MCIWG. Members include two District Attorneys, representatives from a third District Attorney's Office, leaders from the Attorney General's Office and the MBA, trial and post-conviction defense counsel, a former judge, a civil rights attorney, and representatives of the Massachusetts Innocence Network¹² and Prisoners' Legal Services.

Co-Chairs of the MCIWG

- **Richard W. Cole**, Principal, *Cole Civil Rights and Safe Schools Consulting, for the Massachusetts Bar Association*
- **Carolyn McGowan**, Senior Trial Counsel, Northern Region, *Committee for Public Counsel Services*
- **Marian Ryan**, District Attorney, Middlesex County
- **Mary Strother**, First Assistant Attorney General, Attorney General's Office

Members of the MCIWG

- **Sharon Beckman**, Associate Clinical Professor of Law and Director, *Boston College Innocence Program, Boston College Law School*
 - **Sarah Carlow**, Legal Fellow, *Boston College Innocence Program, Boston College Law School*

¹² The "Massachusetts Innocence Network" refers to the Boston College Innocence Program at Boston College Law School, the Innocence Program of the Committee for Public Counsel Services, and the New England Innocence Project.

- **Pippa Temple**, *Law Student, Boston College Innocence Program, Boston College Law School (currently Deputy District Attorney, San Mateo County District Attorney's Office)*
- **Timothy Cruz**, *District Attorney, Plymouth County*
- **Marissa Leigh Elkins**, *Elkins, Auer, Rudof, & Schiff, Northampton, MA*
- **Ira Gant**, *Innocence Program, Committee for Public Counsel Services*
- **Martin Healy**, *Chief Legal Counsel and Chief Operating Officer, Massachusetts Bar Association*
- **Hon. Dyanne Klein**, *former First Justice, Newton District Court (ret.)*
- **Bethany Lynch**, *Assistant District Attorney, Northwestern District Attorney's Office*
- **Becky Michaels**, *Assistant District Attorney, Director of Community Prosecution Projects, Northwestern District Attorney's Office*
- **Radha Natarajan**, *Executive Director, New England Innocence Project*
- **Alicia Rebello-Pradas**, *Chief, Policy and Government Division, Attorney General's Office*
- **Leslie Walker**, *Of Counsel, former Executive Director, Prisoners' Legal Services*
- **Jack Zanini**, *First Assistant District Attorney, Plymouth County District Attorney's Office*

Beginning in September 2018, the MCIWG convened to identify best practices for the formation, structure, and operation of conviction integrity programs in prosecutorial offices in Massachusetts.¹³ The MCIWG commenced its efforts aware that throughout the past decade a growing number of prosecutorial offices in Massachusetts and across

¹³ A “conviction integrity program” refers to a prosecutorial office’s combined efforts to prevent and remedy wrongful convictions, including, for example, through office leadership and culture, staffing, policies, practices, training, data collection, self-study, public accessibility, and communication. A CIU, or other division, panel, committee, or designated staff charged on an ongoing basis with identifying, reviewing, investigating, and making recommendations regarding claims of wrongful conviction and other miscarriages of justice is an essential part, but just one component, of an effective conviction integrity program.

the country have recognized the need to institute conviction integrity programs to enhance their ability to identify, review, remedy, and prevent wrongful convictions, prosecutorial and forensic error, official misconduct, and other circumstances where there is reason to lack confidence in the integrity of convictions or prosecutions. As the MBA's Resolution on Conviction Integrity states:

Such [conviction integrity] programs promote public trust and confidence in the criminal justice system, while offering assurance that all Massachusetts prosecutorial offices are taking the steps necessary to prevent, identify, and remedy wrongful convictions, correct miscarriages of justice, and address implicit bias in the criminal justice system.

As a result, the MCIWG focused its research and study efforts on identifying best practices and effective ways for Massachusetts prosecutorial offices to structure and implement their conviction integrity programs.¹⁴ Given that Massachusetts prosecutorial offices vary significantly in geographic areas covered, size, staffing, structure, case volume, and budget, the MCIWG undertook to identify and recommend conviction integrity policies and practices that all Massachusetts prosecutorial offices, regardless of size, can implement. To that end, the MCIWG researched and examined the variety of conviction integrity programs, structures, and initiatives that prosecutorial offices around the country have adopted. In prioritizing their commitment to critical criminal justice reforms, Massachusetts prosecutorial offices will most likely need to reallocate staffing and resources in order to adopt and implement the range of MCIWG best practice recommendations set forth in this Guide.

¹⁴ The MCIWG did not address the creation of a statewide Innocence Commission, but rather focused its efforts on the creation of CIUs in all Massachusetts prosecutorial offices.

IDENTIFICATION OF BEST PRACTICES

Since its inception, the MCIWG has interviewed numerous individuals with expertise in conviction integrity programs and CIUs and has gathered and studied the practices of CIUs around the country as well as publications by scholars and practitioners about conviction integrity programs. Members participated in dialogues with leading experts, researchers, and practitioners in the field to help identify best practices for the structure and operation of conviction integrity programs and CIUs. In preparation for these discussions, members studied and familiarized themselves with the research gathered by the MCIWG and provided presenters lists of questions and requests for materials with a special focus on gathering information relevant to the variety of size, staffing, and budgets of prosecutorial offices in Massachusetts.

For example, the MCIWG had conversations with various current Directors of highly regarded CIUs. On January 16, 2019, the MCIWG spoke with CIU Directors Cynthia Garza of the Dallas District Attorney's Office in Texas (whose CIU was established in 2007) and Dawn Boswell of the Tarrant County District Attorney's Office in Texas (whose CIU was established in 2015). The Directors emphasized the importance of establishing an office-wide conviction integrity culture with leadership from the top, having the CIU Director report directly to the District Attorney, and ensuring that the CIU is independent of the appeals unit. They explained how their CIUs screen, review, and investigate high volumes of wrongful conviction claims. They also described their open-file discovery policies and practices and their contributions enhancing their offices' ability to prevent errors that may lead to wrongful convictions and other miscarriages of justice.

On February 27, 2019, the MCIWG held a discussion with Patricia Cummings, Director of the CIU in the Philadelphia District Attorney's Office, the largest prosecutorial office in Pennsylvania (whose CIU was established in 2018). Director Cummings highlighted the

CIU's large caseload, its case review and investigative procedures, its *Brady*¹⁵ and open-file discovery policies, and its involvement in developing procedures, checklists, and trainings to assist prosecutors in identifying and preventing wrongful convictions. She also discussed the CIU's contributions to office policy and practice reforms in the area of forensics and identifying and reviewing patterns of conduct that generate a risk of wrongful convictions, and highlighted passage of a Pennsylvania law regulating the use of incentivized witnesses, including informants.

On April 23, 2019, MCIWG members participated in a national webinar with the Director of the CIU of the Santa Clara County District Attorney's Office in California (whose CIU was established in 2004). The National Association of Prosecuting Attorneys hosted the webinar, titled, "The Evolution of a Conviction Integrity Unit." The Director discussed the role of the CIU in establishing a conviction integrity culture, examples of some of the CIU's actual cases resulting in exonerations, the CIU's review of the entire record in wrongful conviction claims, and its application of a "Rapid Response Misconduct Protocol" to address issues raised pretrial and during trial.

On May 9, 2019, the MCIWG participated in a dialogue with Attorney Barry Scheck, Co-Founder of and Special Counsel to the National Innocence Project and Professor of Law and Co-Director of the Innocence Clinic at Benjamin N. Cardozo School of Law. He is a national expert and a leading scholar on conviction integrity. Attorney Scheck discussed a number of exonerations involving leading CIUs in the United States and provided a history of CIUs and law enforcement misconduct registries. He emphasized the importance of CIUs and defense counsel collaborating in a joint search for justice. He stressed the importance of structuring CIUs to be independent of appeals units and of having attorneys with innocence or defense practice backgrounds to lead, or at least participate meaningfully in, CIUs. Attorney Scheck also noted that many exonerations result from the recognition of flawed forensic evidence and repudiated science.

¹⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

On June 19, 2019, the MCIWG participated in a presentation by and dialogue with Professor Charlotte Whitmore, Supervising Attorney at the Boston College Innocence Program Clinic, who was a former staff attorney in the Pennsylvania Innocence Project and a former Assistant District Attorney in the Middlesex County District Attorney's Conviction Integrity Program. Professor Whitmore is a leading expert in the area of post-conviction investigation in Massachusetts as she is currently the only attorney in Massachusetts with experience re-investigating cases within a prosecutorial office's CIU and within an Innocence Network organization. She emphasized the similarity in her roles re-investigating cases as part of a CIU and at an innocence organization, as she described the investigation in both contexts as a search for justice. Similar to other invited CIU Directors, Professor Whitmore emphasized the value of including a prosecutor with innocence experience in the CIU. She stressed the importance of having a dedicated full- or part-time CIU investigator. She highlighted as best practices collaboration between the CIU and counsel for the defendant and open-file discovery policies. She endorsed collecting data for analysis and reviewing past cases in order to develop policies and training to prevent wrongful convictions. Assistant District Attorney Sara DeSimone, Director of the Middlesex County District Attorney's Conviction Integrity Program, also contributed to this meeting, providing practical details about that program's current operation and activities.

On February 3, 2020, MCIWG members convened a special in-person presentation by and dialogue with Dr. Itiel Dror, titled *"Research in Human Cognition as Applied to Conviction Integrity Programs and Post-Conviction Case Reviews in Prosecution Offices."* Dr. Dror, Senior Cognitive Neuroscience Researcher at the Center for Forensic Sciences of University College in London, England, is among the world's leading researchers of human cognition in forensic and institutional decision making. Among the attendees were several District Attorneys, Assistant District Attorneys, Assistant Attorneys General, and CPCS attorneys.

Dr. Dror began by explaining basic understandings from well-accepted psychological research about how any human decision-making process can be tainted by human

nature and the functioning of the human brain, environment, culture, experience, and case-specific information. He explained how mindset, belief perseverance, and decision momentum cause decision makers to "dig [their] heels in" or attempt to rationalize erroneous decisions. Dr. Dror explained the difference between unethical, intentional bias by "bad apples," and the universal phenomenon of implicit bias, which he described as unintentional and occurring without awareness by ethical, competent, and hard-working people. He offered examples of how the biasing factors listed above lead people to see or hear what they expect to see or hear – rather than what is – in numerous fields. For example, Dr. Dror described a study showing that the number of female musicians in orchestras tripled after the orchestras moved to "blind" auditions using screens to conceal the identity and gender of the auditioning musician from the judges.

Dr. Dror also explained what he called the "bias blind spot" – the subject of research showing that most people who know about the problem of implicit bias in human decision making nevertheless think that it does not apply to their domain or to themselves personally.

Dr. Dror then applied these basic scientific principles and insights from other contexts to post-conviction case review within a prosecutorial office. He identified training and office incentives, organization structure, expectations, and exposure to irrelevant case-specific information, as examples of potentially tainting influences that an office can seek to control to reduce the risk of error. He explained how these factors can lead ethical professionals to misinterpret evidence, look for evidence to confirm and rationalize erroneous assumptions and decisions, and discredit or fail to see or to look for relevant evidence that is contrary to the erroneous hypothesis.

Dr. Dror's takeaway message was that prosecutors engaged in post-conviction case review should seek to remove irrelevant information and influences whenever possible and to control them where removal is not possible, all with the goal of ensuring that the evidence drives the investigation.

Participating in a Forensic Training Program

On October 30 and December 13, 2018, MCIWG members participated in a training program designed for prosecutors and defense counsel focused on current forensic practices at the Massachusetts State Police Forensic and Technology Center in Maynard to learn about current forensic training in Massachusetts.¹⁶ Following lectures and question and answer sessions, a prominent forensic lab representative guided members on a tour of the Center.

Catalog of Structures and Activities of CIUs in Other Jurisdictions

Through the Boston College Innocence Program, the MCIWG attempted to contact and gather information from all known CIUs in the United States as of 2019. This research effort included identifying prosecutorial offices with CIUs, gathering publicly available information about each existing CIU, and following-up through phone calls and email communications. In all, the MCIWG was able to communicate with twenty-seven (27) CIUs from fourteen (14) different states.¹⁷ The MCIWG then compiled, analyzed, and summarized the empirical data obtained about the structure, policies, and practices of the canvassed CIUs. This data included: the year each CIU was established; the size of the CIU; the number of ADAs in the office; a breakdown of the background and roles of CIU staff; to whom the head of the CIU reports; whether the CIU is independent of other units; the number of submissions per year; the number of exonerations; the types of cases the CIU will review; the review criteria; the procedures for reviewing claims; prevention and accountability efforts; and whether the CIU had written procedures to share with the MCIWG.

¹⁶ Two members of the MCIWG, Co-Chair District Attorney Marian Ryan and CPCS attorney Ira Gant, presented at the program. The program was the sixth iteration of forensic/DNA training resulting from efforts of the statewide “278A Working Group,” of which District Attorney Ryan and the CPCS Innocence Program are leaders. That Working Group’s mission is to promote effective implementation of MASS. GEN. LAWS ch. 278A, which concerns post-conviction access to forensic and scientific testing and analysis.

¹⁷ Currently, there are approximately 2,330 prosecutorial offices in the country, fewer than 100 of which are known to have CIUs. Bureau of Justice Statistics, *Prosecutors Offices*, OFFICE OF JUSTICE PROGRAMS, <https://www.bjs.gov/index.cfm?ty=tp&tid=27>; NRE, *supra* note 6.

Review of Sample Forms and Procedures from CIUs in Other Jurisdictions

Through its contact with CIUs, and as a result of its sessions with current directors of CIUs, the MCIWG reviewed a number of sample forms and procedures used by CIUs throughout the United States. These documents included, for example, written policies and procedures for operating a CIU; factors for case selection; procedures to gather case information; checklists for defense counsel to complete when referring cases for review; *Brady*-related procedures; open-file policy/discovery practices; disclosure-compliance policies for forensic labs and law enforcement; checklists for use when making charging decisions; and written cooperation agreements for post-conviction forensic testing.

Creation of an Electronic Research and Reference Library

The MCIWG, through the Boston College Innocence Program, also developed an electronic research and reference library for its members. The library includes the results of MCIWG communications with CIUs from around the country and publications on CIUs, including leading national conviction integrity reports, law review scholarship, criminal justice publications, and publications from other jurisdictions proposing or discussing already existing conviction integrity reform efforts, together with a memorandum summarizing the available materials.

Outreach to Stakeholders

MCIWG members met with representatives of the American Civil Liberties Union, Massachusetts (“ACLUM”) and the Massachusetts Association of Criminal Defense Attorneys (“MACDL”) to obtain insight and perspectives about the components of an effective conviction integrity program and the range of subject matters to consider. In the latter stage of their efforts, MCIWG members met with members of the Massachusetts District Attorneys Association (“MDAA”).

The MCIWG expects this Guide to be a starting point for further conversation and collaboration among stakeholders, including people and communities most impacted by its implications.

EXECUTIVE SUMMARY

Wrongful convictions and miscarriages of justice happen because our criminal legal system is a human system in which actions, whether accidental or purposeful, can lead to an unjust result. Fairness and justice require the legal system to be open to remedying past injustices however they occurred, and to implementing reforms to prevent future errors. Prosecutors have a special obligation in this regard to do all they can to correct errors, and to analyze past errors to determine how they happened and how to ensure they do not happen again.

The MCIWG recommends that the 11 Massachusetts District Attorney Offices (“DAOs”) and the Massachusetts Attorney General’s Office (“AGO”) have well-designed, effective conviction integrity programs within their offices. Some Massachusetts prosecutorial offices have already established such programs. Whether an office is creating a new program or building on its current efforts, the recommendations in this Guide present a structure for a program that investigates and remedies claims of wrongful convictions and other miscarriages of justice, and also identifies necessary reforms to prevent future errors.¹⁸

As a general matter, a successful conviction integrity program includes the following features:

- Leadership at the top and throughout the office that recognizes the need to reexamine convictions in appropriate cases;
- A case review process involving attorneys and investigators with diverse training and skills and ideally a mix of prosecution and innocence or defense backgrounds;

¹⁸ If a prosecutorial office does not have a formal CIU, it should still attempt to create a process that maximizes the structural independence of the panel or committee charged with reviewing, investigating, and making recommendations regarding claims of wrongful conviction or other miscarriages of justice. It should also ensure that a staff member is assigned responsibility for, and afforded the time and support needed to implement, other aspects of an effective conviction integrity program discussed in this Guide.

- A process that acknowledges – and to the extent possible safeguards against – bias that might influence decisions of whether to reexamine or reinvestigate a case or might impact the outcome of the review;
- Staff training about factors that can lead to wrongful convictions, such as eyewitness misidentification, flawed forensic practices, unreliable informants, false confessions, official misconduct, and ineffective assistance of counsel;
- Implementation of measures to help prevent future wrongful convictions and other miscarriages of justice;
- Credibility within the community for integrity and fair post-conviction reviews.

This Guide recommends, first and foremost, that a conviction integrity program include a Conviction Integrity Unit (CIU) authorized to review claims of wrongful convictions and miscarriages of justice and make recommendations to the District Attorney or the Attorney General where there is reason to believe justice may not have been done, such as when a person convicted may be innocent or where there is otherwise reason to doubt the integrity of the investigation, prosecution, conviction, or sentence. This Guide will detail the most effective structure of a CIU to maximize independence, efficacy, and transparency and to reduce the risk of cognitive bias in post-conviction case review (including confirmation bias and implicit racial or ethnic bias), regardless of the size, staffing, or resources of the prosecutorial office. These recommendations include:

- Direct reporting to the District Attorney or Attorney General, who communicates to the rest of the prosecutorial office's staff that remedying and preventing wrongful convictions is a priority;
- Structural independence from the trial and appellate units;
- Open file discovery practices;
- Clear and publicly accessible procedures for screening, review, and investigation;
- Training and education of members on how to spot and review wrongful convictions and mitigate cognitive biases;

- Learning, training, and dedicating time to understanding issues specific to identifying wrongful convictions;
- Efforts to prevent wrongful convictions, including through sentinel event reviews.

Some prosecutorial offices incorporate CIU functions within their appellate units. However, the MCIWG urges offices to operate CIUs separately from appellate units. While a CIU may well involve one or more appellate prosecutors, just as it will likely involve one or more trial prosecutors, separating the unit from the appeals division reflects that analysis of innocence claims often involves different skills and perspectives than those involved in an appellate prosecutor's regular caseload, requiring additional or different education and training. A CIU should also be seen as a unit to which an appellate prosecutor can refer a case that may require a fresh eye, further investigation, or an independent review, including one that may not seem, initially, to be appropriate for a new trial or where the issues raised do not lend themselves to a specific available appellate remedy.

As prosecutorial offices either establish CIUs or consider whether the best practices outlined here have been incorporated into their current processes, they must understand that the work of the CIU often entails deep review and investigation as opposed to uncovering a lone dispositive error. For many cases in which a conviction is ultimately determined to have been erroneous, the reason rests not with "a single failed component; it lives in the many interactions of many components."¹⁹ Indeed, "[m]any wrongful convictions are 'normal accidents.' Even when everyone does what they are expected to do, a tragedy can still result."²⁰ A CIU must review cases with the understanding that it may not uncover one particular piece of evidence or decision that

¹⁹ James M. Doyle, *The New Pioneers of Conviction Integrity*, THE CRIME REPORT (Mar. 4, 2021), <https://thecrimereport.org/2021/03/04/the-new-pioneers-of-conviction-integrity/> ("Ask who is responsible for a wrongful conviction and the answer is 'everyone involved, to one degree or another.' The cops got the wrong guy; the forensics didn't exonerate him; the prosecutors missed the gaps; the defenders, the jury, and the courts failed to intercept the error.").

²⁰ *Id.*

resulted in what is now a clearly wrongful conviction. Instead the CIU must use its “position to see how small misjudgments—none of them a ‘eureka part’²¹—combined with each other and with latent system weaknesses and created a dangerous result.”²²

Finally, this Guide also recommends the creation of a statewide “Conviction Integrity Task Force,” to be convened by the MBA, which could assist prosecutorial offices by developing model checklists and procedures in areas in which errors are likely to result in wrongful prosecutions and convictions and other miscarriages of justice. Ideally, the Task Force will serve as a resource for prosecutorial offices of all sizes in adopting and operationalizing the recommendations and best practices outlined in this Guide.

The MCIWG believes that the best practices set forth herein are important means of addressing and preventing wrongful convictions, miscarriages of justice, and the adverse impacts of bias, and of reinforcing community trust and confidence in the integrity of our criminal legal system.

²¹ When Doyle refers to “eureka part” he means the “broken component” (e.g., the faulty forensic technique) or the “villainous practitioner” (e.g., the prosecutor who hid the *Brady* material) that was the primary cause of a wrongful conviction. *Id.*

²² *Id.*

MCIWG GUIDE AND RECOMMENDATIONS

The following is a distillation of the MCIWG's recommendations of best practices for the structure, operation, transparency, and accountability of conviction integrity programs for the prevention of wrongful convictions and related miscarriages of justice.

As a threshold matter, the MCIWG recognizes that some Massachusetts prosecutorial offices have already established CIUs and conviction integrity programs. To build on these current efforts, the MCIWG strongly encourages all Massachusetts prosecutorial offices to adopt the following recommendations, to the extent practicable, regardless of the structures or mechanisms already adopted for implementing conviction integrity programs in their offices.²³

These best practice recommendations should enable Massachusetts prosecutorial offices to create and operate effective conviction integrity programs. The MCIWG believes that the best practices set forth herein are the most effective means to address and prevent wrongful convictions, miscarriages of justice, and the adverse impact of implicit biases, and to reinforce community trust and confidence in the integrity of our criminal legal system.

The MCIWG also recommends that the proposed Conviction Integrity Task Force discussed more fully below, convene under the MCIWG's auspices by June 2021.

ADOPT BEST PRACTICES FOR OPERATING CONVICTION INTEGRITY PROGRAMS

Create a Conviction Integrity Culture with Leadership at the Top

1. At the heart of a conviction integrity program is a commitment from prosecutorial office leadership to create a tone at the top and a culture that values and rewards prosecutors and law enforcement partners who act in an ethical and professional

²³ Adoption of these recommendations is intended to prevent the creation of a CIU without the structures, policies, and practices necessary to achieve its goals.

manner,²⁴ and who are aware that unjust prosecutions and wrongful convictions can occur even in the presence of good faith and best efforts.²⁵

²⁴ This includes ensuring that all prosecutors are knowledgeable about the relevant ethical rules, including MASS. R. PROF. C. 3.8(i), which is modeled on the ABA MODEL RULES OF PROF'L CONDUCT 3.8 and provides that:

“When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time: (1) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and (2) if the conviction was obtained by that prosecutor's office, (i) disclose that evidence to the appropriate court; (ii) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown; (iii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and (iv) undertake or assist in any further investigation as the court may direct.”

MASS. R. PROF. C. 3.8(i), cmt. 7 further explains that:

“Consistent with the objectives of Rules 4.2 and 4.3, disclosure under paragraph (i) to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. Paragraph (i) applies to new, credible, and material evidence regardless of whether it could previously have been discovered by the defense. The disclosures required by paragraph (i) should ordinarily be made promptly.”

In addition, MASS. R. PROF. C. 3.8(j) states that:

“When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.”

MASS. R. PROF. C. 3.8(j), cmt. 8 further explains that:

“Under paragraph (j), once the prosecutor knows that clear and convincing evidence establishes that the defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the injustice. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.”

For all attorneys, including defense counsel, MASS. R. PROF. C. 1.6(b)(1) states in relevant part, that:

“A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1, or 8.3 must reveal, such information . . . to prevent the wrongful execution or incarceration of another”.

MASS. R. PROF. C. 1.6(b)(1), cmt. 6A further states that:

“Rule 1.6(b)(1) also permits a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime.”

2. Establishing a conviction integrity culture includes recruitment, hiring, and promotion practices that emphasize the importance of quality over quantity and the value of prosecutors' work in the pursuit of justice over the number of cases prosecuted or the number of convictions secured or affirmed.
3. Leaders in prosecutorial offices should establish and promote a positive conviction integrity culture by supporting, encouraging, and valuing conviction integrity initiatives and reforms that foster systemic criminal justice improvements through robust policies, practices, training, supervision, forward-focused accountability measures, and supportive norms.
4. Prosecutorial offices should create a "safe harbor" for reporting errors and "near misses" and promote a culture of shared ethical responsibility for identifying and reporting such events, with an explicit focus on correction and remediation, rather than blame or discipline, except for intentional misconduct.
5. Leaders in prosecutorial offices should cultivate a culture that recognizes the value and importance of learning from mistakes through open, candid internal discussions and robust case and issue assessment and analysis.

Establish an Independent Structure for Conviction Integrity Programs

6. An essential feature of a conviction integrity program is a CIU or some other independent structure, such as a designated panel or committee, with staff responsible on an ongoing basis for independent case review and for identifying, investigating, reviewing, and making recommendations regarding claims of wrongful conviction or other miscarriages of justice, and for leading other conviction integrity program efforts and initiatives.

²⁵ JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NAT'L PERSPECTIVE 24 (2016) ("[I]t is important that the DA signify strong support for the undertaking."). The Quattrone Center Report uses the term Conviction Review Unit or "CRU." This Guide, however, uses the term Conviction Integrity Unit or "CIU."

7. Structural independence is critical to address and help mitigate cognitive biases²⁶ in the review of cases and decision making.

8. The size, staffing, and funding of a CIU may vary depending on the size and resources of the office, but the CIU or an alternative staffing arrangement should be structured to maximize its independence, efficacy, and transparency and to reduce the risk of cognitive and confirmation bias in post-conviction case review.²⁷

²⁶ Cognitive bias is a systemic error in the way an individual processes information, often unconsciously and without any motivation, that affects their judgment or decision making. Itiel E. Dror, *Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias*, 92 ANALYTICAL CHEMISTRY 7998, 7998-99 (2020); Carla L. MacLean & Itiel E. Dror, *A Primer on the Psychology of Cognitive Bias*, in BLINDING AS A SOLUTION TO BIAS 13, 14 (A. Kesselheim & C. Robertson 1st ed., 2016). As Dr. Dror stated in his presentation to the MCIWG, using the phrase "cognitive contamination" as opposed to "cognitive or implicit bias" may clarify that this is not about intentional discrimination by bad actors, but rather a cognitive condition affecting all humans. Replacing "bias" with "contamination" may help overcome defensiveness or resistance to seeking safeguards.

Three forms of cognitive biases common in decision making are *confirmation bias*, perceiving or looking for new information in a way that only confirms previously held beliefs without fully evaluating or searching for new information; *circular reasoning*, forming a conclusion first and then analyzing evidence only in a way that supports that conclusion; and *contextual bias*, perceiving new information through the lens of contextually irrelevant information or influences. Dror, *supra* note 26, at 7999-8001.

Cognitive biases affect everyone, but can be mitigated. *Id.* at 8003. Research has shown that individuals who believe themselves to be objective and without bias, while employing no bias reducing methods, to be at no less risk of making a bias-related error in judgment, especially where the information is susceptible to subjective or ambiguous interpretation. *Id.* at 7999, 8003.

²⁷ As Dr. Dror maintained in his presentation to the MCIWG, cognitive bias cannot be overcome by conscious effort or mindset. It is not a matter of "willpower." Cognitive bias can only be addressed by bias-reducing structures, procedures, and incentives within an office. See also Hollway, *supra* note 25, at 2, 22 ("A CRU dedicated to collaborative, good-faith case reviews designed to ensure the factual integrity of a conviction should be independent, flexible, and transparent in its work" and "[should] [g]uard against cognitive or confirmatory biases. ... The important thing is to ensure that size and resources not impose a limitation on the ability of the DA's office to provide justice to all of its citizens.") (emphasis omitted). And as Dr. Dror stated in his presentation, small or under-resourced DAOs should utilize "all countermeasures that are possible" to reduce the effects of cognitive bias in post-conviction review.

9. To achieve these goals, the 11 DAOs and the AGO should each have a CIU that is led by someone who reports directly to the applicable District Attorney or the Attorney General,²⁸ whose primary responsibility is the conviction integrity program,²⁹ and whose position is defined in such a way as to enable the case review process to function in a timely fashion and without interference from other office units.³⁰

10. To the extent that an internal CIU is not feasible, a prosecutorial office should implement other arrangements to replicate the structural independence of CIUs as part of its conviction integrity program. These arrangements could include, for example, a shared regional CIU, partnerships with a CIU within a larger DAO or the AGO, hiring part-time staff, or hiring contract attorneys and investigators.³¹ Irrespective of staffing arrangements, each prosecutorial office should ensure that those designated for this role are given the time, resources, and responsibility to support and implement all features of the office's conviction integrity program, including case reviews and investigations, training, data collection, and clerical functions.³²

²⁸ Hollway, *supra* note 25, at 2 (“An independent CRU should ... [r]eport directly to the District Attorney (DA) or prosecuting attorney, or head of the prosecutor’s office, and should not be contained within the Office’s appellate or post-conviction/habeas unit.”) (emphasis omitted).

²⁹ *Id.* (“An independent CRU should ... [b]e appropriately resourced by attorneys, investigators and staff for whom the CRU cases have clear priority over other office matters”) (emphasis omitted).

³⁰ *Id.* (“An independent CRU should ... [have] sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations.”).

³¹ Josh Cutino, *Continuous Quality Improvement: Increasing Criminal Prosecution Reliability Through Statewide Systematic Improvement Procedures*, 20 Lewis & Clark L. Rev. 1065, 1090 (2016) (“[A] statewide best practices committee provides a cost-effective solution to smaller communities that cannot afford full scale CIUs or other innovative programs. Pooling resources together for statewide best practices reduces costs for all.”); Hollway, *supra* note 25, at 21-22 (Smaller DA’s offices can conduct good faith post-conviction reviews “by sharing responsibility for case reviews with larger offices within the jurisdiction, by engaging a volunteer panel ... and contracting out leadership of case reviews as needed, or through a statewide organization”).

³² Dr. Dror stated in his presentation to the MCIWG that to determine which structural reforms are optimal, prosecutorial offices should develop performance measures determined ahead of time, with results collected by persons who have no stake in the outcome and are unaware of the measurement criteria. If the DAO is not meeting these performance measures, the office

11. A CIU should be authorized to make recommendations to the applicable District Attorney or the Attorney General regarding convictions where its review and investigation reveals that a wrongful conviction may have occurred or where the CIU no longer has confidence in the integrity of the verdict or plea. In addition:

- A. The CIU should be led by a person who reports directly to the District Attorney or Attorney General and should be supported by investigative and administrative support personnel.³³
- B. A CIU should be independent of other units or divisions in the DAO or AGO, including the trial and appellate units.³⁴
- C. The size of the CIU staff will vary with the size of each prosecutorial office, but it should be sufficient to ensure timely case review and recommendations.³⁵

should consider whether the problems/errors would be better addressed by further bias-reducing structural changes.

³³ FAIR AND JUST PROSECUTION, CONVICTION INTEGRITY UNITS AND INTERNAL ACCOUNTABILITY MECHANISMS 4 (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.ConvictionIntegrity.9.25.pdf> (“A CIU should be led by a respected senior lawyer and well-staffed with prosecutors and investigators with passion and zeal for the work.”); Hollway, *supra* note 25, at 2, 23 (“An independent CRU should... [b]e appropriately resourced by attorneys, investigators and staff for whom CRU cases have clear priority above other office matters.” In addition, “the CRU [should be] operating free from the control or bias of others”); see N.Y. STATE BAR ASS’N, REPORT OF TASK FORCE ON WRONGFUL CONVICTIONS 6 (2019) <https://nysba.org/app/uploads/2020/01/Wrongful-Convictions-Report-Feb.-2019.pdf> (“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.”).

³⁴ Hollway, *supra* note 25, at 2 (“An independent CRU should ... [r]eport directly to the District Attorney (DA) or prosecuting attorney, or head of the prosecutor’s office, and should not be contained within the Office’s appellate or post-conviction/habeas unit.”) (emphasis omitted).

³⁵ *Id.* (“An independent CRU should...[b]e appropriately resourced by attorneys, investigators and staff...with sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations.”) (emphasis omitted); see N.Y. State Bar Ass’n, *supra* note 33, at 7 (“[T]he CIU should be comprised of attorneys, investigators and staff for whom CIU cases have clear priority above other office matters, with sufficient personnel and budget resources to enable timely investigations and thorough and thoughtful recommendations.”).

- D. The CIU should include at least one person with criminal defense or post-conviction innocence experience, who is employed or retained by the prosecutorial office.³⁶
- E. To avoid the risk and appearance of bias, no attorney, investigator, or staff member who participated in any aspect of a case being reviewed, nor the unit chief at the time the case was prosecuted or appealed, should participate in the CIU's review of or decision making as to that case, other than to provide necessary historical information.³⁷
- F. Though structurally independent from other units, the CIU staff should collaborate in the training of prosecutors and staff with regard to best practices for identifying, remedying, and preventing erroneous or otherwise

³⁶ See N.Y. State Bar Ass'n, *supra* note 33, at 6 ("The CIU should guard against cognitive or confirmatory biases and appear to be guarding against biases by attempting to include the perspective of at least one external criminal defense attorney in the process of the Unit's policy definition, case screening, case investigation, and recommendations for action."); Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 Ohio St. J. Crim. L. 705, 738, 741 (2017) ("The best Conviction Integrity Units have either been run by defense attorneys working on a full-time basis or defense attorneys working on a part-time basis with substantial oversight authority for the operation of the unit. This might well be the single most important best practice to assure that the CIU runs well and is perceived as credible by the legal community and the public."); Hollway, *supra* note 25, at 2 (An independent CRU should ... "[b]e led by an attorney with firsthand prosecutorial and criminal defense experience" and "should ... [g]uard against cognitive or confirmatory biases by including the perspective of at least one external criminal defense attorney in the process of CRU policy definition, case screening, case investigation, and recommendations for action.") (emphasis omitted).

As Dr. Dror stated in his presentation to the MCIWG, it is important for a CIU to include "outside" perspectives to avoid bias and "group think" – otherwise the situation is like having cigarette companies investigate the health effects of smoking. Outside perspectives – whether from people with defense or innocence experience, or other outsiders – will help reduce implicit bias and also increase the CIU's credibility with the public. At the same time, it is important to take the steps needed to prevent "in-group versus out-group dynamics," where prosecutors are reluctant to share information, thoughts, and feelings, or admit mistakes because of the presence of "outsiders." Also, even among same-group members (i.e., the prosecutors within an office), other factors like seniority, hierarchy, personality, personal relationships, and gender can prevent some voices from being heard. The goal is to create a balance and a dynamic where people coming from different perspectives can feel comfortable expressing their views and opinions.

³⁷ Hollway, *supra* note 25, at 2 ("An independent CRU should ... "[e]xclude personnel who participated in an underlying case under review from the CRU's decision-making regarding the cases, limiting participation in such cases to the provision of historical information") (emphasis omitted).

wrongful convictions.³⁸ The CIU should also participate in joint trainings for the bench and the bar with other criminal justice stakeholders.

Establish a System that Encourages the Submission of Claims

12. DAOs and the AGO should develop policies and procedures for the operation of their CIUs that are designed to encourage the submission of claims of wrongful conviction, unjust prosecution, and other miscarriages of justice. In drafting and developing such policies and procedures, the DAOs and the AGO should consider utilizing external advisors, such as members of the defense bar, former prosecutors, retired judges, legal scholars, and leaders in the community and Massachusetts innocence organizations.

Adopt Policies and Procedures for Promoting the Review of Claims

13. DAOs and the AGO should develop policies and procedures for intake, screening, and investigation by the CIU. These policies and procedures should specify the criteria that must be met to advance a case to each subsequent stage of review.

14. Aside from providing historical information, the trial and appellate prosecutors, victim witness advocates, paralegals, investigators, law enforcement officers, and any other individual who participated in the investigation or prosecution of a case, should not participate in the review of that case.

Implement an Intake/Screening System with Criteria for Acceptance for Review

15. When receiving an application for the review of a case – from a *pro se* defendant, defense counsel, prosecutor, law enforcement officer, judge, or any other source – the CIU staff should determine whether the case meets the baseline criteria for review.

³⁸ See, e.g., INNOCENCE PROJECT, CONVICTION INTEGRITY UNITS (2016), <https://leg.mt.gov/content/Committees/Interim/2015-2016/Law-and-Justice/Meetings/Jun-2016/Exhibits/innocence-project-conviction-integrity-doc-june-2016.pdf> (CIUs should “[p]rovide training to personnel on specific topics including underlying contributing factors to wrongful convictions and emerging issues in forensic science that may impact past convictions secured by the use of older scientific methods”) (emphasis omitted).

The CIU staff should screen and accept for review any case within its jurisdiction where there is a plausible claim of factual innocence and/or other significant concerns about the integrity of the conviction. Examples of conviction integrity concerns include, but are not limited to, concerns about the integrity of the investigation or evidence, the performance of defense counsel, and the fairness of the process the defendant received.

16. The following circumstances in a case should not bar the CIU's review:
 - A. A defendant's guilty plea or inculpatory statements
 - B. A defendant's completion of the criminal sentence resulting from the conviction, disciplinary history while incarcerated, or prior or subsequent charges, convictions, incarceration, or civil commitment
 - C. The outcome of prior litigation or the availability of procedural objections

17. The CIU should not bar review or reject a claim based solely on a decision by a defendant or defendant's counsel not to participate collaboratively in the CIU's internal review processes where invited to do so.

Investigate Claims Comprehensively, As Appropriate

18. If the CIU's screening of a case either continues to support a potential claim of innocence or raises concerns about the integrity of a conviction, the CIU should devote more substantial resources to investigate the claims. The CIU should assign at least one prosecutor on its staff to lead the investigation, supported by at least one investigator where appropriate.

Promote Collaboration, Communication, and Expansive Discovery

19. The CIU should not view itself as an adversary to the defendant or their attorney, but instead look at itself as a collaborator in the search for a fair and just outcome. To that end, the CIU should disclose relevant information to the defense and request information sharing. However, the CIU should make clear to defense counsel and *pro se* defendants that the CIU's review is not contingent on reciprocal information sharing

or participation by the defendant in the process.³⁹ The CIU should keep defense counsel or a *pro se* defendant informed regarding the status of the case review and promptly explain any conclusions or dispositive actions.

20. Where there is a plausible claim of factual innocence or wrongful conviction, the CIU should assist defense counsel or a *pro se* defendant in obtaining materials relevant to the screening, investigation, or litigation of the case. In the post-conviction context, the CIU should establish an “open file” discovery policy and publish a clear procedure with the presumption of sharing information with defense counsel and *pro se* defendants. This post-conviction policy should allow for the inspection of prosecution and law enforcement files in the case, except for compelling cause, such as with materials barred from disclosure by law or court order or materials the disclosure of which would present a potential risk to witness safety or prejudice other litigation. Although evidence and discovery rules provide guidelines about work product in the context of a court proceeding, the non-adversarial nature of the relationship between a CIU and defense counsel or a *pro se* defendant encourages disclosure of materials that might arguably constitute work product or be privileged. While the contents of the materials may appear at first blush irrelevant, disclosure may reveal something not easily recognizable that turns out to be significant to the case review.⁴⁰

³⁹ This asymmetry is in recognition of the fact that there are circumstances in which defense counsel ethically may not agree to collaborate with a CIU or participate in its case review, such as where adversarial litigation may reasonably limit information sharing by the defense.

⁴⁰ As CIUs craft discovery policies, they are encouraged to participate in and obtain assistance from the MBA-convened Conviction Integrity Task Force, which can play an advisory role in assisting with the determination of what materials, if any, should be withheld and in what circumstances. On the other hand, a prosecutorial office may determine that there are no circumstances under which it would not turn over the entire file, including all documents that would be categorized as work product.

21. The CIU's procedures should include documenting any materials withheld from disclosure and the reasons for withholding them, and preserving the withheld materials in the case file. Additionally, the CIU should periodically review its decision to withhold documents as its review of a case proceeds to ensure that the original reasons for withholding remain advisable. The CIU procedure should permit the use of confidentiality agreements and protective orders with defense counsel or *pro se* defendants where necessary and/or appropriate.

22. "Inspection" may be satisfied by delivering print or electronic copies to defense counsel or the *pro se* defendant, and the CIU may set a reasonable limit on the number of copies of the same document it provides to the same person. Communication with *pro se* defendants should include notice that a CIU generally will not provide successive copies of materials, except in unusual circumstances. The CIU should create a copy of all materials shared, and should securely store such a copy electronically where feasible.

23. MASS. GEN. LAWS ch. 278A governs post-conviction requests for forensic testing by defendants claiming factual innocence of the crime for which they have been convicted. The CIU should make all physical or biological items available for post-conviction forensic testing, including re-testing of a previously tested item, if the testing has the potential to result in evidence material to (i) the identity of the perpetrator or (ii) whether a crime occurred. The CIU should make items available for such testing even if the potential results will not, alone, be dispositive. Any handling, storage, or dissemination of such material should be undertaken in compliance with the law, including, but not limited to, the provisions of MASS. GEN. LAWS ch. 278A and regulations promulgated thereunder.

24. The CIU should establish a clear procedure for its contact with crime victims or victims' families, which should address each stage of its review, investigation, or disposition of a case at which the CIU will be in contact with them, consistent with

MASS. GEN. LAWS ch. 258B, often called the “Victims Bill of Rights,” and MASS. GEN. LAWS ch. 278A, § 14.

25. Where defense counsel or a *pro se* defendant files a motion for post-conviction forensic testing, pursuant to MASS. GEN. LAWS ch. 278A, §§ 3 and 7, the CIU should review the case as to any other basis asserted in the claim of wrongful conviction. Such additional review need not occur simultaneously, and, where possible, should not postpone the CIU’s decision whether to agree to the defendant’s request for testing.

26. In the event of the denial of a claim, the CIU should inform the defense counsel or *pro se* defendant of the ability to re-apply or revisit the review process and the circumstances under which the CIU will re-examine the case.

Adopt a Flexible and Expansive Standard of Review for Assessing Claims

27. Throughout its review of every case, the CIU staff should make every effort to remain objective and open-minded and endeavor to understand the totality of the circumstances, rather than simply examining what was presented or known at the time of trial. Some strategies include:

- A. CIUs should presume neither guilt nor innocence.
- B. The CIU staff should operate in a manner that accepts the reality that mistakes may have occurred and unjust prosecutions, unjust outcomes, or wrongful convictions may have resulted despite the good faith and best intentions of the prosecutors, investigators, expert witnesses, and civilians involved.
- C. Although factual guilt or innocence may initially appear clear in some cases, the CIU staff will need to practice flexibility in its review and investigation so as not to foreclose uncovering evidence of wrongful conviction or other miscarriages of justice.
- D. The CIU staff should gather all information it deems appropriate or necessary to review any claim of factual innocence, injustice, or wrongful conviction.

- E. The CIU staff should recognize that it is better to err on the side of further review for potential error than to miss something by closing a case review prematurely.

28. CIU staff should understand that in order to review a particular case they may need to obtain training in areas known to lead to wrongful convictions. For example, when CIU staff reviews a claim of wrongful conviction by someone who made an inculpatory statement, it may be necessary for the staff to recognize red flags of false confessions in order to assess the reliability of the inculpatory statements. In an eyewitness identification case, the CIU staff may need to understand the estimator variables that may have impacted the eyewitness's reliability, or the system variables that may have suggested to the witness, improperly and inaccurately, to choose the defendant. In a case involving pattern-matching evidence or a medical opinion, the CIU staff may need to research the literature calling into question the reliability of that evidence in identifying an individual or a cause of a physical injury. The CIU staff should be open to the idea that, even with extensive criminal litigation experience, it may be necessary to obtain further education on a particular aspect of a case before drawing a conclusion about its integrity.

Implement Disposition Procedures after CIU Review and Investigation

29. After its investigation, the CIU staff should determine whether to recommend that the prosecutorial office either close its investigation or take appropriate action to remedy an injustice. The CIU staff should record its determinations and any recommendations in writing, and these documents should be made part of the case file and provided to the District Attorney or the Attorney General for their review and final decision.

30. If the CIU declines to screen or review a claim, or closes a claim without recommending that the prosecutorial office seek or agree to act to remedy the injustice after completing its investigation, the CIU should allow for the resubmission and re-review of a case where additional, credible information is later presented or discovered.

31. When a CIU declines a case after review, and subsequent litigation ensues, the prosecutorial office should not, as a general matter, affirmatively reveal or publicize its review and rejection of the defendant's claim because that may unduly prejudice and influence a judge. In other words, the CIU process should not act to bias the separate, independent adjudication by a court. Also, revealing CIU rejections in subsequent litigation could have a chilling effect on claims being submitted to that CIU in the future.

32. The DAOs and the AGO should establish written policies and procedures about how and when to refer to the relevant authorities official misconduct by prosecutors, law enforcement, expert witnesses, defense counsel, or judges that is identified during a CIU review.

Apply Appropriate Standards for Action to Remedy an Injustice

33. When the CIU review reveals the occurrence of a wrongful conviction or other injustice, or where the CIU does not have confidence in the integrity of a verdict or plea, the CIU should recommend that the prosecutorial office take appropriate action to remedy the injustice, such as joining a defendant's request for relief, confessing error, or filing a request that a court vacate a conviction or reduce a sentence.⁴¹

⁴¹ While a prosecutor has an ethical duty in some circumstances to seek to remedy the injustice of a conviction of an offense that the defendant did not commit, and a duty to seek relief from an illegal sentence, see MASS. R. PROF. C. 3.8 (i) & (j), MASS R. CRIM. P. 29, a prosecutor, as the representative of the people and the government, also has a broader and deeper duty to remedy an injustice. Therefore, the prosecutor's "interest [] in a criminal prosecution is not that [their office] shall win a case, but that justice shall be done. As such, [the prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger*, 295 U.S. at 88.

Even where an affirmative pleading seeking relief does not automatically entitle a defendant to relief, the Court has an independent duty to review the case to determine whether and what action is lawful and appropriate: "Confessions of error are, of course, entitled to and given great weight, but they do not relieve this Court of the performance of the judicial function. . . . [and because a Court's] judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties [rather] our judicial obligations compel [the Court] to examine independently the errors confessed." *Commonwealth v. Poirier*, 458 Mass. 1014, 1015 (2010) (cites and quotes omitted).

34. In evaluating a claim of factual innocence or other miscarriages of justice, the CIU should guard against being unduly influenced by the fact of a conviction and against unattainable expectations of finding definitive *proof* of innocence. The CIU should also guard against placing undue weight on what may appear to be a particularly strong piece of inculpatory evidence over other evidence that suggests a wrongful conviction may have occurred. For example, the CIU should not discount the possibility of a mistaken identification or a faulty forensic opinion where a defendant reportedly confessed or made an inculpatory statement. Wrongful convictions can be caused by a confluence of factors working interdependently.⁴² A mistaken identification or an incorrect forensic “match” - or other unrelated factors - may have contributed to the defendant’s false or involuntary confession or inculpatory statement. At the same time, the CIU, in recognizing the importance of respecting jury verdicts, should be mindful that mere disagreement or disquiet about a jury verdict is not alone a sufficient basis to vacate a conviction.⁴³

⁴² See *Commonwealth v. Rosario*, 477 Mass. 69, 77-78 (2017) (explaining that “a trial judge may need to look beyond the specific, individual reasons for granting a new trial to consider how a number of factors act in concert to cause a substantial risk of miscarriage of justice and therefore warrant the granting of a new trial,” and affirming order vacating conviction because the “confluence of factors combined to create a substantial risk of miscarriage of justice”) (citing *Commonwealth v. Epps*, 474 Mass. 743, 767-68 (2016), and *Commonwealth v. Brescia*, 471 Mass 381, 396 (2015)).

⁴³ MASS. R. CRIM. P. 30 authorizes judges to grant relief whenever “it appears that justice may not have been done.” In the case of *newly discovered* evidence, the SJC has instructed judges to ask whether the new evidence, in light of the entire trial and post-conviction record, “would probably have been a real factor in the jury’s deliberations.” *Commonwealth v. Ellis*, 475 Mass. 459, 477 (2016). Not all claims of wrongful conviction and injustice made to a CIU will involve newly discovered evidence or fall neatly into existing Rule 30 frameworks of analysis. Moreover, as noted in paragraph 36, a CIU should not decline to take steps to remedy a wrongful conviction or other injustice on the ground that the prosecution would likely prevail in contested post-conviction litigation. A CIU, while of course respecting the value of juries in our legal system and remaining attendant to the “real factor” test where appropriate, should not employ fallback deference to jury verdicts as a reason to decline to take steps to remedy a wrongful conviction or other injustice it determines has occurred. CIUs must recognize the potential fallibility of juries, just as they must recognize the potential fallibilities of all other participants in the criminal system.

35. The CIU's decision to recommend that the prosecutorial office take steps to remedy a wrongful conviction should not depend on the defendant or the prosecution identifying the true perpetrator(s) of the crime.

36. The CIU should also recommend that a prosecutorial office take steps to remedy a conviction where its review and investigation reveal that the original trial or plea was so corrupted that it denied the defendant a fair adjudication or prevented the defendant from making a knowing and voluntary plea, even if the CIU is not convinced of the defendant's innocence.

37. When determining whether to re-investigate a case or later take steps to remedy a wrongful conviction, the CIU should not decline relief solely on the ground that the prosecution would likely prevail in contested post-conviction litigation.

38. The prosecutorial office should not offer the defendant a plea deal in order to:
(i) avoid reviewing or investigating a claim of wrongful conviction or factual innocence;
(ii) deny the defendant the possibility of seeking compensation; or (iii) prevent the revelation or publicizing of errors made by the prosecution, law enforcement, defense counsel, witnesses, or judges.

Adopt Appropriate Standard for Retrials

39. When a CIU is considering whether there is sufficient evidence of guilt to recommend that its office retry a case, the prosecutorial office should consider whether a retrial that relies heavily on transcripts rather than live witnesses can afford the defendant a fair trial, or whether a retrial would repeat errors that led to overturning the wrongful conviction in the first place.

PROMOTE TRANSPARENCY

Ensure Public Accessibility and Accountability

1. To ensure public access and accountability, a CIU should establish processes to communicate clearly with the public.⁴⁴ This expectation is three-fold. The CIU should (1) make its programming easily accessible to the public,⁴⁵ particularly to those who wish to submit a claim, by publicizing its procedures for submission; (2) publicize clear standards for claim review; and (3) produce an annual report detailing its conviction integrity activities, case actions and outcomes, and accomplishments.⁴⁶ These three practices will help ensure transparency, facilitate the submission of applications for review, and promote public confidence in the conviction integrity program.⁴⁷

2. A CIU will not function effectively if it cannot be found or accessed by members of the public, including convicted persons and their families. To ensure public access, a prosecutorial office should publicize information about its CIU and its contact information on its website.⁴⁸ At a minimum, the website should include the mailing address, email address, and telephone number of the program; identification of the Director of the CIU; a description of the CIU, including its policies and procedures and

⁴⁴ N.Y. State Bar Ass'n, *supra* note 33, at 24 (“To facilitate the submission of petitions for review and to promote public confidence in the integrity of the post-conviction review process, the CIU should be transparent about their operations”).

⁴⁵ *Id.* (“[T]o facilitate submissions, the CIU [should] make public how to submit a petition for review, that petitions may be filed by any person, and the types of cases accepted for review”).

⁴⁶ Hollway, *supra* note 25, at 4 (A transparent CRU should “[t]rack and report on CRU activity at least annually”); Scheck, *supra* note 36, at 742 (A CIU should publish “[t]ransparent [r]esults [through an] annual report detailing: [n]umber and nature of cases reviewed...[and] [o]utcomes of investigations”).

⁴⁷ N.Y. State Bar Ass'n, *supra* note 33, at 24 (the CIU should track and report publicly on the extent of its activities at least annually); Scheck, *supra* note 36, at 742 (“Keeping track of these numbers is not only a sound quality assurance practice to help the CIU see how key indicators are trending, but it provides an important window for the public to see what the CIU is doing.”).

⁴⁸ NRE, EXONERATIONS IN 2017 14, 23 (2018), <http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf> (two of the “[t]hree indicat[ors] of accessibility are ... [the presence of a] web address[] [and] contact information”).

the types of cases it reviews; and instructions as to who may submit an application for review, how submissions may be made, and how to learn the status or disposition of a matter submitted to the CIU for review. The DAOs and AGO should also make this information and any updates available to individuals incarcerated in state prisons and houses of correction, the Commissioner of the Massachusetts Department of Correction, the county sheriffs, Prisoners' Legal Services, member organizations in the Massachusetts Innocence Network, the Committee for Public Counsel Services, the Massachusetts Association of Criminal Defense Lawyers, and the local and regional bar associations.

3. Prosecutorial offices should request that the Commissioner of the Department of Correction and county sheriffs make the CIU information available to persons in their custody by posting it in their facilities and including it in their orientation materials. The CIU should also be reachable through the general access telephone number and mailing address for its respective office.⁴⁹

4. In addition to communicating with the general public, a CIU should communicate and share information with persons petitioning to have their cases reviewed through their attorneys or, in the case of a *pro se* applicant, a designated representative, should the applicant so request. If a *pro se* applicant requests the CIU to communicate with them directly, the CIU should respect that request. If a *pro se* defendant is incarcerated and it becomes necessary for the CIU staff handling the matter to speak by telephone with the applicant, the staff should make reasonable efforts to do so. Communication with either counsel or a *pro se* defendant or their representative should include timely updates regarding the status of the review, the sharing of evidence gathered, application of an open-file discovery policy, and an explanation of actions taken and

⁴⁹ *Id.* at 14-15 (as of March 14, 2018, “[t]hirteen of the CIUs [identified nationwide] without accessible web addresses could be contacted by telephone. Ten CIUs without available web sites could not be reached by phone. ... As a result, it appears that these units are not, as a practical matter, accessible to the public at large”).

next steps anticipated.⁵⁰ Similarly, the CIU should establish practices enabling timely and open communication with other interested parties, including victims and their families.

5. In order to improve its functioning, a CIU should provide individuals who have been involved with the program – whether as prosecutors, defense or innocence program attorneys, applicants, crime victims, or witnesses – the opportunity to give direct or anonymous feedback about their experience.

Provide Annual Public Reporting

6. The value of a CIU within a prosecutorial office cannot be captured in numbers alone. A CIU that identifies and remedies even one wrongful conviction has advanced justice. In addition, the results of training and other efforts to prevent wrongful convictions may be difficult to quantify. Nevertheless, to ensure public accountability, a conviction integrity program should publish an annual report detailing the CIU's actions and outcomes from the past year.⁵¹ Gathering and reporting this information enables members of the public and those elected to represent them to evaluate the efficacy of an office's conviction integrity program. Such a report may also enhance internal accountability and quality assurance within the DAOs and the AGO, enabling office leadership to make changes to improve the performance of the CIU.⁵²

⁵⁰ Hollway, *supra* note 25, at 3 (“A Transparent CRU should...[c]ommunicate in an ongoing and timely fashion to Petitioner or Petitioner’s counsel regarding case review, including sharing any evidence gathered, and explaining the actions taken and conclusions drawn from the review...[and should e]ncourage an open exchange of information and ideas regarding the case review between Petitioner and CRU, including open file discovery and contemporaneous disclosure of information discovered in the CRU investigation”) (emphasis omitted); N.Y. State Bar Ass’n, *supra* note 33, at 24-25 (“[T]he CIU should be transparent during the investigation with the petitioner and his or her representatives about the progress of the case review. The CIU should minimize barriers to the participation of the Petitioner and Petitioner’s counsel in the review”).

⁵¹ Hollway, *supra* note 25, at 4 (A Transparent CRU should “[t]rack and report on CRU activity at least annually”) (emphasis omitted).

⁵² *Id.*; Scheck, *supra* note 36, at 742 (“Keeping track of these numbers is not only a sound quality assurance practice to help the CIU see how key indicators are trending, but it provides an important window for the public to see what the CIU is doing”).

A conviction integrity program's "Annual Report" should include the following information where available.⁵³

- A. The number of total applications/petitions received
- B. The types of referral sources that have generated cases
- C. The number of cases actually reviewed or reinvestigated by the CIU
- D. The nature of cases reviewed and types of issues in cases
- E. Demographic information about applicants, victims, and witnesses⁵⁴
- F. The number of cases where a decision was made not to undertake a re-investigation
- G. The reasons for rejecting reviews or re-investigation
- H. The outcomes of re-investigations, including the number of cases where relief was granted, whether assented to or not, and the nature of that relief

ADOPT BEST PRACTICE MEASURES FOR PREVENTION AND ACCOUNTABILITY

Perform Sentinel Event Reviews

1. CIUs, as part of prosecutorial offices' conviction integrity programs, should engage in, and standardize the use of, "Sentinel Event Reviews" ("SERs"), a systematic form of retrospective analysis of cases involving pre-trial or post-conviction exonerations, significant criminal legal system errors, "near misses," "close calls,"⁵⁵ and circumstances that stakeholders believe involved an unjust outcome or a significant event that should not be repeated.⁵⁶

⁵³ Scheck, *supra* note 36, at 742.

⁵⁴ Identifying demographic information can be particularly difficult in post-conviction review, years after the original investigation or court case. This data may not have been recorded or may only exist in police reports, investigative notes, or case materials that are not a part of the record or the prosecution's case file.

⁵⁵ A "near miss" or "close call" refers to circumstances where a significant error nearly occurred or, but for an intervening event, would have resulted in a wrongful conviction or other unjust outcome.

⁵⁶ This is comparable to the analysis applied by the Federal Aviation Administration and the National Transportation Safety Board after plane crashes and near crashes to prevent future similar events, resulting at times in establishing new safety standards. It is also similar to the quality assurance, error reduction, and prevention analysis that the medical profession utilizes

2. SERs provide insights that help minimize the risk of future wrongful prosecutions and convictions. They also serve as mechanisms for promoting fairness, accountability, and integrity in the criminal legal system.⁵⁷

3. SERs can assist CIUs and prosecutorial offices as a whole in identifying, learning from, and remedying systemic problems, supervision failures, non-compliance with legal requirements, departures from accepted practice, forensic evidence flaws, law enforcement or prosecutorial misconduct, and violations of policies and procedures.⁵⁸

4. In performing SERs, CIUs should use “Root Cause Analysis” (“RCAs”) and procedures not only to determine *what* went wrong but also to diagnose *why* something went wrong and the likelihood of a similar event or factor occurring in the future. The focus of an RCA is on identifying all of the factors that compromised the integrity of an investigation, prosecution, or conviction, or that had the potential to do so but did not, due to timely discovery of such factors or some other fortuitous intervening event(s). An RCA procedure should include analysis of how such factors were eventually identified and how they may be identified in a timely way in the future.

5. CIUs should adopt policies and procedures for identifying “sentinel events” and performing SERs and RCAs. They should further develop guidelines for how to identify and audit similar or related cases to discern other potential incidents of error involving, for example, a repeat “bad actor,” investigator, expert, analyst, or informant, a repeat flawed test method, or a repeat questionable or disproven forensic science.

to identify human factors, systems, and processes resulting in medical errors that have led to significant adverse outcomes. As Dr. Dror stated in his presentation to the MCIWG, prosecutors can learn from how other fields assess what is an acceptable level of risk of error; that depends, in part, on the magnitude of the harm that may result from a mistake.

⁵⁷ NAT’L INST. OF JUSTICE, DEP’T OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS (2014), <https://www.ncjrs.gov/pdffiles1/nij/247141.pdf>.

⁵⁸ The Quattrone Center for the Fair Administration of Justice, at the University of Pennsylvania Law School, is an available resource for free assistance to and collaboration with prosecutorial offices in performing SERs (<https://www.law.upenn.edu/institutes/quattronecenter/>).

6. Prosecutorial offices should develop guidelines for a DAO or AGO request for a SER referral to another office, or for a joint SER, where there is a need for additional technical expertise, staffing, or resources, a potential or actual conflict, or other appropriate reasons.
7. Prosecutorial offices and their CIUs should identify and train staff members who will participate in SERs and RCAs.
8. Upon completion of a SER, the prosecutorial office should implement a written plan of corrective action that identifies the problem(s) in order to eliminate or minimize the risk of repeating the same or a similar error or “near miss” and, to the extent practicable, remedies the relevant adverse impact, with follow-up to assess the plan’s efficacy.
9. Prosecutorial offices should develop mechanisms for regular dissemination of their learning from SERs to other Massachusetts prosecutorial offices in order to foster and support the development of conviction integrity best practices and policies statewide.
10. SERs should not focus on blame or individual culpability; nor should they serve as a basis for, or be conducted in connection with, performance evaluations or disciplinary reviews. Conversely, prosecutorial offices should not apply a “no-blame” policy in cases involving willful, malicious, or egregious departures from legal and ethical requirements or from core office policies and procedures. SER results should inform the basis for and design of corrective action, training, or debriefings for involved individuals, calculated to prevent repetition of the same or similar error or conduct.

Create a Task Force to Develop and Support Best Practices

11. Massachusetts prosecutorial offices, in collaboration with the MBA, the MDAA, the Massachusetts Innocence Network, and other key stakeholders, should convene a “Conviction Integrity Task Force” with committees (consisting of members who have expertise in the relevant law, policies, practice areas, and procedures), to develop model checklists and procedures for prosecutors to promote best practices in the

following key areas in which errors are likely to result in miscarriages of justice and wrongful prosecutions and convictions, prioritizing their development based on need and importance:

- A. Confessions and admissions, including police interrogation practices and other factors that may produce false or involuntary confessions or admissions
- B. Eyewitness identification
- C. Use of incentivized witnesses, including jailhouse and confidential informants and immunized witnesses
- D. Flawed or misused forensic science
- E. Coercive plea practices
- F. Disclosure of evidence and reports from forensic laboratories, law enforcement agencies, and the Office of the Chief Medical Examiner
- G. Identifying *Brady* and *Giglio*⁵⁹ material and discovery disclosure requirements and related ethical obligations
- H. Open-file discovery, including identification of appropriate exceptions (e.g., situations involving risk to witness safety and legally prohibited disclosures), as well as provisions for confidentiality agreements and sample protective orders
- I. Requesting and accessing entire investigative files from state and local law enforcement departments and agencies
- J. Identifying, examining, and addressing racial disparities in stops, searches, arrests, charging decisions, plea offers, sentencing requests, and actions taken in response to claims of factual innocence or other claims of miscarriages of justice
- K. Engaging in a systemic review when errors or misconduct are revealed
- L. Inadequate or ineffective assistance of counsel
- M. Judicial error or bias
- N. Policies and procedures for CIU intake, screening, and investigation

⁵⁹ *Giglio v. United States*, 405 U.S. 150 (1972) (under *Brady*, the prosecutor has a duty to make available to the defense exculpatory evidence, including evidence useful for impeachment, possessed by the prosecution team or its agents).

- O. Policies and procedures for identifying “sentinel events” and performing SERs and RCAs

12. Each prosecutorial office should consider adopting model checklists, or adapting them to fit the office's specific needs, policies, staffing, and resources. These checklists may be streamlined versions of developed policies or procedures or a formalization of unwritten practices.

13. The checklists and procedures can be useful tools for (a) prosecutors when making charging decisions and other decisions before, during, and after trial, and (b) prosecutors and supervisors when assessing compliance with legal and ethical requirements and office policies and procedures.

14. The Task Force and its committees should revise the model checklists and procedures periodically to ensure compliance with changes in the law and procedures.

Promote and Provide Needed Prosecutor Training

15. The CIU and other designated conviction integrity program staff in each DAO and the AGO should receive regular training on subjects relevant to their work on conviction integrity matters, including but not limited to:

- A. Known causes of erroneous, unjust, and otherwise wrongful convictions
- B. Developments in relevant areas of law
- C. Developments in forensic methods, eyewitness identification procedures, and police and prosecutor interviewing and interrogation techniques, including discoveries of flaws in such methods that may impact the integrity of past and future convictions
- D. Post-conviction investigative techniques
- E. Practices to recognize and minimize the distorting effects of cognitive bias, including confirmation bias and implicit racial and ethnic bias, in decision making processes

16. All prosecutorial offices and their CIUs should include what is learned through SERs in their orientation and training programs for new and current office staff.

17. Upon an exoneration or other significant result from a claim of wrongful conviction or other miscarriage of justice, including allowance of a new trial motion, a subsequent declination to retry a matter, or an acquittal on retrial, the office should conduct internal training to discuss lessons learned from the review and disposition of the case. Such internal training should include discussions about the effect of the error(s) or circumstances that contributed to the unjust prosecution or wrongful conviction on other prosecutions or convictions in that jurisdiction.

18. Prosecutorial offices and their CIUs should hold or sponsor trainings for trial and appellate prosecutors, police, investigators, laboratory personnel, and other appropriate personnel about the causes of wrongful convictions and methods for reducing such errors.

19. Prosecutorial offices and the MDAA should collaborate to promote and facilitate the attendance of prosecutors at trainings, including forensic trainings, such as those currently provided at the Massachusetts State Police Crime Labs. Where appropriate, such training programs should include defense and post-conviction innocence attorneys and/or defense experts on the relevant subject matters, as both speakers and attendees.

20. Where appropriate and space permitting, larger prosecutorial offices and their CIUs should publicize the schedule for, and availability of, their internal training programs, including forensic and conviction integrity-related programs, to staff from other prosecutorial offices.

Establish Model Statewide Curricula and Training Modules

21. The MBA-convened Conviction Integrity Task Force should identify and collect model training curricula currently used by prosecutors in Massachusetts and elsewhere in the United States for professional training concerning conviction integrity. Where no such model exists, the Task Force should help develop such curricula in the following areas, prioritizing their development based on need and importance:

- A. Forensic evidence matters (i.e., DNA, drug analysis, fingerprints, bite marks, arson science, microscopic hair comparisons, ballistics, shoeprint impressions, head trauma, preliminary tests/serology, and cognitive bias in forensic analysis and reporting)
- B. Professional ethics for prosecutors (including reviewing cases that present challenging ethical matters)
- C. Implicit and other bias, including how to recognize and address racial and ethnic bias, confirmation bias, and other cognitive bias
- D. Eyewitness identification and other reliability issues relating to perception and memory
- E. Use of incentivized witnesses, including “jailhouse informants”
- F. Discovery
- G. Confessions
- H. Conduct and use of SERs and RCAs
- I. Lessons learned and solutions identified from SERs, with cause analysis training to prevent future errors
- J. Presentations by and about exonerated individuals
- K. Prosecutor training that includes prison visits

Enact Measures to Reduce Bias in Prosecutorial Decision Making

22. Prosecutorial offices should take steps to reduce the effect of cognitive bias in their review of cases and decision making. In addition to creating a CIU with structural independence, such bias-reduction measures include having a CIU member with defense or innocence organization experience and policies that preclude CIU staff from

discussing their case reviews with the trial and appellate prosecutors originally involved in that case, except to obtain necessary historical information.

23. Prosecutorial offices should collect data on, and periodically review their own practices regarding, when they do and do not agree to join motions for forensic testing, post-conviction discovery, and post-conviction relief, to ensure that they are fulfilling their ethical duty to identify and seek to remedy wrongful convictions and other miscarriages of justice.

Perform Systematic Data-Driven Case Analysis

24. DAOs and the AGO should each collect and enter into electronic databases critical case-related information from all past, current, and future CIU cases, and from all current and future Superior Court cases, to enable them to review cases more effectively and to identify, prevent, and remedy wrongful convictions and other miscarriages of justice.⁶⁰ Specifically, for each case, the database should include the following case information, where applicable: the race and gender of the defendant and key witnesses, both law enforcement and civilian; the crimes charged; the law enforcement agencies and key law enforcement personnel; informants or incentivized witnesses; forensic analyst/labs; types of forensic analysis; types of eyewitness identification procedures; to whom confessions or admissions were made; experts; and prosecution and defense attorneys. Such a database would be used, for example, if a forensic analyst were found to have engaged in flawed science or misconduct in

⁶⁰ The MCIWG recognizes that conviction integrity is important for all criminal cases and Juvenile Court matters. Limiting this best practice recommendation to current and future Superior Court cases at this time is intended as a starting point, not an endpoint. This Guide recommends that CIUs address how such database development can be expanded in scope to reach additional matters, particularly District Court felony and youthful offender matters. We note a recent report by the Juvenile Justice Policy and Data Board finding that the current technology used by District Attorney Offices in the Commonwealth is not sufficient to track the information suggested in this provision. COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE STATE AUDITOR, OFFICIAL AUDIT REPORT: CAPE AND ISLANDS DISTRICT ATTORNEY'S OFFICE 6 (Mar. 3, 2021), <https://www.mass.gov/doc/audit-of-the-cape-and-islands-district-attorneys-office/download> ("The database used by the District Attorneys ("DAMION") is several decades old and not currently capable of tracing all of the data requested by the Legislature.").

a current case so that the prosecutorial office can identify past and pending cases involving that same forensic analyst.⁶¹

25. Prosecutorial offices should also collect demographic data, including race and ethnicity, of defendants, victims, witnesses, lead law enforcement officers involved in the case, and jurors, to ascertain whether disparities exist – and if so, what causes or potentially causes such disparities – in arrests, charging decisions, plea offers, sentencing recommendations and results, and CIU reviews and actions taken in the cases.⁶² Before engaging in demographic database construction, prosecutorial offices are encouraged to consult with other stakeholders and experts to identify best practices in this regard.⁶³

⁶¹ To create the most effective system for a systematic data-driven case analysis by CIUs, prosecutorial offices should also consider initiating and engaging in a longer-term project of collecting the above case-related data from prior cases. A potential resource for prosecutorial offices is the Justice Reinvestment Policy Oversight Board, consisting of criminal justice leaders and stakeholders statewide, statutorily charged with developing policies for collection, standardization, and public availability of data within Massachusetts criminal justice agencies. MASS. GEN. LAWS ch. 7D, § 11.

⁶² See *Commonwealth v. Long*, 485 Mass. 711, 735 (2020) (“urg[ing] the [l]egislature to require the collection and analysis of officer-specific data, such as set forth in 2020 Senate Doc. No. 2820. This type of data collection would help protect drivers from racially discriminatory traffic stops, and also would protect police officers who do not engage in such discriminatory stops”); *Id.* at 734-35 (“This bill would require all officers . . . to record information on any traffic stop . . . , including the reason for the stop and the age, race, ethnicity, and gender of the individual stopped, among other information”).

⁶³ As an example of an effective methodology for determining how to identify, collect, and analyze this range of racial and ethnic-based data, the MCIWG references the following. In 2000, the state legislature enacted “An Act Providing for the Collection of Data Relative to Traffic Stops,” 2000 Mass. Acts 228, to address concerns about racial and gender profiling in traffic stops and searches by law enforcement in Massachusetts. In or about February 2003, the Secretary of the Executive Office of Public Safety (“EOPS”) (currently known as the Executive Office of Public Safety and Security or EOPSS) established a Racial and Gender Profiling Task Force, consisting of 32 members, including representatives from the state legislature, EOPS, the Attorney General’s Office, the Massachusetts Chiefs of Police Association, the State Police, municipal police departments, and community stakeholders, to advise the Secretary about data collection and data analysis issues related to the implementation of the statute. Pursuant to the statute, after the Task Force reached consensus on the collection forms and protocol, EOPS transmitted traffic-stop data collected from the State Police and municipal police departments for analysis to Northeastern University’s Institute on Race and Justice. The Registry of Motor Vehicles collected the traffic citation, warning, and search data from departments between April 1, 2001 and June 30, 2003.

Create and Maintain a List of “Problematic Actors” to Aid Case Reviews

26. The CIU or other conviction integrity staff should develop lists of persons whose involvement in a case may warrant closer scrutiny such as law enforcement personnel on a *Brady* list and expert witnesses, civilian witnesses, prosecutors, or defense counsel, who, in the CIU’s opinion or as found by a court, have committed serious misconduct or errors in judgment, whose credibility is in question, or who otherwise had a role in a case where the CIU has identified serious problems with the investigation, prosecution, or conviction. The CIU should consider including someone on such a “Problematic Actor List” for reasons that include, but are not limited to, failing to provide exculpatory information, using excessive force and/or coercion in investigations, failing to follow policies and procedures in investigations, overstating their ability to perceive events or draw conclusions beyond what is scientifically feasible, providing false or misleading information or testimony, engaging in conduct that reflects or exploits racial bias, or a defense counsel’s apparent lack of diligence.

27. The CIU should use information contained in a “Problematic Actor List” in its review of a case and in determining whether a colorable claim of factual innocence or unjust investigation or prosecution exists. Inclusion in the “Problematic Actor List” may trigger review of other cases involving these same actors.

Establish a Law Enforcement Misconduct Database

28. DAOs and the AGO, in collaboration with the MBA, the MDAA, and other key stakeholders, through the Conviction Integrity Task Force, should develop and maintain a statewide “Law Enforcement Misconduct Database.”⁶⁴ The database, accessible to all prosecutorial offices, should include the identity of all law enforcement personnel

⁶⁴ The recently enacted law, *An Act relative to justice, equity and accountability*, includes a new “Peace Officer Standards and Training Commission” (“POST Commission”). MASS. GEN. LAWS ch. 6E, § 2. One of the POST Commission’s mandates is to “create and maintain a database containing records for each certified law enforcement officer,” including all officers who the POST Commission decertifies or suspends, and who have been subject to discipline by their police agency. MASS. GEN. LAWS ch. 6E, § 4(h). The POST Commission is also required to “promulgate regulations for the division of police certification to maintain a publicly available and searchable database” of all Massachusetts law enforcement officers it decertifies or suspends. MASS. GEN. LAWS ch. 6E, § 4(j).

(officers and civilians) found by courts and/or internal investigations to have engaged in significant law enforcement-related misconduct or criminal behavior, with applicable dates and relevant findings.⁶⁵ Prosecutorial offices should disclose this information to defense counsel promptly in prosecutions involving the relevant law enforcement personnel identified in the database.⁶⁶ A prosecutor should make prompt pretrial inquiry into the database in each case for all relevant personnel.

29. Prosecutorial offices should audit caseloads of each law enforcement officer found guilty of criminal conduct relevant to or related to their official duties in order to determine if the officer engaged in similar or related wrongdoing in other investigations or cases. Such audits should be viewed as due diligence and conducted regardless of whether they are anticipated to result in identifying wrongful convictions of the factually innocent or other miscarriages of justice.

⁶⁵ This Registry should be based on the development of clear standards describing the type of conduct that merits inclusion and requires disclosure.

⁶⁶ The SJC has "strongly recommend[ed]" that the Massachusetts "Attorney General and every district attorney in this Commonwealth" promulgate a policy comparable to the DOJ's "Giglio Policy," which establishes a procedure for prosecutors to obtain potential impeachment information regarding law enforcement witnesses from investigative agencies. *In the Matter of a Grand Jury Investigation*, 485 Mass. 641, 658-60 (2020). As set forth in the SJC's opinion, impeachment information may include findings of misconduct that reflect upon the employee's truthfulness or possible bias; any past or pending criminal charge brought against the employee; any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation; prior findings by a judge that the agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct; any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence that the prosecutor intends to rely on or that might have a significant impact on the admissibility of prosecution evidence; information that may be used to suggest that the agency employee is biased for or against a defendant; and information that suggests that the agency employee's ability to perceive and recall truth is impaired.

Establish a Database to Safely Maintain Information about Jailhouse or Confidential Informants Who Have or Will Testify

30. The use of informants and other incentivized witnesses at trial can contribute to wrongful convictions. While not all of these witnesses are unreliable, the benefit a person believes they may receive, or may have been led to believe they will receive, can provide a powerful motivation to provide testimony that is not truthful or entirely truthful. When the Commonwealth calls a witness who has been provided incentives in the past or expects an incentive based on an implicit or explicit promise, the incentives must be disclosed to the accused. Unfortunately, because of the nature of these relationships, benefits are not always tracked and, as a result, full disclosure becomes impossible. To prevent wrongful convictions on the basis of unreliable incentivized testimony and to be able to fulfil disclosure obligations, prosecutors should endeavor to find ways, consistent with relevant safety concerns, to obtain information about incentives from both investigating agencies and other prosecuting entities. Creating a way to safely track data and share that data across jurisdictions should be prioritized.

MCIWG’S POST-GUIDE ROLE IN FACILITATING AND ASSESSING PROGRESS OF CONVICTION INTEGRITY PROGRAMS IN PROSECUTORIAL OFFICES IN THE COMMONWEALTH

The MCIWG’s Guide offers detailed practical guidance to prosecutorial offices to pursue systemic criminal reform through conviction integrity programs and CIUs. Success, however, requires an ongoing, long-term commitment by prosecutorial offices to review, apply, and embed the range of best practice recommendations contained in this Guide, consistent with their size, staffing, and resources.

Following publication of this Guide, the MCIWG will promote and support the adoption of its recommendations for systemic conviction integrity reform in the Commonwealth. In that regard, the MCIWG will offer initial training programs and will provide or arrange for technical assistance to help prosecutorial offices establish and maintain effective conviction integrity programs and CIUs and to implement the best practice recommendations in this Guide.

The MCIWG will help facilitate the prompt formation of a statewide “Conviction Integrity Task Force” made up of key stakeholders. As proposed in this Guide, the Task Force’s role will include: (1) developing model checklists and procedures for Massachusetts prosecutors; (2) identifying and collecting model training curricula, and where no appropriate model exists, developing such curricula, prioritizing development based on need and importance; (3) providing training on conviction integrity and CIUs; (4) providing input about collecting racial and ethnic data; and (5) providing input about tracking the use of incentivized witnesses who have testified or will testify in cases.

Additionally, the MCIWG, in collaboration with the Task Force, will help support efforts by Massachusetts prosecutorial offices to reallocate staffing and resources to adopt and implement the MCIWG best practice recommendations set forth in this Guide.

Moreover, in its follow-up efforts, the MCIWG intends to seek and obtain feedback from a broad range of key stakeholders about its best practice recommendations and how to assist in facilitating their implementation in all Massachusetts prosecutorial offices.

Furthermore, with input from key stakeholders, the MCIWG and the Conviction Integrity Task Force will be available to assist with evaluation of CIUs and with the development of metrics to assess the progress made by prosecutorial offices in adopting and implementing the recommended best practices for conviction integrity programs and CIUs. The MCIWG is committed to assessing and publishing information about the progress made by prosecutorial offices in establishing conviction integrity programs and CIUs, and their success in adopting and implementing the best practice recommendations identified in this Guide, consistent with their size, staffing, and resources, at the end of each calendar year after the publication of this Guide, beginning in 2022 through 2024, and hopefully thereafter, either itself or through a designee.

Finally, although this Guide focuses on Massachusetts prosecutorial offices, it provides generally applicable practical guidance for all prosecutorial offices committed to establishing and maintaining effective conviction integrity programs and CIUs, wherever they are located. As a result, the MCIWG intends to publicize this Guide and make it available to the general public.

CONCLUSION

The best practice recommendations contained in this Guide reflect a consensus of all MCIWG members, who are representative of key stakeholders in the Massachusetts criminal legal system. The Guide provides detailed guidance to enable each Massachusetts prosecutorial office to create and maintain its own conviction integrity program. It also presents a roadmap for criminal justice stakeholders to collaborate on further initiatives to help ensure conviction integrity in the Commonwealth.

The recommendations provided are interrelated and mutually reinforcing. Taken together and implemented with ongoing planning and consistency, they will not only enhance conviction integrity, but also reinforce community trust and confidence in the integrity of our criminal legal system.

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