

SPECIAL DIRECTIVE 20-13

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN  
District Attorney

SUBJECT: CONVICTION INTEGRITY UNIT

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Bureau of Prosecution Support Operations, Conviction Integrity Unit (formerly known as the Conviction Review Unit) in Chapter 1.07.03 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 1.07.03 of the Legal Policies Manual.

**INTRODUCTION**

The CIU shall conduct strategically collaborative, good-faith case reviews designed to ensure the integrity of challenged convictions, remedy wrongful convictions, and take any remedial measures necessary to correct injustices uncovered, within the bounds of the law. The CIU will also study and collect data on the causes of wrongful convictions in L.A. County, in service of informing office wide policies and procedures designed to prevent such injustices going forward and strengthen community confidence in the criminal legal system overall. The CIU is committed to seeking the truth and ensuring transparency in the review process and shall openly and regularly report its case review numbers to the public. To fulfill its mission, the CIU will operate independently from litigation units in the office and approach its review and investigation in a non-adversarial manner to ensure that justice prevails in each and every case.

**GUIDING PRINCIPLES**

“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.”

-American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b)

“When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor’s jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit...When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.”

-American Bar Association, Model Rules of Professional Conduct, Standard 3.8(g)-(h); California Rules of Professional Conduct (F)-(G)

### **POLICIES GOVERNING CIU CASE REVIEW**

In view of the growing body of evidence demonstrating that wrongful convictions occur with greater frequency than is acceptable in our criminal legal system, as well as the legislature’s recent revisions to the Penal Code that expand the legal avenues available for review of new evidence supporting claims of wrongful conviction, and based on a review of best practices employed in CIUs in other jurisdictions, the policies governing this office’s CIU shall be as follows:

The CIU shall be an independent unit that reports directly to the District Attorney or his designee. It shall be staffed with specially trained deputies, investigators, paralegals and other staff who are committed to its mission.<sup>1</sup> The CIU shall be comprised of members with diverse backgrounds and experiences.

The CIU has a broad mandate to review a wide range of issues relating to wrongful convictions but shall prioritize claims of actual innocence brought by individuals who are currently in custody. The CIU shall not reject any case because a conviction is based on a guilty plea, an appeal is pending, the case is in active litigation, or where the applicant has completed his or her sentence. The CIU shall be authorized to fast-track cases submitted by applicants who are represented by counsel, including innocence organizations, where those cases have undergone substantial, reliable investigation and where new evidence supporting the wrongful conviction claim is presented.

### **CASE REVIEW CRITERIA**

The CIU shall accept for review cases in which:

- (1) the applicant was prosecuted by the Los Angeles County District Attorney’s Office; and,

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<sup>1</sup> The CIU shall work with defense organizations and members of the post-conviction legal community, including innocence organizations, as well as relevant experts, to develop and implement trainings on best practices for conducting post-conviction investigations.

- (2) there is a claim of actual innocence or wrongful conviction; and,
- (3) the CIU identifies one or more avenues of investigation that have the potential to substantiate the applicant's claim(s) of actual innocence and/or wrongful conviction.

The intake criteria shall always include an "interest of justice" exception. Under this exception, the CIU shall be authorized to undertake a review and investigation in cases that do not meet the intake criteria, if doing so is in the interests of justice. The interests of justice may be met where the applicant alleges and/or the CIU concludes that further investigation is warranted to determine whether:

1. There is a reasonable probability that the applicant is actually innocent<sup>2</sup>;
2. Some or all of the evidence relied upon to obtain the conviction is no longer deemed credible;
3. There is evidence the prosecution or conviction was tainted by racial discrimination, whether or not a court previously agreed with the applicant's assertion of racial discrimination;
4. The prosecution failed to disclose material evidence in the possession of any law enforcement agency that was favorable to the defense, whether exculpatory, impeaching, or mitigating;
5. The fact-finding process was so corrupted as to deny the applicant a fair adjudication of his or her guilt or innocence at trial;
6. A manifest injustice rendered the trial fundamentally unfair; and/or,
7. Had the office known at the time of trial what it now knows about the evidence, the office would not have chosen to prosecute the case, or would have charged the case differently.

The above list is intended to be illustrative; it is not exhaustive.

The CIU shall pay special attention to cases where the applicant claims the conviction was obtained based on any of the following high-risk factors, or common causes of wrongful conviction, which shall not be rejected without meaningful review and investigation:

1. The applicant was convicted based, in whole or in part, on eyewitness identification evidence or testimony, particularly where it was a stranger identification or cross-racial identification, or both<sup>3</sup>;

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<sup>2</sup> See, Rule 3.8 Special Responsibilities of a Prosecutor (Rule Approved by the Supreme Court, Effective June 1, 2020).

<sup>3</sup> Both at the application stage and in the investigation of cases accepted for review, the CIU shall verify that eyewitness identifications supporting a conviction comport with standards and research accepted by the scientific community and do not run afoul of the best practice and recommendations in the 2019 Third Circuit Eyewitness Identification Report. The CIU shall assess the reliability of eyewitness identification

2. The applicant was convicted based, in whole or in part, on the applicant's confession and there are allegations that this confession was false or coerced<sup>4</sup>;
3. The applicant was convicted based, in whole or in part, on testimony that has since been recanted as false or coerced;
4. The applicant's conviction is alleged to have been borne from official misconduct, including witness tampering, misconduct in interrogations, fabricated evidence and confessions, the concealment of exculpatory evidence, and misconduct at trial<sup>5</sup>;
5. Law enforcement personnel involved in the investigation or arrest of the applicant were subsequently discharged or relieved of their duties for misconduct;
6. Law enforcement personnel involved in the investigation or arrest of the applicant who have been adjudicated by a court or an internal investigation by a law enforcement entity to have been committed an act of dishonesty or sexual assault as defined by Cal. Penal Law Section 832.7 (b) (B) and (C);
7. The applicant was convicted based on forensic evidence grounded in methodologies that have since been largely or wholly discredited as unreliable, including but not limited to bloodstain pattern analysis, comparative bullet lead analysis, forensic odontology (bitemarks), hair microscopy for the purpose of determining whether known/unknown hairs share a common source, Shaken Baby Syndrome (SBS). The CIU shall review the forensic methods used to analyze the evidence and ensure that forensic evidence used to obtain a conviction is foundationally valid and valid as it was applied in the case<sup>6</sup>;

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evidence in light of the non-exhaustive lists of system and estimator variables set forth in *State v. Henderson* (N.J. 2011) 27 A.3d 872, and continually examine and apply emerging research related to eyewitness identifications, including but not limited to the American Psychological Association white papers Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence (2020) and Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads (1998).

<sup>4</sup> The CIU shall consult the 2010 American Psychological Association white paper on police interrogation and confessions, and any emerging literature or research regarding false confession and recanting witnesses, to inform its review of convictions supported by statements obtained during custodial interrogations that have since been recanted or disavowed by the person who allegedly made the statement.  
[https://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20\(2010\).pdf](https://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf)

<sup>5</sup> The CIU shall consult the National Registry of Exonerations report *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* (2020), and any emerging literature or research regarding official misconduct, to inform its review of convictions alleged to have resulted in whole or in part from official misconduct.

<sup>6</sup> The use of unreliable and misleading forensic evidence, which we know is a common cause of wrongful convictions, imperils the integrity of the criminal legal system. The CIU shall critically and continually examine emerging scientific literature, which may also call into question older forensic methods, and train staff about these changes, so that case review criteria can be updated as needed. The CIU shall ensure that forensic evidence supporting a conviction complies with the findings, recommendations, and best practices set forth in specific reviews of the relevant sciences, including but not limited to:

8. The applicant was convicted based on forensic evidence that the LACDA has generally accepted as reliable, but the particular conclusions or opinions presented to the jury in support of the prosecution's case exceeded the bounds of what is now recognized to be valid science – for example, through testimony purporting to “identify” an applicant as the unique source, or through expert testimony implying or stating a statistical basis for the likelihood of a particular conclusion that is not verifiable or otherwise valid;
9. A conviction was based either on the factors identified above but corroborated only with jailhouse informant testimony or testimony by an informant that has been used by law enforcement or this office on more than one occasion;
10. The conviction was based, in whole or in part on jailhouse informant testimony or testimony by an informant that has been used by law enforcement or this office on more than one occasion;
11. The conviction was based in whole or in part on the testimony of witnesses who received benefits from this office or law enforcement in exchange for, or close in time to, their testimony against the applicant;
12. A gang allegation was found true by a jury where the only evidence of gang membership was presented by a gang expert, and that evidence would now be deemed inadmissible hearsay under *People v. Sanchez* (2016) 63 Cal. 4th 665, and the evidence of gang membership served as the only evidence of motive used to obtain the conviction;
13. Evidence based on analysis by crime labs that were not accredited when the analysis was conducted, and/or have been implicated in scandals related to their handling and testing of evidence;
14. Evidence supporting the conviction was corroborated by one or more of the above types of unreliable evidence;
15. The applicant was convicted after one or more retrials, following a hung jury;
16. Defense counsel was disbarred or otherwise disciplined after the challenged conviction was obtained, and/or presented no evidence to counter the prosecution's case at trial, and/or was found by a court to have provided ineffective assistance of counsel in one or more other case.

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- I. American Association for the Advancement of Science (AAAS) reports on Fire Investigation (2017) and Latent Fingerprint Examinations (2017)
  - II. American Statistical Association (ASA) Position on Statistical Statements for Forensic Evidence (2019)
  - III. National Academy of Sciences (NAS) report *Strengthening Forensic Science in the United States: A Path Forward* (2009)
  - IV. National Institute of Standards and Technology (NIST) report on Latent Print Examination and Human Factors (2012), Working Group on Human Factors in Handwriting Examination (2020), and Scientific Foundation Studies on DNA mixture interpretation, bitemark analysis, firearms examination, and digital evidence (forthcoming)
  - V. President's Council of Advisors on Science and Technology (PCAST) report *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016).

## **SPECIAL CONCERNS IN EVALUATING FORENSIC EVIDENCE**

In cases involving forensic evidence, the CIU shall request or permit the applicant's counsel to conduct forensic testing, when doing so could be probative, in that it may tend to identify the identity of the perpetrator of the crime or may exculpate the applicant seeking review of their conviction. The CIU shall request that forensic results be expressed in reports and testimony using clear and comprehensible language, to inform the CIU's own decision making and that of other legal actors. Where such testing is conducted, the CIU shall permit any forensic analysts retained by the CIU to speak freely and independently with the applicant's counsel and shall make the analysts' underlying data and case materials available to the defense.

The CIU shall not raise procedural challenges or defenses to oppose, nor shall it oppose, requests for seeks forensic testing, including but not limited to DNA testing, fingerprint analysis, firearms comparison, GSR, toxicology, where the testing may lead to evidence relevant to the applicant's claim of actual innocence or wrongful conviction, including but not limited to testing that is capable of identifying the perpetrator of a crime. The CIU shall assist applicants in ascertaining the status of physical evidence by facilitating contacts between individuals seeking testing and/or their attorneys and the crime lab and/or law enforcement personnel needed to search evidence and property rooms to locate the evidence in question.

The CIU shall carefully scrutinize cases in which experts or others opined or testified by using terms like "reasonable degree of scientific certainty," which have no accepted scientific meaning yet convey an unsupported measure of reliability or conclusiveness to the factfinder. The CIU shall request that all information concerning the limitations of forensic techniques should be disclosed alongside the results of any analyses. All forensic methods have limitations, and none are error free. Where error rates for a method are not known or have not been adequately measured, reports shall state that fact. The CIU shall carefully scrutinize any conviction based in whole or in part upon testimony that states or implies a "zero error rate" or which purports to provide an error rate that has not been independently validated. The CIU shall similarly make those limitations clear in communications with the applicant and/or their counsel and the court. The CIU shall also request that all methods of forensic analyses be documented in the first instance to permit the CIU's review and disclosure of all steps followed and the methodology used to arrive at the conclusions reached.

The CIU shall ensure that the applicant and/or their counsel receive not just certificates or reports of forensic analyses, but also complete documentation of the methods used, and the results reached. The CIU shall disclose the applicant and/or their counsel all inconclusive and exculpatory forensic results, in addition to any information about corrective actions taken in a laboratory or proficiency testing of individual analysts. The CIU shall also make routine requests to preserve forensic evidence, especially where the applicant and/or their counsel seek preservation for potential future testing.

The CIU shall facilitate a CODIS, AFIS or NBIN search of evidence that may help demonstrate an individual was wrongly convicted.

## **PRO SE APPLICANTS**

When a case accepted for review is submitted by a *pro se* applicant, the CIU shall determine whether appointment of independent legal representation would promote justice and facilitate review of the case, such as in cases involving high-risk factors, listed above. In the absence of those factors, the determination as to whether appointment of counsel would promote justice shall be determined on a case-by-case basis. In such cases, the CIU shall recommend that the applicant seek legal representation and, if requested, assist by referring the individual to an appropriate innocence project, law school clinic, *pro bono* counsel, or public defender office. The CIU shall also consider whether to file a joint petition for writ of habeas corpus stipulating that an order to show cause should issue and counsel should be appointed pursuant to Penal Code section 1484.

Where an applicant is represented by counsel, the CIU shall use joint discovery and/or limited disclosure agreements, in appropriate cases, to share work product information. The CIU will seek to conduct investigations jointly and collaboratively with counsel, sharing exculpatory or improperly withheld information as quickly as practicable. Any attorney-client or work-product privileged information that is shared between a claimant and the CIU shall not be shared with other units in the office and shall not be used at trial or in post-conviction proceedings by other units for any purpose.

## **COMMUNICATIONS WITH APPLICANT'S COUNSEL**

This Office respects the sanctity of the attorney-client privilege between an applicant and defense counsel. An applicant who alleges Ineffective Assistance of Counsel may have, unwittingly, impliedly waived some portion of the attorney-client privilege as to communications with their trial counsel. This waiver is not absolute, however, and is extremely limited.

The CIU shall err on the side of caution and notify an applicant before seeking to contact defense counsel or seeking to obtain counsel's file and provide the applicant with a chance to object or modify a claim to avoid an inadvertent or implied waiver of the attorney-client privilege. The CIU shall not seek disclosure of anything beyond that which is strictly necessary and legally allowable under California and Federal law, including information that exceeds the limited scope of the ineffective-assistance-of-counsel claim.

The CIU shall not encourage any attorney to violate their ethical duties of confidentiality and loyalty to former clients, as articulated in the California Rules of Professional Conduct; rather, CIU attorneys or investigators speaking to defense counsel must remind defense counsel of the attorney-client privilege prior to the start of a substantive interview.

## **ACCESS TO DISCOVERY**

If the CIU accepts a case for review, the CIU shall assist the applicant in obtaining all discovery the applicant is entitled to under P.C. 1054.9, as well as any and all *Brady* materials in the constructive possession of the office. The CIU shall also allow applicants and/or their

attorneys to have access to all non-privileged and non-sensitive information in the case files under review, including information in police reports and lab reports concerning the testing of forensic evidence.

Recognizing that certain categories of otherwise privileged information and work product prepared by this office may contain exculpatory or impeachment information relevant to an applicant's claims, and the benefit to the truth-seeking process of having both parties review this material, the CIU shall err on the side of disclosing the complete LACDA trial file to the applicant's counsel for independent review, subject only to reasonable and necessary disclosure agreements. Any redactions shall be limited to those deemed strictly necessary to protect victim or witness privacy.

The CIU shall not condition its review of a case or its own disclosures on any reciprocal commitment by the part of the applicant to waive any aspect of the attorney-client or work-product privilege or waive such privileges generally. Where otherwise privileged information may be necessary for the CIU to fully investigate and consider an applicant's claims for relief – for example, to speak with the applicant's trial counsel or review portions of the trial file to determine if certain *Brady* information was or was not timely disclosed – the CIU shall limit its waiver requests to only those necessary to investigate the claim or issue. Similarly, where the CIU seeks to interview the applicant or the applicant's prior counsel, the CIU shall afford the applicant's current counsel the opportunity to be present (or waive counsel's presence) at the interview.

The CIU shall proactively seek to obtain complete files from law enforcement agencies pertaining to the case, including forensic evidence and files maintained by laboratories and coroner or medical examiner's offices. In the event the CIU discovers that the case file(s) have been lost in whole or in part, the CIU shall immediately inform the person seeking review of their conviction, or their counsel, that the file(s) has been lost. The CIU shall work with the Discovery Unit to reconstruct the file by obtaining records from:

- The LACDA's internal files;
- The LAPD, LASD, LAFD, and/or any other law enforcement agency or emergency services provider involved in the case;
- Crime labs;
- The coroner's office, in homicide cases;
- The original trial deputy's personal file;
- The superior court file;
- The courthouse exhibit room;
- The court of appeal; and
- Any other source reasonably likely to have relevant materials, records, and/or evidence, such as medical records, where appropriate releases are provided, 911 dispatch call recordings, etc.

The CIU shall review every case previously rejected by the former CRU, whether at the screening stage or after an investigation, in light of all of the above.



## **INVESTIGATIONS IN CLAIMS OF WRONGFUL CONVICTION**

CIU investigations often require looking into convictions that are decades old, where witnesses' memories have faded, and/or that involve reluctant or recanting witnesses, and therefore often require specialized knowledge and training on issues such as memory science, eyewitness identifications, and police practices used at the time that are no longer considered best practices. CIU deputies and investigators shall consult with outside experts, as needed, to obtain relevant materials concerning best practices regarding conducting CIU investigations.

These investigations shall not be undertaken as a means of “protecting” a conviction, nor shall they be adversarial in nature. Thus, for example, investigators shall not engage in tactics designed to dissuade a recanting witness and shall not threaten to charge that witness with perjury; rather the paramount goal of a CIU investigation shall be to determine the reliability and truthfulness of the recantation. Using a high-pressure, coercive, or intimidating approach in these investigations wastes time and resources and sends a mixed message to office staff about the CIU's mission and undermines the CIU's credibility with the public.

CIU deputies and investigators shall also make all reasonable efforts to avoid *unintentional* witness intimidation. These efforts shall include, but are not limited to, conducting interviews in non-threatening or neutral locations (rather than in this office or another law enforcement entity's office or station), if possible, and the concealing of the investigator's weapon, if one is carried, except where specifically required to do so by law, or if approved by the elected District Attorney.

CIU deputies and investigators shall understand what confirmation bias is—also referred to as tunnel vision—and how to avoid it. Studies have shown that confirmation bias is pervasive in the reinvestigations in wrongful conviction cases. It can occur, for example, when original police reports are viewed deferentially and/or treated as unassailable accounts of the truth of what transpired in the case, when research shows that police reports are often incomplete and contain inaccuracies, sometimes due to the fast-pace at which criminal investigations unfold, following serious felony offenses. CIU deputies and investigators shall test and probe information in police reports, witness accounts, and other new evidence presented by an applicant, in a manner designed to uncover the truth.

## **INDEPENDENCE OF THE CIU**

To the extent possible the CIU shall not disclose or discuss ongoing investigations with other units within this office, other than the elected District Attorney and/or his designee. Nor will the CIU share information from ongoing investigations with other governmental entities, except where specifically required to do so by law, or if approved by the elected District Attorney. In addition, to ensure a full and fair review of each case, investigations and case reviews shall be conducted independently by CIU deputies and investigators, without consultation or input from the original trial deputy, Head Deputy, or Assistant District Attorney of the trial division, except as needed to obtain historical information about the case.

The trial deputies who handled the original prosecution shall be afforded a reasonable opportunity to respond to any challenges that have been made to the prior handling of the case,

but shall not take part in the office's determination as to whether to accept a case for review or whether to recommend that relief from a conviction be granted. This unique investigative and litigation perspective underscores the need for CIU independence from other areas of the office and should be read to encourage collaboration with an applicant seeking review of a conviction wherever possible.

### **CASE RESOLUTION & REMEDIAL OPTIONS**

Once a case that has been accepted for review undergoes a full investigation, the CIU shall make a recommendation to the District Attorney as to whether it is in the interest of justice to seek relief from the applicant's conviction or sentence.

If the CIU concludes that it is not in the interests of justice to revisit the conviction and/or sentence, the CIU shall inform the District Attorney of its conclusion and recommendation. The District Attorney shall have final decision-making authority to determine whether it is in the interest of justice for the office to seek relief from a conviction or sentence. If the determination is made that relief is not warranted, the CIU shall communicate the reasons for its decision, in writing, to the applicant with an explanation as to why and how the decision was reached, including what investigative steps were taken.

If the determination is made that relief is warranted, the CIU shall determine and consider all available and appropriate remedies, including seeking dismissal of the case pursuant to P.C. 1385, moving for a reduction of sentence pursuant to P.C. 1170(d), joining the applicant in filing a joint petition for writ of habeas corpus that stipulates to the need for an issuance of an order to show cause, advocating before parole boards for early release, supporting a petition for the restoration of rights, seeking expungement of the case, and/or supporting a request for clemency or pardon, where such remedies are in the interest of justice.

The CIU shall not delay the release of those persons whose entitlement to post-conviction relief has been established, for any reason; it is the duty of the CIU to immediately arrange for conditional release of those individuals pending the formalization of the conviction being vacated.

### **VICTIM OUTREACH & ADVOCACY**

The CIU shall comply with all statutes and rules governing victims' rights and may engage a victim representative at any stage in the investigation when doing so may be in the best service of the investigation and/or the victim. The CIU will be respectful of victims and institute a culture of keeping victims abreast of investigation outcomes, when the outcome affects or changes the nature of the conviction and/or sentence. Upon the District Attorney's decision to seek relief in a case, the CIU shall engage a victim representative to liaise with the victim or victims.

## **REENTRY ASSISTANCE & COMPENSATION ASSISTANCE**

Where the CIU determines that a conviction should be overturned and a case dismissed based on actual innocence, the CIU shall assist in securing necessary support and documentation, such as a finding of actual innocence, that facilitate successful reentry into the community and will support the enactment of systems of compensation for those wrongfully convicted.

### **FINDINGS OF FACTUAL INNOCENCE**

This office recognizes that monetary compensation is essential to a wrongfully convicted person's ability to rebuild their life. Under California law, wrongfully convicted persons who are innocent of the crimes for which they were convicted may file a claim for compensation with the California Victim Compensation and Government Claims Board (CVCGC Board), under California Penal Code section 4900.

Where the CIU determines that an applicant has demonstrated their innocence, the CIU shall proactively assist the applicant in seeking the statutory compensation to which they are entitled, including filing in the superior court, jointly with the applicant, if requested, a motion "for a finding of factual innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her." Cal. Pen. Code 1485.55 (b). The court's "finding of factual innocence," is binding on the CVCGC Board and this office's joint request for that finding will expedite and facilitate the compensation process. The CIU shall also assist the applicant by supporting their claim before the CVCGC Board, when filed, if requested.

Under current law, to obtain a "finding of factual innocence" in the superior court, a wrongfully convicted person must demonstrate that they are innocent by a preponderance of the evidence. The burden is on the wrongfully convicted person to prove their innocence. Because that standard is antithetical to the bedrock principle of our criminal justice system, which presumes a person is innocent until they are proven guilty beyond a reasonable doubt,<sup>7</sup> it shall be the policy of this office, absent extenuating circumstances and with supervisor approval, to move jointly for and/or concede in the superior court that "a finding of factual innocence" should be made, where the conviction has been overturned, the charges have been dismissed, and there no longer exists constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt.

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<sup>7</sup> "Absent conviction of a crime, one is presumed innocent." *Nelson v. Colorado*. (2017) 137 U.S. 1249, 1255 (explaining that once a criminal conviction is erased, the presumption of innocence is restored and holding that the state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions"), citing *Johnson v. Mississippi* (1988) 486 U. S. 578, 585 (1988) (holding that after a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge"); *Coffin v. United States* (1895) 156 U. S. 432, 453 ["axiomatic and elementary," the presumption of innocence "lies at the foundation of our criminal law."]

## **TRANSPARENCY**

The CIU will conduct business in the most transparent manner possible, with biannual updates to the website on the number of cases submitted, under review, rejected, and outcomes. The CIU shall have open discussions with a designated ethics officer about critical case-related decisions; the pursuit of justice and the interest in avoiding and remedying wrongful convictions shall be at the forefront of each decision.

The CIU's expansive scope of review and transparent practices are designed to remedy past individual wrongful convictions and enhance community confidence in the justice system, as well as provide a tool for improving office wide practices in a manner that reduces the likelihood of errors occurring again in the future.

## **“LEARNING ORGANIZATION”**

The outcomes of CIU investigations are intended to provide a critical opportunity to identify systemic gaps that go beyond just one individual's error and can reinforce the idea that the District Attorney's office is a “learning organization.” The CIU will have a clear avenue for recommending policy and procedural changes, as well as enhanced training, to address any deficiencies that are uncovered, including but not limited to:

- Consistent with its commitment to ensure that the forensic evidence underlying convictions is scientifically sound and accepted, the CIU shall develop appropriate systems, curricula, and CLE opportunities to help ensure that forensic evidence is used appropriately office-wide, prospectively, at every stage of criminal and post-conviction proceedings.
- Consistent with its commitment to the use of best practices in policing, the CIU shall develop appropriate systems, curricula, and CLE opportunities to help ensure that, officewise, deputies are regularly trained on what constitutes best practices in policing and rely on evidence obtained through policies and procedures reflecting the use of best practices in policing prospectively, at every stage of criminal and post-conviction proceedings.
- The CIU shall develop and maintain a database to track errors and other causes of wrongful convictions uncovered in the course of its case reviews. On a periodic basis, not less than once a year, the CIU shall review and synthesize the data collected to proactively recommend policy and procedural changes officewise. The CIU shall develop a well-defined method to develop, implement, and train the office on these changes. The CIU shall publish these findings and policy changes on the website not less than once a year.
- The database shall track official misconduct, including the names of law enforcement officers, prosecuting attorneys, agents of law enforcement including jailhouse informants and crime lab analysts, expert witnesses, and any other actor found to have committed misconduct or whose testimony has otherwise been proven to be unreliable. Not less than once a year the CIU shall use the data compiled in the database to compile a list of all other cases office wide, past and present, in which those actors participated in a case that resulted in a plea or

conviction. The CIU shall review each of those cases and notify the applicant and/or defense counsel that their case is being reviewed and the reason for the review.

*The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.*