



NEW YORK  
CITY BAR

July 8, 2014

Hon. Kenneth P. Thompson  
Kings County District Attorney  
350 Jay Street  
Brooklyn, New York 11201

Re: **The Conviction Review Unit and Conviction Integrity Review Procedures**

Dear District Attorney Thompson:

The New York City Bar Association (the “City Bar”) respectfully submits this letter, prepared by its Committee on Criminal Law (the “Committee”), concerning your Office’s recently expanded and reorganized Conviction Review Unit (the “Unit”). We commend you for the significant steps you have taken to address the scourge of wrongful convictions and the commitment you have shown to the conviction integrity review process. In this letter, we offer the Committee’s recommendations for “best practices” for the Unit.

The City Bar is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The Committee focuses on a range of issues concerning the practice of criminal law and the criminal justice system. The City Bar has a long-standing history of supporting measures that would further strengthen New York’s commitment to correcting wrongful convictions.<sup>1</sup> In October 2013, the Committee formed the Brooklyn Conviction Review Subcommittee (the “Subcommittee”) to focus on the issue of potential wrongful convictions involving serious crimes in Brooklyn from the 1980s and 1990s. To that end, the Subcommittee has promoted information sharing, including communication within the defense bar and with your Office.

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1. *See, e.g.*, Report in Support of Amending C.P.L. § 440 to Provide for Actual-Innocence Claims (March 2011); Letter from the City Bar President to the Governor of New York State regarding Governor’s Program Bill #29 (S5848) addressing statutory post-conviction remedies and DNA evidence (May 2008).

Members of the Subcommittee have consulted with current and former prosecutors, defense attorneys, and judges to further an understanding of what are considered the “best practices” in the conviction integrity review process. A number of themes arose consistently during those discussions, which we share below.

## **1. Standards for Review**

At the outset, we believe that it is important for the public to understand: (1) what criteria the Unit will apply in deciding whether to accept a case for review; (2) the process for that decision; and (3) how an attorney or a defendant should present a case for potential review. One fundamental question is what standard the Unit will use in deciding which cases to review. We recommend that convictions should be reviewed by the Unit when there is reason to believe a miscarriage of justice may have occurred. This broad standard would encompass a variety of scenarios, including but not limited to those in which the convicted person has a colorable claim of actual innocence, or where new evidence emerges that likely would have led to a more favorable verdict for the defendant at trial.

We recognize that the Unit will confront situations that present difficult ethical, legal, and procedural questions. For example, the legal landscape for “innocence” claims shifted dramatically earlier this year when the Second Department recognized in *People v. Hamilton*, 115 A.D.3d 12 (2d Dep’t 2014), that the New York Constitution and CPL § 440.10 provide relief where a defendant can show clear and convincing evidence that he or she is actually innocent. We recommend that the Unit adopt guidelines for handling post-conviction reviews that begin as “innocence” investigations but produce more nuanced fact patterns, such as where a defendant’s innocence is unclear but a due process violation is revealed, or where evidence of actual innocence emerges alongside evidence that the defendant may have committed another crime. To achieve just results in these challenging cases, the Office should determine in advance the respective roles of the Unit and other branches of the Office, such as the more common post-conviction litigation process handled by the Appeals Bureau.

## **2. Information Sharing and Disclosure**

The City Bar believes that there is an urgent need for transparency and communication in the conviction integrity review process. In cases where the Office and defense counsel are conducting simultaneous reviews, an open exchange of information and ideas is in the interest of justice and all parties. We urge the Office to encourage a cooperative approach to case investigation by the Unit, including coordination with defense counsel on matters such as witness interviews, identification procedures, third-party information requests, and other investigative methods.

Because most post-conviction investigations take place in the absence of formal procedures for the exchange of information (at least during the pre-litigation stages), it is essential to develop policies and procedures governing the flow of information in both directions, and the treatment of that information. We recommend that, in order to facilitate the sharing of information between the Unit and defense counsel, the Office should enter into formal agreements with defense counsel prohibiting disclosure of information to non-parties throughout the post-conviction review process. This procedure has been used effectively by the Dallas

County (Texas) District Attorney's Conviction Integrity Unit, and it should be similarly effective here. Confidentiality agreements help both sides rely on their counterparties' disclosure duties, understand and meet their own disclosure obligations, address potential disclosure disputes, ensure proper treatment of confidential or sensitive information, and otherwise control the dissemination of non-public information. With this protection in place, the default policy for disclosure should be an "open file" approach, subject to limitations necessary to accommodate legitimate law enforcement interests such as witness safety. A sample File Review Agreement used in Dallas is enclosed.

### **3. Effective and Independent Investigation**

An area of particular concern to the City Bar is how the Office will handle cases that present evidence of prosecutorial misconduct. In this context, we use the term "prosecutorial misconduct" narrowly, to refer to cases of fraud or intentional wrongdoing (*e.g.*, making false statements to a court, tampering with evidence, or suborning perjury), rather than cases of negligent or reckless conduct suggested by a broader use of the term (*e.g.*, unintentional *Brady* or *Rosario* violations).

Where threshold evidence of serious misconduct emerges, the Office's investigation of one of its own current or former assistants raises the possibility of an actual or apparent conflict of interest. We recommend that the Office develop procedures for handling such cases, including a procedure for referring cases posing a risk of a true conflict to an independent authority such as another district attorney's office, the New York State Attorney General or the New York City Department of Investigation.


### **4. Resource Allocation**

We commend your Office for announcing a commitment to expand significantly the legal staff of the Unit. Clearly, the success of the Unit's work will depend on a staff of dedicated and motivated attorneys who have the full support of their Office and its leadership. Given the fact-intensive nature of post-conviction review, we are hopeful that additional investigative resources will be devoted to the Conviction Review Unit's work. As with the Unit's legal staff, the investigators assigned to support the Unit's work should be individuals with a genuine commitment to the importance of the conviction integrity review process.

### Conclusion

The Criminal Law Committee and the City Bar are committed to promoting a constructive and fair conviction integrity review process. We hope this letter will be the beginning of a dialogue between your Office and the Criminal Law Committee on this important initiative and that, as members of the bar, we can continue to provide assistance by fostering discussion, sponsoring educational initiatives, and focusing attention on the essential legal and ethical issues. We are grateful for your time and look forward to speaking with you further. If you or a member of the Unit would be interested in speaking with me and/or members of the Subcommittee, please call me at (212) 840-6866.

Very Truly Yours,



Sharon L. McCarthy  
Chair, Criminal Law Committee

Encl.

**FILE REVIEW AGREEMENT**

\_\_\_\_\_ formally requests, and the Dallas County District Attorney's Office's Conviction Integrity Unit (CIU) formally agrees to, a review of the District Attorney's file in the following case(s):

**State of Texas vs.** \_\_\_\_\_

**Cause No(s):** \_\_\_\_\_

I, the undersigned requestor, am authorized to practice law in the State of Texas. I represent \_\_\_\_\_ as his/her attorney of record for the purpose of evaluating a claim of actual innocence and I acknowledge this file review is for that purpose.

By this request, I represent to the CIU that, to my knowledge, litigation is not pending in this case. I agree that any information gained during the review of the listed file(s) shall remain confidential and shall not be shared with third parties outside the scope of investigation and litigation, if any.

Additionally, I acknowledge that documents protected by law have been removed.

If copies of documents in the District Attorney's file are desired, specific authorization from an Assistant District Attorney assigned to the CIU shall be obtained prior to making any copies.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Requestor, Attorney of Record for File Review

\_\_\_\_\_  
Bar No.

\_\_\_\_\_  
Intern/Extern

\_\_\_\_\_  
Intern/Extern

File(s) Reviewed:    \_\_\_\_\_ Trial File  
                              \_\_\_\_\_ Writ File

                              \_\_\_\_\_ Appellate File  
                              \_\_\_\_\_ DNA File

File prepared by: \_\_\_\_\_

Date: \_\_\_\_\_