



Memorandum

Michael C. O'Malley
Prosecuting Attorney

To: Cuyahoga County Prosecutor's Office Staff	From: Prosecutor Michael C. O'Malley
Subject: Cuyahoga County Prosecutor's Office Conviction Integrity Unit Policy	Date: March 7, 2017*

PURPOSE: To detail the procedure and protocol for presenting a post-conviction claim of actual innocence to the Cuyahoga County Prosecutor's Office ("CCPO") for review. This procedure is completely independent of any previously filed or on-going post-conviction litigation or appellate filings. The Conviction Integrity Unit ("CIU") will thoroughly and carefully review all claims submitted.

SUMMARY: A decision by the CCPO to review and/or investigate an alleged actual innocence claim should not be construed, either by the applicant, and/or his/her representative, that the CCPO has made any determination as to the validity or merit of the innocence claim. When the CCPO consents to DNA testing concerning the applicant's innocence claim, the CCPO takes no position regarding the significance (or lack thereof) of any DNA results unless and until the CIU makes a final determination on the applicant's innocence claim.

Assistant Prosecuting Attorney ("APA") Jose A. Torres is designated as the CIU Coordinator. Any questions concerning the procedures described below should be directed to APA Torres or Co-Criminal Chief and Civil Rights Unit Chief Russell Tye:

Russell W. Tye
Civil Rights Unit Chief
Cuyahoga County Prosecutor's Office
The Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
(216) 443-7755
rtye@prosecutor.cuyahogacounty.us

Jose A. Torres
Conviction Integrity Coordinator
Cuyahoga County Prosecutor's Office
The Justice Center, Courts Tower
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
(216) 443-7779
jtorres@prosecutor.cuyahogacounty.us

CUYAHOGA COUNTY PROSECUTOR'S OFFICE CONVICTION INTEGRITY UNIT PROTOCOL

I. OVERVIEW

The CIU is established for the review of convicted offenders' legitimate extrajudicial post-conviction claims of actual innocence. The CIU is a division of the CCPO's Civil Rights Unit ("CRU"). The CIU is comprised of a Civil Rights Unit Chief, Conviction Integrity Coordinator, an Administrative Assistant, Conviction Integrity Board, and an Independent Review Panel ("IRP").

Under the direct supervision of the CRU Chief, the CIU Coordinator organizes the work of the Board and assists in leading all investigations of cases that present a meaningful claim of actual innocence or a compelling claim where the pursuit of truth and justice requires CIU's review.

The Conviction Integrity Board ("CIB") is comprised of at least seven members. The CIB members are a combination of APAs and at least one (1) outside volunteer attorney. The participating APA CIB members are experienced and diverse. The APA CIB members do not receive additional compensation, benefits, or anything of value due to their membership on the CIB.

The IRP is comprised of a minimum of four members who are completely independent of the CCPO. The IRP consists of two accomplished volunteer lawyers and a minimum of two volunteer community leaders. The IRP members may include well respected volunteers from the community including, but not limited to, accomplished lawyers, community leaders, civic leaders, residents, business leaders, clergy, and/or legal scholars/experts. The IRP members receive no salary, no compensation, no benefits, or anything of value from the CCPO for serving as IRP members.

All CCPO APAs must closely scrutinize and thoroughly examine their cases during the pretrial and trial stages. In doing so, APAs must interview all witnesses, examine the scientific evidence, and meet with the victim and all experts well in advance of trial. Being proactive at the early stages of a case will minimize litigating wrongful conviction claims in the future. The CIU will review all cases where the facts, current law, and/or a substantial change in the law or science compels such review.

The CCPO and the CIU is responsible for the performance of work that, for the most part, is highly confidential, private, and sensitive in nature. The CCPO and the CIU expressly prohibits the CIB and IRP members from the unauthorized release or disclosure of confidential information.

All CIB and IRP members must immediately disclose, to the CRU Chief and CIU Coordinator, any potential or actual conflict of interest. Following the disclosure and confirmation of a conflict of interest, the member will be immediately recused from participating in the review, investigative process, and determination of the merits concerning the case where such conflict of interest exist.

II. CIU REQUIREMENTS AND INTAKE PROCESS:

Notwithstanding other statutory remedies, a criminal defendant may only submit an application to the CIU based on a claim of actual innocence or an otherwise compelling claim, as defined below, both of which must be compliant with the requirements set forth herein.

The following types of case submissions will be accepted and reviewed:

A. Claims of actual innocence

1. All requests must be submitted in writing. In order for the Conviction Integrity Unit to carry out a preliminary review of a conviction, the following prerequisites must be met:
 - a. The conviction occurred in the Cuyahoga County Common Pleas Courts;
 - b. The applicant must currently be a living person and presenting his/her claim of actual innocence or otherwise compelling claim where the pursuit of truth and justice requires CIU's review;
 - c. There must be a claim of actual innocence or a compelling claim and not solely a claim based on a legal issue (previously raised and/or could have been raised at the trial or during the appellate process);
 - d. New and credible evidence of innocence must exist;
 - e. The claim must not be frivolous; and
 - f. The applicant must sign a written "limited" waiver of certain procedural safeguards and privileges (See Attached Waiver), agree to cooperate with the CIU, and agree to provide full disclosure regarding all requirements of the CIU.
2. The request shall include the applicant's name, case number, an explanation of the claim and evidence of innocence and, if applicable, a recommendation as to how the CIU can further investigate applicant's claim of innocence.
3. The CIU does not review strictly legal challenges such as those concerning procedural errors at trial or trial court rulings unless there is an obvious material error or ruling that necessitates such review in light of an accompanying credible claim of actual innocence or an accompanying compelling claim (a claim where the pursuit of truth and justice, based upon compelling evidence, requires CIU's review). The CIU's review of actual innocence claims and non-innocence compelling claims is done solely at CIU's discretion, and its decision is to accept or deny such claims is not subject to appeal or further court review).
4. While the scope of the CIU review is ordinarily limited to claims of actual innocence, the CIU reserves the right, in extraordinary circumstances, to conduct a review of

cases where there is a compelling claim that the level of offense for which the defendant stands convicted is overwhelmingly disproportionate to the criminal conduct that actually occurred. The CIU shall have the complete discretion as to whether, and in what instances, any such non-innocence claims of over-conviction shall be reviewed.

5. Priority will be given to those cases where the applicant is currently incarcerated solely for the crime for which he or she claims actual innocence.
6. An applicant may submit an application to the CIU on his/her own or the applicant's counsel may submit the written request. If the applicant is represented by counsel, all communication will be through the applicant's attorney.

B. Post-Conviction Motions

All post-conviction relief petitions (R.C. 2953.21), applications for DNA testing (R.C. 2953.71 to 2953.81), motions to withdraw guilty pleas filed under Crim. R. 32.1, and new trial motions (Crim. R. 33) will be handled by the Appeals Unit. The Appeals Unit Supervisor shall notify the CIU of any of the above motions claiming actual innocence or a compelling claim that meets the above prerequisites.

III. **CONVICTION INTEGRITY UNIT REVIEW PROCESS**

- A. At all times during the CIU's review process, the Cuyahoga County Prosecutor has complete discretion and authority to review an applicant's claim and accept or reject the claim based upon the prosecutor's review of all relevant evidence. The Cuyahoga County Prosecutor's decision on the merits of the claim is final and is not subject to further review or appellate review by any court.

B. Initial Review

After receiving a written request, the Conviction Integrity Coordinator will preliminarily review the application and supporting documentation. If the Conviction Integrity Coordinator determines that Section II-A-1 prerequisites are not met, the applicant and/or legal representative will be notified that no further action will be taken.

Investigation Process

- a. The investigation procedure is unique and includes, but is not limited to, the reviewing the following :
 - A complete review of the case file, appellate record, post-conviction motions and all relevant evidence;
 - Information from a cooperating defendant and/or cooperating witness, and/or confidential informant;

- Brady/Giglio material (Brady v. Maryland (1963) 373 U.S. 83 and its progeny and Giglio v. United States (1971), 405 U.S. 150);
- Any recantation evidence;
- Transcripts of proceedings;
- Attorney's file where consent is given in writing;
- An identification case checklist.

b. Records shall be kept by the CIU throughout the investigation.

If at any point during the review and investigation process, it is discovered that the case does not meet the criteria set forth herein, the claim shall be rejected and subject to further review only at the discretion of the CIU.

C. In-Depth Review and Re-Investigation

1. If Section II-A-1 prerequisites are met, the CRU Chief and/or the Conviction Integrity Coordinator will designate a CIU APA or another APA to review the innocence claim as soon as administratively possible. The designated APA will prepare, for the CIU, a memorandum outlining the merits of the claim and all pertinent information warranting further review or investigation.
 - a. The Civil Rights Unit Chief and the Conviction Integrity Unit Coordinator will supervise the review of the cases that warrant further consideration of the merits.
 - b. A thorough review will be given to all claims based upon, but not limited to, the following: DNA test results by a certified laboratory specified in R.C. 2901.07(C) for DNA testing that incriminates or tends to incriminate a person other than the applicant; other persons claiming responsibility for committing the crime(s); victim and/or witness recantations; misidentification of the applicant; untruthful statements made by an informant/confidential informant/cooperating witness/co-defendant statements; a credible alibi that existed at the time of the trial but was not introduced through no fault of the applicant; and any newly discovered evidence that bears on innocence.
 - c. Many post-conviction claims of actual innocence or compelling claims may include reviewing the entire case file, reviewing appellate files and briefs, or addressing any open issues with the APA who handled the case at trial, on appeal or in any post-conviction motion. Other claims may require a more thorough examination including, but not limited to, further case investigation, interviews, a review of defense counsel files, and a review of

any existing or new evidence. Each case will be carefully and independently weighed and reviewed on its own merits.

- d. Claims made by an applicant who has plead guilty to a crime(s) are subject to a higher scrutiny of review by the CIU. Only in rare and extraordinary circumstances will the CIU initiate an in-depth review of an innocence claim or a compelling claim by an applicant who has plead guilty. The policy reason behind this provision is that there is a presumption that the applicant has knowingly, intelligently and voluntarily, with the assistance of counsel, plead guilty of a crimes(s). The CCPO will consider only credible compelling evidence that overcomes this presumption, including, but not limited to, where the court record shows otherwise.
2. The CIB may, when requested, review the memorandum and/or “any” additional credible evidence brought forth to determine, by a majority vote, one of the following:
 - a. A valid claim of actual innocence or a valid compelling claim is present.
 - b. A valid claim is not present.
 - c. More information and/or investigation is needed before voting takes place.
 3. Standard of review: Clear and convincing evidence of actual innocence or of a compelling claim as defined herein.
 4. Based upon a thorough and completed investigation, the CIU Chief and/or the CIB will make a final recommendation to the Cuyahoga County Prosecutor.
 5. If a majority of the CIB members determine that there is no valid claim of actual innocence, no merit to the compelling claim, or that the conviction should otherwise stand, the CIB’s findings as well as the entire case file and investigative material will be forwarded to the IRP. The IRP will conduct an independent review of the CIB’s findings and, if the IRP deems it necessary, will remand the matter back to the CIB for further review or re-investigation. Following this procedure, the IRP will make a final recommendation to the Cuyahoga County Prosecutor.
 6. If a majority of the members of the CIB determine that a valid claim of innocence or a compelling claim is present, the memorandum, the vote, and the recommendation to grant the applicant’s claim shall be presented to the Cuyahoga County Prosecutor.
 7. Dissenting CIB members may include a personal or joint letter to the County Prosecutor outlining their positions.
 8. If the County Prosecutor agrees with the CIB’s recommendation to grant the applicant’s claim, the appropriate motion will be filed with the Court by the CIU Coordinator and the Court, at its discretion, will hold a hearing on the motion.

9. In the event that the CIB's recommendation of granting applicant's claim is rejected by the County Prosecutor, the claim will then be reviewed by the IRP. If the IRP agrees that the claim should be rejected, the claim is forever rejected and not subject to further review or the appellate process. Should the IRP agree, however, that the applicant's claim should be granted, their recommendation will be forwarded to the County Prosecutor.
10. In the event that the County prosecutor rejects the IRP's recommendation to grant applicant's claim, the IRP has the discretion to ask the County Prosecutor to re-evaluate the evidence and reconsider granting applicant's claim. The IRP's request for reconsideration must be in writing and must outline the specific reasons warranting the County Prosecutor's reconsideration.
11. The County Prosecutor will make the final decision after re-evaluating the evidence and reconsidering applicant's claim.
12. Should the County Prosecutor, after reconsideration, agree with both the IRP and CIB's recommendations to grant applicant's claim, the appropriate motion will be filed with the Court and the Court, at its discretion, will hold a hearing on the motion. If the County Prosecutor, after reconsideration, decides to reject applicant's claim, the decision is final and not subject to further review or the appellate process.
13. The CIU Coordinator will make every reasonable effort to notify the victim(s), his or her family member(s), or their representative, if applicable, prior to a final determination of granting an applicant's innocence claim or compelling claim.
14. The final decision will be communicated, in writing, to the applicant or to his or her legal representative if represented by counsel. Due to the complexities, extensive nature, review, and investigative process involved in these types of claims, it is extremely difficult to ascertain the approximate time that the process will take. Each claim will be carefully and thoroughly reviewed and, when necessary, re-investigated. Each case will be assessed based on their unique case-by-case facts and evidence of the claim.
15. While the rare case (e.g. true DNA exoneration) may be resolved without substantial judicial oversight, others may present complex legal and factual issues that can only be resolved through litigation. In these situations, the appropriate motion with a request for oral hearing shall be filed by the CIU Coordinator with the Court with a request for the appointment of counsel (if the applicant does not have a legal representative) to resolve all of applicant's claims.
16. Each case shall be maintained according to the following procedure:
 - a. Cases shall be entered into Justice Matters ("JM") as a matter if not already entered and all case notes, etc., shall be updated as done in all cases;

- b. The CIU shall create and maintain a tracking system that will record the name of the applicant and the ultimate outcome of the claim;
- c. Completed files will be maintained pursuant to the Cuyahoga County Prosecutor's Office Record Retention Policy.

Extrajudicial Requests for Post-Conviction DNA Testing.

- a. All extrajudicial requests for post-conviction DNA testing filed with the Court pursuant to Chapter 2953 on behalf of the applicant shall be handled by the Appeals Unit. The CIU will assist the Appeals Unit should the test results warrant a further review of applicant's claim of actual innocence. In the event that the Appeals Unit APA, discover in his or her review, that the requirements herein are satisfied, the APA will immediately contact the CIU Chief and/or the CIU Coordinator to assist in the case.

*Last Amendment 2/26/18