

# LEGALLY GUILTY, FACTUALLY INNOCENT: AN ANALYSIS OF POST-CONVICTION REVIEW UNITS

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## ABSTRACT

In 1990, two men were incarcerated for the slaying of a nightclub bouncer, despite a notable lack of evidence and a massive amount of exonerating evidence discovered post-trial. On retrial, a prosecutor who believed in the pair’s innocence was forced to sabotage the case, as post-conviction review did not exist in a substantial capacity at that time. Indeed, this is not a minute problem; one study of a fifteen-year period between 1989 and 2003 concluded that up to 29,000 people may have been convicted of crimes that they did not commit. While still not widely prevalent in legal systems, this Note examines the field of post-conviction review and, in particular, three different post-conviction review models—the Conviction Integrity Unit of the Dallas County District Attorney’s Office, the North Carolina Innocence Inquiry Commission, and the Criminal Cases Review Commission of Britain. In addition to examining the strengths and weaknesses of these models, this Note also advocates “best practice” recommendations for post-conviction review units.

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## I. INTRODUCTION

The investigation and criminal trial regarding who shot and killed a bouncer outside of New York City’s Palladium Nightclub in 1990 began and ended as a simple one. Four eyewitnesses identified both David Lemus and Omeldo Hidalgo as the men who had gotten into a physical fight with bouncers outside of the popular Manhattan club.<sup>1</sup> They were positive of their identification because the area was well lit and their vision was unobstructed.<sup>2</sup> Further, Lemus had bragged about the event to his girlfriend and asked if he could hide a gun at her house.<sup>3</sup> Finally, both Lemus and Hidalgo had prior arrests—Hidalgo’s, notably, was for gun

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<sup>1</sup> Stone Phillips & Dan Slepian, *Murder at the Palladium*, NBC NEWS, (Sept. 8, 2008), [http://www.nbcnews.com/id/6913736/ns/dateline\\_nbc-crime\\_reports/t/murder-palladium/](http://www.nbcnews.com/id/6913736/ns/dateline_nbc-crime_reports/t/murder-palladium/).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

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possession.<sup>4</sup> The jury in the joint trial quickly found the pair guilty of second-degree murder and both were sentenced to twenty-five years to life in prison.<sup>5</sup>

After the trial ended, however, massive amounts of discrepancies began to accumulate over the next decade. An informant mentioned that two of his fellow gang members had admitted to the crime and provided him with salient details.<sup>6</sup> Another anonymous tipster called the NYPD hotline and also identified the same two gang members as the shooters.<sup>7</sup> Moreover, one of the gang members owned a blue Oldsmobile with a license plate containing the numbers “8” and “1,” which matched the description of the getaway vehicle.<sup>8</sup> Later, the two gang members all but confessed to investigators that they were the shooters and agreed to testify if given immunity.<sup>9</sup> Most damning of all, investigators have never been able to show that Lemus and Hidalgo had ever even met each other prior to their joint trial.<sup>10</sup>

The New York Supreme Court granted a motion for a retrial.<sup>11</sup> Despite all of the contradicting evidence, including the District Attorney’s own Cold Case Unit’s conclusion that “substantial new evidence indicates that Lemus and Hidalgo were NOT involved in the homicide,”<sup>12</sup> District Attorney Morgenthau pressed forward. Morgenthau assigned prosecutor Daniel Bibb to the case, despite Bibb’s protestations that Lemus and Hidalgo were innocent.<sup>13</sup>

Assistant District Attorney Bibb had no option other than to proceed with the prosecution.<sup>14</sup> At the time, the New York County District Attorney’s Office had no conviction review unit, and there was no outside

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*; see also Damien Cave, *Lawyers Want New Hearing for 3 Convicted in 1990 Murder*, N.Y. TIMES, (July 20, 2004), <http://www.nytimes.com/2004/07/20/nyregion/lawyers-want-new-hearing-for-2-convicted-in-1990-murder.html>.

<sup>8</sup> Phillips & Slepian, *supra* note 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> M. Alex Johnson, *In the Shadow of Justice: The Palladium Murder*, NBC NEWS (Aug. 2, 2007), [http://www.nbcnews.com/id/19981970/ns/us\\_news-crime\\_and\\_courts/t/shadow-justice-palladium-murder/](http://www.nbcnews.com/id/19981970/ns/us_news-crime_and_courts/t/shadow-justice-palladium-murder/).

<sup>12</sup> *Id.* (emphasis in original).

<sup>13</sup> *Id.*

<sup>14</sup> Benjamin Weiser, *Doubting Case, a Prosecutor Helped the Defense*, NBC NEWS (June 23, 2008), <http://www.nytimes.com/2008/06/23/nyregion/23da.html>.

agency that took any interest in the lives of two seemingly innocent men who had been imprisoned for over a decade. Thus, Bibb did the only thing he felt he could ethically do—he intentionally threw the case.<sup>15</sup> He cooperated extensively with Lemus and Hidalgo’s defense attorneys.<sup>16</sup> This included making numerous phone calls discussing the evidence with the other side, hunting down witnesses in the witness protection program and urging them to testify, telling the defense what questions to expect for his cross examination, confronting the defense during breaks and telling them what to ask, and resigning from the case before final arguments were heard.<sup>17</sup> As Bibb stated, “I did the best I could . . . to lose.”<sup>18</sup>

The murder of the bouncer at the Palladium illustrates one of the most troubling and complex problems that plagues the prosecutorial system: the challenge of post-conviction review. Here, a seemingly simple case grew increasingly complex as new evidence almost conclusively pointed to the innocence of two incarcerated men. However, no system existed at the time that could review these convictions and determine whether they were at fault. This Note will examine the structure of three different agencies charged with post-conviction review duties: Dallas County’s Conviction Integrity Unit, the North Carolina Innocence Inquiry Commission, and Britain’s Criminal Cases Review Commission. It will further discuss the different problems inherent in these agencies and which style of post-conviction review has the highest level of efficacy, and will provide “best practice” suggestions.

## II. BACKGROUND

### A. OVERVIEW OF THE INNOCENT CONVICTION PROBLEM

As is inherent in virtually any criminal justice system, the problem of innocent convictions remains monumental in the United States.<sup>19</sup> According to one study of a fifteen-year period between 1989 and 2003, 29,000 people may have been wrongfully convicted.<sup>20</sup> Additional studies

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Tim Bakken, *Exonerating the Innocent: Pretrial Innocence Procedure*, 56 N.Y.L. SCH. L. REV. 837, 841 (2011/2012).

<sup>20</sup> Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 CRIM. L. & CRIMINOLOGY 523, 532 (2004–2005).

place the number of currently incarcerated innocent people somewhere between 2.3 and 5 percent of the current overall prison population, which indicates that between 46,000 and 100,000 people are currently imprisoned for crimes that they did not commit.<sup>21</sup>

Furthermore, murder, rape, and sexual assault comprised approximately 96 percent of known wrongful convictions in that fifteen-year period, with 22 percent stemming from death sentence cases.<sup>22</sup> Aside from the obvious answer of innocence, another answer for the skewing of exonerations toward serious crimes is that innocent defendants were less likely to plead guilty to a serious crime to avoid social condemnation and the long prison terms that accompany an admittance to a heinous act.<sup>23</sup> Conversely, innocent people accused of less serious charges, such as robbery, were more likely to plead out, with innocent defendants rationalizing the plea bargain by considering the lower prison terms, possibility of probation, and resources conserved by foregoing trial.<sup>24</sup> We are left, then, with the following chilling proposition: if all people who were sentenced to prison had been exonerated at the same rate as those who were sentenced to death, there would have been nearly 87,000 exonerations in the United States from 1989 through 2003, instead of a mere 266.<sup>25</sup>

#### B. ISSUES OF FINALITY AND HABEAS CORPUS

Made evident by the adversarial model of trying cases, the American justice system has long enjoyed a preoccupation with finality in trial proceedings.<sup>26</sup> As Professor David Wolitz of the University of Tennessee notes, the adversarial model can be likened to a sporting event in which the prosecution and defendant are the two players, the judge is the umpire, and the jury is the scorekeeper.<sup>27</sup>

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<sup>21</sup> *How Many Innocent People Are There in Prison?*, INNOCENCE PROJECT, <http://www.innocenceproject.org/about-innocence-project/faqs/how-many-innocent-people-are-there-in-prison> (last visited Feb. 22, 2016).

<sup>22</sup> Gross et al., *supra* note 20, at 528–29.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 958–59 (2008).

<sup>26</sup> David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. 1027, 1033 (2010).

<sup>27</sup> *Id.* at 1037.

The trial takes on the atmosphere of a zero-sum game, in which there is a definitive winner and loser between the two “players.”<sup>28</sup> The outcome of the trial is based solely on the skill of the “players” and the only legitimate challenge to the outcome is that someone did not follow the rules—perhaps the prosecutor committed misconduct or the defendant’s attorney hid evidence.<sup>29</sup> In this game, no one is allowed to declare an improper victory if the rules were followed; the correct player won.<sup>30</sup> As Professor Wolitz acknowledges, this is deep-seated in the history of the American judicial system: criminal appeals were essentially non-existent at the federal level prior to the 1880s, and even today, despite most jurisdictions recognizing insufficient evidence as grounds for reversal, the standard of review is set so high that the possibility of reversal is a non-issue.<sup>31</sup>

Several other, perhaps more practical, issues with the “game” relate to a need for finality. First, there exists a finite number of resources that the criminal justice system can dedicate to each case.<sup>32</sup> As is, federal prosecutors have the resources to prosecute merely two percent of all drug-related crimes—tackling on all of the retrials and appeals involved with these crimes would force investigation of other cases to a standstill.<sup>33</sup> Furthermore, victims need closure from a clear-cut resolution to move on with their lives, and judges need to clear their dockets to move forward with new cases.<sup>34</sup> Defendants, too, pursue the sense of finality after a not guilty verdict, or else live in a constant state of insecurity that the government will retry them in violation of double jeopardy.<sup>35</sup> As such, very valid reasons exist for the judicial system to do away with a case once it has been adjudicated. This culture of finality, however, makes it very difficult for those wrongfully convicted to seek post-conviction relief.<sup>36</sup>

The basic option for post-conviction relief still turns on the concept

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<sup>28</sup> *Id.* at 1036.

<sup>29</sup> *Id.* at 1037.

<sup>30</sup> *Id.* at 1036.

<sup>31</sup> *Id.* at 1036–37.

<sup>32</sup> *Id.* at 1055.

<sup>33</sup> Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 764, 777 (2005).

<sup>34</sup> Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 552 (2014).

<sup>35</sup> *Crist v. Bretz*, 437 U.S. 28, 35 (1978) (citing *Green v. United States*, 355 U.S. 184, 187–88 (1957)).

<sup>36</sup> See Wolitz, *supra* note 26, at 1055.

of finality by relying on habeas petitions.<sup>37</sup> Most of these claims focus on either *Brady*<sup>38</sup> or *Strickland*<sup>39</sup> violations.<sup>40</sup> In the case of *Brady* habeas petitions, the defendant argues that the prosecution failed to turn over exculpatory evidence, while in *Strickland* habeas petitions, the defendant argues that defense counsel acted “below professional standards” and “that counsel’s errors had a reasonable probability of affecting” the jury’s verdict.<sup>41</sup> These habeas petitions are accompanied by a slew of problems: district attorney’s offices often assign the same, sometimes corrupt or incompetent, investigators to the case;<sup>42</sup> inmates are heavily restricted from conducting their own investigation;<sup>43</sup> prosecutors are extremely protective of their witnesses;<sup>44</sup> prosecutors may cover up their actions for fear of civil action;<sup>45</sup> and case law generally allows the prosecution to destroy old evidence after trial.<sup>46</sup> Both forms of these habeas petitions urge that the “game,” as described by Professor Wolitz, was played unfairly—either the prosecutor “cheated” by not relinquishing exculpatory evidence, or the defense attorney “cheated” by not playing to their full potential. Most notably, neither option gives the defendant the opportunity to challenge the jury’s final calculation of the game’s score and assert that he or she is, in fact, completely innocent. This is where post-conviction review programs show their promise.

### C. POST-CONVICTION REVIEW PROGRAMS, GENERALLY

Post-conviction review is a relatively new phenomenon in the United States. The first major scholarly work on the subject was published in 1932, but follow-up scholarship was virtually non-existent.<sup>47</sup> Through the 1970s and 1980s, any attempt at scholarship receded even further, as America became focused on a large increase in crime and “tough on

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<sup>37</sup> Levenson, *supra* note 34, at 555.

<sup>38</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>39</sup> *Strickland v. Washington*, 466 U.S. 668, 761 (1984).

<sup>40</sup> Levenson, *supra* note 34, at 555.

<sup>41</sup> *Id.* at 556.

<sup>42</sup> *Id.* at 561.

<sup>43</sup> *Id.* at 562.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 563.

<sup>46</sup> *Id.* at 565.

<sup>47</sup> JOHN B. GOULD, INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 13–14 (2009).

crime” stances.<sup>48</sup> In the 1990s, however, a decline in crime rates, the explosive introduction of DNA evidence, and the Supreme Court’s decision in *Herrera v. Collins*<sup>49</sup> changed the scene of post-conviction review.<sup>50</sup>

To start, crime rates steadily plummeted during the 1990s.<sup>51</sup> According to a Federal Bureau of Investigation study, serious crime had decreased by 3 percent in 1997, which continued a six-year trend during which violent crime decreased by 19 percent and overall crime decreased by 17 percent.<sup>52</sup> This, coupled with a large increase in literature and academic work on the subject of wrongful convictions began to draw national attention to the issue.<sup>53</sup> The introduction of DNA as evidence in the late 1990s was perhaps the biggest contribution to America’s newfound interest in post-conviction review, as American society began to see that convictions of clearly innocent people could be scientifically proven.<sup>54</sup> The final stroke was the Supreme Court’s decision in *Herrera v. Collins*, which found that, absent constitutional error, federal habeas petitions were an ineffective way to pursue actual innocence claims, thus hinting at the need for something else.<sup>55</sup>

As such, both prosecutors and independent agencies have begun to set up units to review convictions. The next part of this Note will provide a brief history and synopsis of several examples of each, will discuss the relative merits and criticisms of each style of organization, and will ultimately suggest which style of organization should be adopted as the ideal post-conviction review program across the country.

### III. ANALYSIS

As the Conviction Integrity Unit of Dallas County has generally been lauded as the most ideal model for district attorney-led units,<sup>56</sup> it will serve

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<sup>48</sup> Wolitz, *supra* note 26, at 1045.

<sup>49</sup> *Herrera v. Collins*, 506 U.S. 390 (1993).

<sup>50</sup> Wolitz, *supra* note 26, at 1045–46.

<sup>51</sup> Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 10 (1999).

<sup>52</sup> *Id.*

<sup>53</sup> GOULD, *supra* note 47, at 14–15.

<sup>54</sup> See Wolitz, *supra* note 26, at 1045–46.

<sup>55</sup> See generally *Herrera*, 506 U.S. 390 (holding that, absent constitutional error during the criminal proceedings, claims of innocence based on new evidence are not valid grounds for federal habeas relief).

<sup>56</sup> See Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why*



as the district attorney's office unit examined in this note for the sake of comparison.

#### A. DISTRICT ATTORNEY'S OFFICE: CONVICTION INTEGRITY UNITS

##### 1. History

A catalyzing event or series of events generally kicks off the process that forms a post-conviction review unit inside of the office of a district attorney.<sup>57</sup> Typical events include a series of embarrassing exonerations or a public revelation of corruption in the office. Following this, a new attorney generally runs for the position of district attorney based on a campaign of integrity and review. As one of their first actions in office, the newly elected district attorney then handpicks a team of lawyers and investigators to staff a post-conviction review unit.<sup>58</sup>

For instance, the formation of Dallas County's Conviction Integrity Unit began when a series of embarrassing exonerations rocked the county.<sup>59</sup> A new attorney, Craig Watkins, then ran for the post of Dallas County District Attorney and won in January 2007, beating out the former district attorney's handpicked successor.<sup>60</sup> At the time of Watkins's election, the Dallas County office stood at nine post-conviction DNA exonerations,<sup>61</sup> and within a few weeks of Watkins taking office, the number was brought to twelve.<sup>62</sup> District Attorney Watkins then handpicked a team of highly respected and credible trial lawyers, from

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*They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2250–51 (2010) (discussing the Unit's best practices—if an entity presents a plausible claim of evidence, then the prosecution's entire case file is made available; the Unit uses its own investigators to follow certain leads; the Unit allows other lawyers to investigate leads; and the Unit has a close relationship with the public defender's office and routinely shares information and conducts joint investigations).

<sup>57</sup> See generally Dana C. Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 628–42 (2014) (the Santa Clara County District Attorney's Office in California established their Conviction Integrity Unit after a series of misconduct allegations; Cook County, Illinois implemented a Conviction Integrity Unit only after a long-term problem with wrongful convictions; the Harris County District Attorney's Office in Texas established their program only after it was publically made known that they led the nation in sending defendants to the gas chamber).

<sup>58</sup> *Id.* at 628, 639.

<sup>59</sup> *Id.* at 628.

<sup>60</sup> Terri Moore, *Prosecutors Reinvestigate Questionable Evidence*, 26 CRIM. JUST. 3, 4, 7 (2011).

<sup>61</sup> Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1035 (2011/2012).

<sup>62</sup> *Id.*

both private and public practice.<sup>63</sup> Watkins established the unit, despite widespread criticism from individuals both inside and outside the office who were worried about their own reputations being tarnished for their past work on cases.<sup>64</sup> A 2011 statistic stated that the unit had since freed twenty-six wrongfully convicted people.<sup>65</sup>

## 2. Organization

The Conviction Integrity Unit of Dallas County was formed with two of the office's 267 prosecutors, an investigator, and a paralegal.<sup>66</sup> The unit cost roughly \$450,000 to create.<sup>67</sup> Structurally, District Attorney Watkins ensured that the unit would be integrated with already-existing units, such as the appellate and writ divisions, in case of overlapping cases.<sup>68</sup> To ensure that the unit would not be marginalized or pushed aside, the head of the Conviction Integrity Unit is ranked as the third highest position in the office in terms of authority and reports directly to the district attorney.<sup>69</sup> Watkins granted the unit this high level of authority in the hope that exoneration-based policies would be implemented in all office discussions.<sup>70</sup>

The unit proceeds along two main lines of review. First, the office oversees the review of more than 400 DNA-related cases alongside the Innocence Project of Texas.<sup>71</sup> Second, the unit investigates and litigates all other DNA and non-DNA related claims of innocence, regardless of how old the case is.<sup>72</sup> The unit also makes available the prosecution's entire case file, including attorney work product, to any entity, such as the Innocence Project, if a plausible claim of innocence is set forth.<sup>73</sup> The unit

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<sup>63</sup> Moore, *supra* note 60, at 8–9.

<sup>64</sup> *Id.* at 9–10.

<sup>65</sup> *Id.* at 8.

<sup>66</sup> Molly Hennessy-Fiske, *Dallas County District Attorney a Hero to the Wrongfully Convicted*, L.A. TIMES (May 8, 2012), <http://articles.latimes.com/2012/may/08/nation/la-na-dallas-district-attorney-20120509>.

<sup>67</sup> *Id.*

<sup>68</sup> Boehm, *supra* note 57, at 630.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 631.

<sup>71</sup> Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 62 (2009) [hereinafter Medwed, *The Prosecutor as Minister of Justice*].

<sup>72</sup> *Id.*

<sup>73</sup> Scheck, *supra* note 56, at 2250–51.

maintains a working relationship with the Dallas County Public Defender's Office, in which joint investigations take place,<sup>74</sup> and actively searches for other cases of merit.<sup>75</sup> Finally, if the outcome of the test could prove to be dispositive to a case, the unit will support a policy of additional DNA testing on adjudicated cases.<sup>76</sup>

### 3. Assessing the Efficacy

The chief strength of prosecutorial post-conviction units lies in the office's close connection to the case and the law enforcement world. As the original office that prosecuted the case, attorneys in the Conviction Integrity Unit enjoy easy access to files from the original case. Additionally, Conviction Integrity Unit attorneys have a much easier time accessing files from prosecutors outside their jurisdiction, in case an innocence claim, for example, involves a similar case in a neighboring county.<sup>77</sup> Prosecutors also enjoy a close working relationship with experienced police officers; these seasoned investigators possess the skills and information networks necessary to investigate claims.<sup>78</sup> Additionally, prosecutors working full-time in the Conviction Integrity Unit grow skilled in the area of post-conviction review and become veterans in applicable case law and procedure.<sup>79</sup> Finally, maintaining and supporting the in-house Conviction Integrity Unit helps create an exoneration-friendly atmosphere around the district attorney's office and encourages a better working relationship between prosecutors, public defenders, and Innocence Project workers.<sup>80</sup>

However, the prosecuting office's proximity to the case also highlights the many drawbacks to this approach. To begin with, the culture inherent in a prosecutor's office is directly at odds with that of post-conviction review, as prosecutors have many professional incentives that discourage post-conviction review.<sup>81</sup> For example, a superior may judge an individual prosecutor's competency based on conviction rates and

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<sup>74</sup> *Id.* at 2251.

<sup>75</sup> Medwed, *The Prosecutor as Minister of Justice*, *supra* note 71, at 40.

<sup>76</sup> Boehm, *supra* note 57, at 629.

<sup>77</sup> Medwed, *The Prosecutor as Minister of Justice*, *supra* note 71, at 59.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 59–60.

<sup>81</sup> Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134 (2004) [hereinafter Medwed, *The Zeal Deal*].

maintaining those conviction rates.<sup>82</sup> Studies show that prosecutors with the highest conviction rates tend to be promoted more often than those that do not.<sup>83</sup> Prosecutors thus have little professional incentive to undo their own convictions, which would make them seem inept, or to undo the convictions of their own colleagues, which would undermine the credibility of the entire office, and thus still reflect poorly on that prosecutor in the long run.<sup>84</sup>

Further, prosecutors can find themselves swept up in a team-spirit mentality, pitting the district attorney's office against the defendant, regardless of potential innocence. Studies on prosecutorial offices have revealed that prosecutors tend to adopt a belief that their trials are staged on a good versus evil landscape, where prosecutors attempt to fulfill a mission of protecting the public and fighting crime.<sup>85</sup> It should be no surprise, then, that this conviction psychology grows overtime, with one study reporting that deputy district attorneys who were more focused on convictions had twice as much experience as deputy district attorneys who were more concerned with a sense of overall justice.<sup>86</sup> As such, it is reasonable to see why a prosecutor could be hesitant in overturning the conviction of someone that had previously become demonized in the prosecutor's own eyes.

A placement in the Conviction Integrity Unit may also result in the prosecutor being ostracized by the rest of the office and by law enforcement officers. Those working in the Conviction Integrity Unit may operate under a stigma, as their entire job focuses on questioning the trial decisions of their colleagues, people whom they had grown to know well.<sup>87</sup> To analogize, attorneys in these units would be treated similarly to police officers who work in the Internal Affairs Bureau, a place where officers are viewed as "rats" concerned with ruining the careers of their old friends.<sup>88</sup> Further, a prosecutor's job relies heavily upon the responsiveness and thoroughness of police investigators. Questioning the ethics and professional competence of police investigators while conducting a post-conviction review can potentially damage the working relationship between a prosecutorial office and a police department.

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 134–35.

<sup>84</sup> *Id.* at 136.

<sup>85</sup> *Id.* at 139.

<sup>86</sup> George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 111 (1975).

<sup>87</sup> Medwed, *The Prosecutor as Minister of Justice*, *supra* note 71, at 60.

<sup>88</sup> *Id.*

Indeed, prosecutors with a reputation for being tough on police can face delays in obtaining information about investigations or face a freeze-out from investigations altogether.<sup>89</sup>

Finally, district attorney's offices exist in a world of finite resources; the creation of a post-conviction review unit can be a significant financial burden for a district attorney's office adhering to a strict budget. Dallas County's Conviction Integrity Unit, for instance, cost roughly half of a million dollars to form.<sup>90</sup> Additionally, many district attorneys run on a campaign of being "tough on crime," which is undermined in the eyes of the public when that office then spends large amounts of money on freeing people that they had previously convicted.<sup>91</sup> Sustaining a post-conviction review unit is made even more difficult in smaller counties with fewer funds, where the average district attorney's office is stationed by only three attorneys.<sup>92</sup> This results in a "needle in a haystack" problem, where a finite number of deputy district attorneys are swamped with a seemingly infinite supply of innocence claims—some of which have merit, but most of which are frivolous.<sup>93</sup> This eats up vast quantities of both time and resources for the office. As such, there are many drawbacks to this style of post-conviction review.

## B. NORTH CAROLINA INNOCENCE INQUIRY COMMISSION

### 1. History

Similar to the events that prompt the formation of a Conviction Integrity Unit in a prosecutor's office, the North Carolina Innocence Inquiry Commission was formed after a series of high-profile exonerations swept the state of North Carolina following the emergence of DNA technology.<sup>94</sup> These cases include several exonerees convicted of murder, rape, and sexual assault.<sup>95</sup> Immediately following these revelations, the Chief Justice of the North Carolina Supreme Court, invited representatives from law enforcement, criminal defense agencies, and legal academia to

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<sup>89</sup> Medwed, *The Zeal Deal*, *supra* note 81, at 146.

<sup>90</sup> Hennessy-Fiske, *supra* note 66.

<sup>91</sup> Medwed, *The Zeal Deal*, *supra* note 81, at 154–55.

<sup>92</sup> *Id.* at 143.

<sup>93</sup> *Id.* at 148.

<sup>94</sup> Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1347–48 (2007).

<sup>95</sup> *Id.* at 1348–49.

discuss post-conviction review.<sup>96</sup> The end result was the North Carolina Actual Innocence Commission (“NCAIC”).<sup>97</sup> While not an actual review agency, the NCAIC sponsored studies, discussions, and best-practice recommendations on eyewitness identification procedures, DNA testing, false confessions, and other investigative procedures.<sup>98</sup>

One of the chief recommendations of the NCAIC was the creation of a review agency for innocence claims.<sup>99</sup> Based on this recommendation, the North Carolina legislature established the North Carolina Innocence Inquiry Commission (“NCIIC”) in 2006.<sup>100</sup> In contrast to the NCAIC, the NCIIC is tasked with actively reviewing claims of innocence, as opposed to merely making best-practices recommendations for agencies.<sup>101</sup> To date, however, only nine cases have made it through formal inquiry to be placed before the NCIIC’s final commission for review.<sup>102</sup> Of these nine cases, only seven have received judicial review, and of those, six have resulted in findings of innocence.<sup>103</sup>

## 2. Organization

The North Carolina Innocence Inquiry Commission is staffed by eight members appointed by the Chief Justice of the North Carolina Supreme Court and the Chief Judge of the North Carolina Court of Appeals, in addition to an executive director and daily staff of five employees.<sup>104</sup> The NCIIC runs at a budget of \$375,000 a year and has also been the recipient of a federal grant of \$570,000 to improve DNA testing.<sup>105</sup>

The NCIIC addresses claims only from, or on behalf of, living people convicted of felonies in a North Carolina state court.<sup>106</sup> Additionally,

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<sup>96</sup> Wolitz, *supra* note 26, at 1047–48.

<sup>97</sup> *Id.* at 1047.

<sup>98</sup> *Id.* at 1048.

<sup>99</sup> *Id.* at 1049.

<sup>100</sup> Mary K. Tate, *Commissioning Innocence and Restoring Confidence: The North Carolina Innocence Inquiry Commission and the Missing Deliberative Citizen*, 64 ME. L. REV. 531, 542 (2012).

<sup>101</sup> Wolitz, *supra* note 26, at 1049.

<sup>102</sup> *Cases*, N.C. INNOCENCE INQUIRY COMMISSION, <http://www.innocencecommission-nc.gov/cases.html> (last visited Feb. 22, 2016).

<sup>103</sup> *Id.*

<sup>104</sup> Wolitz, *supra* note 26, at 1049–50.

<sup>105</sup> *Id.* at 1050.

<sup>106</sup> *Id.* at 1049.

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claimants must assert that they are entirely factually innocent of the crime for which they were convicted.<sup>107</sup> Although the Commission does allow review of claims from defendants who had originally plead guilty, with some procedural restrictions.<sup>108</sup>

Before initiating an investigation, the NCIIC requires that a defendant promise to fully cooperate with the NCIIC and agree to waive his or her procedural safeguards and privileges.<sup>109</sup> For example, the defendant might have to acknowledge that any evidence of guilt of another crime unearthed by the NCIIC would be forwarded to the prosecution team.<sup>110</sup> In return, the NCIIC embarks on a five phase investigation, which is comprised of (1) receipt of an innocence claim, (2) review and investigation of the claim, (3) inquiry of the claim, (4) a hearing before the Commission, and (5) judicial review by a three judge panel.<sup>111</sup> In the first three steps, the NCIIC processes, reviews, and investigates the claim. If it appears credible, the claim is then forwarded to the Commission, which evaluates the claim under a standard of “sufficient evidence of factual innocence to merit judicial review.”<sup>112</sup> At the Commission level, at least five of the eight commission members must vote in support of the petitioner, if the petitioner had been found guilty during a jury trial.<sup>113</sup> If the petitioner had pled guilty, the Commission must be unanimous in voting.<sup>114</sup> If the claim passes the hearing, it is then forwarded to a panel of judges who must agree in unanimity that the petitioner has shown his or her innocence through clear and convincing evidence.<sup>115</sup>

### 3. Assessing the Efficacy

The strengths of a model such as the North Carolina Innocence Inquiry Commission lie in its relative independence from governmental agencies and ability to wield legal authority when necessary.<sup>116</sup> As an independent agency, the NCIIC exists as a neutral entity with no

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<sup>107</sup> *Id.*

<sup>108</sup> Maiatico, *supra* note 94, at 1360.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Tate, *supra* note 100, at 544.

<sup>112</sup> *Rules and Procedures*, N.C. INNOCENCE INQUIRY COMMISSION 7–10 (2010), <http://www.innocencecommission-nc.gov/rules.html> (last visited Feb. 22, 2016).

<sup>113</sup> Tate, *supra* note 100, at 544.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Wolitz, *supra* note 26, at 1073.

allegiance to either prosecution or defense teams. As such, it is removed from the political considerations that might plague a district attorney's office when reviewing post-conviction claims and also lacks affiliation with the defense team, so that an ensuing investigation can seem fair and neutral.<sup>117</sup> Additionally, as an independent agency unaffiliated with the court, the NCIIC does not require that defendants exhaust all other appeal opportunities before being found eligible for review.<sup>118</sup> This results in an overall faster adjudication, supports judicial economy as the NCIIC works on cases before they reach the court system,<sup>119</sup> and ensures that cases which might have been overlooked due to lack of media attention still get a fair investigation.<sup>120</sup>

Another strength of the NCIIC model is its ability to flex power when necessary. Despite being an independent agency, the NCIIC still has full statutory authority to compel document production, similar to the power of the courts.<sup>121</sup> Additionally, the NCIIC has the authority to decide which cases it will accept—for example, the NCIIC can review claims in which the defendant originally pled guilty, unlike most other post-conviction review projects.<sup>122</sup> The NCIIC also provides fewer procedural hurdles than other traditional modes of review: there is no custody requirement, there is no need to state a constitutional, legal, or procedural error at trial, and there is no statute of limitations to worry about, for example.<sup>123</sup>

Finally, the NCIIC maintains a focus on preserving judicial economy. As a requirement for taking on new claims, the NCIIC mandates that a petitioner waive all procedural safeguards and agree to full disclosure before an investigation is to begin.<sup>124</sup> This requirement ensures that all applicants will be fully cooperative and helps root out frivolous claims.<sup>125</sup> Additionally, the NCIIC only pursues claims based on newly discovered evidence in an effort to specifically target convictions that have the strongest possibility of being overturned, and as a result the courts do not become clogged with cases that have had no recent developments.<sup>126</sup>

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<sup>117</sup> *Id.* at 1074–75.

<sup>118</sup> Maiatico, *supra* note 94, at 1371–72.

<sup>119</sup> *Id.* at 1372.

<sup>120</sup> *Id.* at 1369.

<sup>121</sup> *Id.* at 1373.

<sup>122</sup> *Id.* at 1370.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1369.



Despite the numerous strengths of the NCIIC model, several drawbacks become apparent. These drawbacks focus on the make-up of the Commission, the standards of the Commission, and the overall cost of the Commission.

A valid complaint leveled at the NCIIC is that the composition of its membership can appear to be biased. For instance, the eight person Commission includes a prosecutor, a victim's advocate, a sheriff, and a superior court judge.<sup>127</sup> Each of these persons maintains an interest in representing either the victim, the people, or the integrity of the court—all interests that could be potentially hazardous to a post-conviction review. Only one member of the panel, a criminal defense attorney, would likely have any predisposition toward the fallibility of the judicial system. Additionally, none of the eight Commission members has any reason to push a case through, since the most damaging possible outcome to the NCIIC Commission members' reputations would be the exoneration of a person who later turned out to be guilty.<sup>128</sup>

The standards that the NCIIC demands are also extremely stringent. While excellent for judicial economy, requiring that the petitioner bring forth new and verifiable evidence is simply unrealistic in many older cases, in which evidence had been destroyed years before. Further, in the case of a petitioner convicted at trial, convincing five out of eight commissioners and then all three judges at the judicial panel is a very stringent standard. For those who pled guilty, the odds are even worse: they have to convince all eight commissioners. Even skeptics of post-conviction review indicate that these are almost insurmountable odds.<sup>129</sup>

Finally, the NCIIC model has cost taxpayers much for its scant results. Numbers gathered from a 2010 study indicate that the NCIIC has cost the state of North Carolina between \$200,000 and \$400,000 every year.<sup>130</sup> The office has received 635 petitions, investigated 460 cases, and allowed only three cases to go forward to the three judge panel.<sup>131</sup> Only one of these three people has actually been exonerated through the NCIIC process, which equals one million dollars spent for a single exoneration.<sup>132</sup> While any exoneration can philosophically be termed a victory, a realist

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<sup>127</sup> Wolitz, *supra* note 26, at 1065.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1064–65.

<sup>130</sup> *Id.* at 1062.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

view of the program could see this either as a call for better screening procedures, money better spent elsewhere, or perhaps something else. With its relaxed bar to initial review of a case,<sup>133</sup> perhaps more screening standards are necessary as much of the resource-intensive work goes to reviewing frivolous claims.<sup>134</sup> However, the NCIIC still stands as an example of a powerful post-conviction review unit.

### C. UNITED KINGDOM'S CRIMINAL CASES REVIEW COMMISSION

#### 1. History

The British unit responsible for post-conviction review, the Criminal Cases Review Commission (“CCRC”), owes its creation to the 1970s and 1980s, a period of great civil unrest in the United Kingdom and Ireland, which led to several questionable convictions.<sup>135</sup> These convictions, usually related to Irish Republican Army attacks,<sup>136</sup> included the “Guildford Four,” who were convicted of bombing public houses, but ultimately exonerated due to a false confession;<sup>137</sup> and the “Maguire Seven,” who were convicted of supplying the bombs used by the “Guildford Four,” but were ultimately exonerated due to faulty scientific evidence.<sup>138</sup> Perhaps the most important example is that of the “Birmingham Six,” six Irish men whose convictions of bombing a pub were overturned in 1991,<sup>139</sup> leading to the creation of the Royal Commission on Criminal Justice the very same day of the exonerations.<sup>140</sup> The Royal Commission was charged with researching how wrongful convictions occur and establishing best-practice procedures for correcting them.<sup>141</sup>

The Royal Commission’s report, released two years later, detailed 352 recommendations covering investigations, procedural processes, and

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<sup>133</sup> *Id.* at 1061.

<sup>134</sup> *Id.*

<sup>135</sup> David Kyle, *Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission*, 52 *DRAKE L. REV.* 657, 658 (2004).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (a false confession is an admission of guilt to a crime in which the confessor is not actually guilty).

<sup>138</sup> *Id.*

<sup>139</sup> Wolitz, *supra* note 26, at 1042.

<sup>140</sup> Kyle, *supra* note 135, at 660.

<sup>141</sup> Wolitz, *supra* note 26, at 1042.

trials.<sup>142</sup> The final chapter of the report advocated for an independent post-conviction review board.<sup>143</sup> Up until this point, post-conviction review was done only by the Home Secretary,<sup>144</sup> who, as the official responsible for the police forces, had little incentive to undo his own office's work.<sup>145</sup> The Commission even made special note that the Home Secretary had referred an average of only four or five cases per year for further proceedings.<sup>146</sup> As such, through the Criminal Appeal Act of 1995, the CCRC was created and became fully functional in 1997.<sup>147</sup>

## 2. Organization

The CCRC is headed by a minimum of eleven commissioners, a third of whom must be experienced attorneys.<sup>148</sup> The commissioners serve five-year terms and are appointed by the Queen on recommendation of the Prime Minister.<sup>149</sup> In addition, the CCRC boasts one hundred staff members, fifty of whom are case managers responsible for intake, case review, and directing investigations.<sup>150</sup> The budget of the CCRC has varied considerably, with a 2006 budget worth £8,500,000 in inflation-adjusted currency and a 2012 budget of roughly £5,900,000.<sup>151</sup>

The CCRC stands operationally independent from both the government and the British court system, with only a requirement that it submit an annual report to the British government.<sup>152</sup> However, the CCRC does have the authority both to direct police investigations and to conduct investigations on its own.<sup>153</sup> The CCRC also enjoys unrestricted access to any documents in the possession of a public organization if relevant to the investigated case.<sup>154</sup> Finally, the CCRC investigates any claim of

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<sup>142</sup> Kyle, *supra* note 135, at 660.

<sup>143</sup> *Id.* at 660–61.

<sup>144</sup> *Id.* at 661.

<sup>145</sup> *Id.*

<sup>146</sup> Wolitz, *supra* note 26, at 1044.

<sup>147</sup> Kyle, *supra* note 135, at 662.

<sup>148</sup> Wolitz, *supra* note 26, at 1043.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Business Plan 2012-13*, CRIMINAL CASES REV. COMMISSION 7, <http://ccrc.wpengine.com/wp-content/uploads/2015/03/ccrc-business-plan.pdf>.

<sup>152</sup> Wolitz, *supra* note 26, at 1043.

<sup>153</sup> *Id.*

<sup>154</sup> Kyle, *supra* note 135, at 668.

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innocence, as long as the applicant is not awaiting a decision on appeal.<sup>155</sup>

Once the CCRC receives a petition, a caseworker is assigned to the claim and begins an investigation, which can last anywhere from a few weeks to longer than a year.<sup>156</sup> After the investigation is completed, the case is forwarded to either a commissioner or a panel of commissioners.<sup>157</sup> While a single commissioner has the power to reject a petition, a panel of at least three commissioners must decide if there is a “real possibility”<sup>158</sup> that the conviction could be overturned.<sup>159</sup> If so, the case is referred to the Court of Appeal with a Statement of Reasons for exoneration attached.<sup>160</sup> At this final stage, the Court of Appeal, by majority vote, has the authority to reverse the conviction, uphold the conviction, or take any other action in the interest of justice.<sup>161</sup> Presently, the CCRC only accepts cases in which normal appeals have been exhausted.<sup>162</sup>

### 3. Assessing the Efficacy

The strengths of the Criminal Cases Review Commission are largely in line with that of the North Carolina Innocence Inquiry Commission. As an independent review commission, the CCRC enjoys independence from the groupthink that might plague a prosecuting office’s Conviction Integrity Unit and can be seen as more fair and balanced in its decisions as a neutral entity. Despite its lack of allegiance to a state body, the CCRC still entertains some power, as it can compel public organizations to produce documents, can direct police investigations, and can even undertake an investigation of its own.<sup>163</sup> The CCRC also boasts a relatively large workforce composed of many case managers with the sole duty of investigating each claim.<sup>164</sup> The CCRC conducts its reviews in a streamlined manner, by assigning one case manager to see a case through from beginning to end.<sup>165</sup>

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<sup>155</sup> Wolitz, *supra* note 26, at 1043.

<sup>156</sup> *Id.* at 1044.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1045.

<sup>162</sup> *Id.* at 1043.

<sup>163</sup> *Id.* at 1043.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

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The CCRC, unlike the NCIIC, does not have applicants waive procedural safeguards before proceeding. While the NCIIC's waiver allows for any discovered unflattering evidence about any other crime committed to be forwarded to a prosecutor's office,<sup>166</sup> the CCRC does not force this.<sup>167</sup> Instead, the CCRC focuses only on the defendant's innocence in the current crime, and does not forward incriminating evidence of other crimes to a prosecutor's office—this allows all defendants to step forward with claims, but also creates a much larger caseload with some fraudulent defendants who are not entirely truthful.<sup>168</sup> Finally, in contrast to the NCIIC, the CCRC recognizes the false confession phenomena, which occurs when someone confesses to a crime that they had not committed.<sup>169</sup> Reasons for false confessions are myriad, but include the defendant not wanting to risk a longer sentence, the defendant not understanding what they agreed to, or the defendant receiving bad advice from counsel.<sup>170</sup> As such, unlike the NCIIC, the CCRC holds those who have plead guilty to the same standard as those who were convicted at actual trial.<sup>171</sup>

A 2010 study analyzing the CCRC found that the CCRC had received a total of 13,004 applications.<sup>172</sup> Of those applications, 445 cases were referred to the Court of Appeal, which agreed to hear 411 of them.<sup>173</sup> From those 411 cases, the Court of Appeal upheld 118, reversed 290, and reserved judgment on three pending further hearings.<sup>174</sup> Overall, this means that the CCRC has successfully reversed convictions on approximately three-quarters of the cases it found worthy of review.<sup>175</sup>

Regardless of its strengths, the CCRC does have several weaknesses. Not mandating that applicants waive rights has led to a serious backlog of applications.<sup>176</sup> All of the CCRC's decisions are subject to judicial review, which also adds to the backlog of cases in court.<sup>177</sup> Further, the CCRC's standard for conviction review is only that the conviction is "unsafe," thus

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<sup>166</sup> Maiatico, *supra* note 94, at 1370.

<sup>167</sup> *Id.* at 1370.

<sup>168</sup> *See id.*

<sup>169</sup> *Id.* at 1371.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1371.

<sup>172</sup> Wolitz, *supra* note 26, at 1045.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Maiatico, *supra* note 94, at 1370–71.

<sup>177</sup> *Id.* at 1373.

placing the burden on the prosecutor to defend the conviction.<sup>178</sup> This can result in rightfully convicted people going free, as older cases tend to be marred by witnesses who have disappeared or forgotten about events.<sup>179</sup> Finally, the CCRC comes at immense cost. The CCRC boasts a budget of roughly £5,900,000, or approximately \$9,250,000, which dwarfs that of both Conviction Integrity Review Units and the NCIIC.<sup>180</sup> Despite these drawbacks, the success rate that the CCRC boasts is still very impressive.

#### IV. CONCLUSION

##### A. BEST MODEL

Overall, I believe that the best model of these three is that of the North Carolina Innocence Inquiry Commission, due to its independence, strength, focus on judicial economy, and safeguards.

First, the NCIIC functions independently from the district attorney's office. As such, the attorneys in the office would not feel compelled to protect their colleagues, as in a district attorney's office, when reviewing convictions.<sup>181</sup> Additionally, NCIIC attorneys do not have to balance their relationship with police investigators<sup>182</sup> while thoroughly reviewing cases, and they would not be swept up in a "team spirit" mentality<sup>183</sup> or find themselves ostracized by their own office.<sup>184</sup> Also, the NCIIC also does not have to balance a stance of being "tough on crime" with reviewing cases; it can dedicate itself to the sole mission of post-conviction review without political qualms.<sup>185</sup>

While a perceived benefit of a district attorney's office conducting a review is that its Conviction Integrity Unit members would already have legal and investigative expertise, any NCIIC attorney would obtain that same expertise, as an NCIIC attorney works exclusively on post-conviction review. Additionally, the NCIIC would be seen as a neutral entity conducting investigations by outsiders since it is independent from the district attorney's office, and thus would not be subject to calls of

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<sup>178</sup> *Id.* at 1372–73.

<sup>179</sup> *Id.*

<sup>180</sup> *Business Plan 2012-13*, *supra* note 151.

<sup>181</sup> Medwed, *The Prosecutor as Minister of Justice*, *supra* note 71, at 60.

<sup>182</sup> Medwed, *The Zeal Deal*, *supra* note 81, at 146.

<sup>183</sup> *Id.* at 144.

<sup>184</sup> Medwed, *The Prosecutor as Minister of Justice*, *supra* note 71, at 60.

<sup>185</sup> Wolitz, *supra* note 26, at 1045.

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corruption that might taint a district attorney's office conducting its own in-house investigations.

Despite its independence from the district attorney's office, the NCIIC is still a relatively strong institution, thanks to the North Carolina legislature. The NCIIC possesses full statutory authority to compel document production, similar to a court's authority.<sup>186</sup> The NCIIC can also choose its own cases; it can review claims in which the defendant originally pled guilty, unlike many other post-conviction review projects and many Conviction Integrity Units.<sup>187</sup> Finally, the NCIIC provides fewer procedural hurdles: the NCIIC has no custody requirement and no need to state a constitutional or procedural error at trial.<sup>188</sup>

In a world of finite resources, the NCIIC emphasizes judicial economy. Unlike the CCRC, the NCIIC does not require an applicant to exhaust all other judicial remedies before applying for relief.<sup>189</sup> Instead, the NCIIC allows an appeal at any time post-conviction.<sup>190</sup> Since the NCIIC is more likely to provide faster relief to a client than the judicial system, this saves the defendant from cluttering the courts with several claims and appeals before being allowed to file a claim with the NCIIC.<sup>191</sup> As such, the NCIIC essentially functions as a screening process for the judicial system.

Additionally, the NCIIC requires that its applicants prove themselves with "clear and convincing evidence,"<sup>192</sup> rather than the "unsafe"<sup>193</sup> standard of the CCRC. The more stringent NCIIC standard functions as a double-edged sword. While this means a possible reduction in rightful exonerations, it balances a need for judicial economy and the fact that witness' memories fade overtime, in addition to preserving the need for finality for victims of crime.

Finally, the NCIIC requires all of its applicants to waive procedural safeguards prior to review.<sup>194</sup> For instance, if the NCIIC discovers information related to an unsolved crime that a client may be involved in, the NCIIC will forward it to a prosecutor's office. While this will make

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<sup>186</sup> Maiatico, *supra* note 94, at 1373.

<sup>187</sup> *Id.* at 1370.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 1371–72.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1372.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1370.

some wrongfully convicted defendants weary of approaching the NCIIC for fear of being convicted of other committed crimes, it helps function as a screening mechanism to frivolous claims and ensures that a defendant is truly invested in the cause. This screening mechanism helps avoid the large backlog of cases that the CCRC faces.<sup>195</sup>

At first, it may seem like the CCRC is a better model for post-conviction review than the NCIIC. Statistically, the CCRC boasts a much higher success rate than the NCIIC and has a much larger number of dedicated personnel.<sup>196</sup> However, when thoroughly examined, the CCRC's drawbacks, which generally focus around a lack of power, allow for the NCIIC to be seen as the superior model for post-conviction review.

One of the major problems associated with the CCRC's lack of judicial authority is that the CCRC can only compel the production of documents from public organizations.<sup>197</sup> The CCRC has little recourse if a private organization or person holds exculpatory evidence. In contrast, the NCIIC can compel document production from private entities, similar to the power that American courts possess.<sup>198</sup>

Similar to this lack of power is the CCRC's suboptimal role in regard to the Court of Appeal; the CCRC is only a gatekeeper with little actual authority. In this sense, the CCRC does not have any actual power to declare a "miscarriage of justice" or exonerate convicted persons.<sup>199</sup> Instead, the CCRC can recommend only that the Court of Appeal (which has the final say) review certain cases.<sup>200</sup> Because of this, CCRC case managers are focused on which cases stand the best chance of making it past the Court of Appeal, which does not include all cases in which the case manager believes the convicted person to be innocent.<sup>201</sup> The NCIIC, on the other hand, with its statutory authority granted by the North Carolina legislature, impanels its own judges who can then exonerate a defendant without employing an outside organization; all exonerations for the NCIIC take place during this in-house process.<sup>202</sup>

The CCRC also forces its investigators to make figurative split-

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<sup>195</sup> *Id.* at 1370–71.

<sup>196</sup> Wolitz, *supra* note 26, at 1045.

<sup>197</sup> Maiatico, *supra* note 94, at 1373.

<sup>198</sup> *Id.*

<sup>199</sup> Robert C. Schehr & Lynn Weathered, *Should the United States Establish a Criminal Cases Review Commission?*, 88 JUDICATURE 122, 124 (2004).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*



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second decisions when initially evaluating a case. In an effort to speed up the review process, a CCRC investigator is given access to only five different types of documents, as opposed to the NCIIC, which allows review of all documents received, including ones from private entities, as mentioned above.<sup>203</sup> This process results in an initial CCRC adjudication taking only days—hardly enough time for a thorough review.<sup>204</sup>

While the NCIIC employs a review commission of eight members, the vast majority of the CCRC's cases are initially forwarded to a single commissioner<sup>205</sup> before being allowed to proceed to the Court of Appeal.<sup>206</sup> As such, a defendant's fate is in the hands of a single commissioner, whose judgment could be clouded by a variety of biases, such as a personal experience with the crime that the applicant had been convicted of or even a bias against the very case worker who had worked on that application.<sup>207</sup> The NCIIC, on the other hand, employs a panel of eight commissioners of different backgrounds in an effort to contain biases.<sup>208</sup> Additionally, while all of the NCIIC commissioners come from criminal justice backgrounds,<sup>209</sup> up to a third of the CCRC commissioners are allowed to have no experience or knowledge of the criminal justice system.<sup>210</sup> The only requirement is that they are "legally qualified"—that the members have the requisite legal education.<sup>211</sup>

Finally, while the CCRC maintains a much higher success rate,<sup>212</sup> the CCRC has been in operation since 1997,<sup>213</sup> while the NCIIC was only made functional in 2007;<sup>214</sup> essentially a ten year difference. Further, the CCRC has roughly thirty times the annual funding of the NCIIC and has had more opportunities to review convictions, as the domain of the CCRC covers all of England, Wales, and Northern Ireland, and the NCIIC only maintains jurisdiction in North Carolina.

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Wolitz, *supra* note 26, at 1044.

<sup>206</sup> Schehr & Weathered, *supra* note 199, at 124.

<sup>207</sup> *Id.*

<sup>208</sup> *See generally* Wolitz, *supra* note 26, at 1065 (the commission includes members of various backgrounds, including a judge, victim's advocate, criminal defense lawyer, and county sheriff in an effort to allow different view points).

<sup>209</sup> *Id.*

<sup>210</sup> Schehr & Weathered, *supra* note 199, at 124.

<sup>211</sup> *Id.*

<sup>212</sup> Wolitz, *supra* note 26, at 1045.

<sup>213</sup> Kyle, *supra* note 135, at 661–62.

<sup>214</sup> Tate, *supra* note 100, at 543.

## B. BEST PRACTICE

While I believe that the NCIIC is the best model of the three for post-conviction review units, the NCIIC's statutory strength and procedural safeguards are the only things that enable the organization to outdo the CCRC. Consequently, I believe that several concepts from both Dallas County's Conviction Integrity Unit and the CCRC could be implemented for truly "best practice."

Dallas County District Attorney Craig Watkins has attempted to instill a pro-conviction review atmosphere in his office, and I believe that this is necessary in all district attorney's offices, regardless of whether the office possesses a conviction review unit. This atmosphere would make the office more apt to share information with places like the NCIIC and may incidentally make deputy district attorneys consider that their work is fallible, thus prompting them to review cases more thoroughly before charging a defendant. Additionally, district attorney's offices may wish to place a deputy district attorney in the position of liaison with the local public defender's office, in hopes of maintaining a more open and productive relationship. An open case file policy may help as a gesture of good will.

I also prefer the overall structure of the CCRC to that of the NCIIC. The CCRC is composed of a much larger staff, with a single case manager who handles an investigation from beginning to end; the only responsibility of that case manager is to investigate that single claim of innocence.<sup>215</sup> With only a single occupation, the CCRC case manager can maintain an unbiased position. On the other hand, high-ranking members of the NCIIC include a prosecutor, sheriff, and victim's advocate.<sup>216</sup> While it is possible that these NCIIC members could put their other occupations aside, a very real possibility is that these members may be more apt to speak for victims of crime and not necessarily those imprisoned. This is my strongest best practice urge: that a large, dedicated force of workers make up all facets of a review program, rather than people who may be subject to outside bias based on their dual occupations.

Finally, a post-conviction review organization should adopt the standard of the CCRC for defendants who have plead guilty, rather than that of the NCIIC. By holding the same standard for those who have plead guilty, the CCRC acknowledges the phenomena of the false confession.

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<sup>215</sup> Wolitz, *supra* note 26, at 1043.

<sup>216</sup> *Id.* at 1065.

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By requiring a unanimous commission vote, instead of the usual majority vote, the NCIIC places an unfair burden on a class of defendants who may have been subject to a faulty criminal process.

This being said, while the NCIIC remains the best currently existing model of post-conviction review, it could still be substantially augmented by concepts taken from the CCRC for “best practice.”

### C. A FINAL WORD AND LOOKING FORWARD

In summation, post-conviction review has evolved substantially since the days of the Palladium Murder and David Lemus and Omeldo Hidalgo’s decade of wrongful imprisonment. However, a prosecutor, such as Daniel Bibb, should not have to intentionally throw a case on retrial when enough credible evidence has amassed to prove an incarcerated person’s innocence.

The judicial system has begun to take notice of this and has slowly come to the conclusion that while a sense of finality is important, it is not the be-all, end-all. Post-conviction review programs, in various incarnations, have begun to pop up, state-by-state. As of a 2012 survey, approximately eleven innocence commissions<sup>217</sup> have been established in several states since the country’s first DNA exoneration in 1989. States leading the charge include California, Connecticut, New York, Virginia, and Texas, among others.<sup>218</sup> However, the structures of these commissions vary, and generally hold either higher standards than the units reviewed in this note, rely only on new DNA evidence, or lack any substantial power to remedy wrongs.

As such, it is important to look toward a model like that of the North Carolina Innocence Inquiry Commission when designing a state’s post-conviction review program. The NCIIC, as an independent organization backed by statutory powers, stands as an ideal model for what post-conviction could be and should be. The organization has the power to compel production of evidence, as the courts do, and can adjudicate claims on its own. Additionally, the organization places a premium on judicial economy, with its forced waiver of procedural safeguards and ability to take on any case it deems worthy.

However, the NCIIC can still learn from the Criminal Cases Review Commission, and even the relatively successful Conviction Integrity Unit

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<sup>217</sup> Tate, *supra* note 100, at 536.

<sup>218</sup> *Id.* at 537–43.

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in Dallas County to identify what works, what needs to be changed, and what needs to be thrown out altogether. By utilizing the model of the North Carolina Innocence Commission and fortifying it with pieces taken from the Criminal Cases Review Commission, a very effective post-conviction review unit could be established and would avoid the tragedy that befell David Lemus and Omeldo Hidalgo, who sat for a decade in jail while evidence of their innocence accumulated.