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Conviction Integrity Units and their Impact On Reverse Conviction Litigation

Reversed conviction lawsuits, sometimes called wrongful conviction lawsuits, are on the rise across the United States. For those who are unfamiliar, a reversed conviction lawsuit typically follows a basic pattern: a criminal-defendant is convicted of a crime; his conviction is reversed or set aside based on "new" evidence; and the prosecutor opts not to retry the criminal case. It is at this point that the former criminal-defendant typically sues the police officers involved in the underlying criminal investigation and prosecution for alleged constitutional violations that allegedly caused a "wrongful conviction."

According to the National Registry of Exonerations ("NRE") in 2021, the registry recorded 161 convictions set aside. (https://www.law.umich.edu/special/exoneration/Pages/about.aspx). Of those 161, the NRE claims that official misconduct occurred in at least 102 convictions. For instance, 52 homicide cases were set aside. Homicide cases tend to carry the longest prison sentences, thereby increasing the potential exposure of lawsuits that will likely flow from these convictions being set aside. According to the NRE:

> Professional exonerators — Innocence Organizations (IOs) and Conviction Integrity Units (CIUs) — continued to play essential roles. Jointly, they were responsible for 97 exonerations, 60% of the total. IOs and CIUs worked together on 31 of these exonerations in 2021. IOs took part in 67 exonerations, and CIUs helped secure 61 exonerations.

Table 1: Exonerations in 2021 by Jurisdiction, in Order from Most to Fewest

Illinois — 38	Virginia — 6	Connecticut — 1
New York — 18	Ohio — 4	Indiana — 1
California — 11	Kansas — 3	Missouri — 1
Michigan — 11	Maryland — 3	Nevada — 1
Louisiana — 9	West Virginia — 3	New Jersey — 1
Texas — 9	Florida — 2	Oklahoma — 1
Georgia — 8	Mississippi — 2	Wisconsin — 1
Federal cases — 7	North Carolina — 2	Guam — 1
Pennsylvania — 7	Oregon — 2	
Massachusetts — 6	Tennessee — 2	

(NRE Annual Report 2021 Report at p. 6, https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf.)

As to the average length of incarceration for those who were "exonerated", the NRE reported:

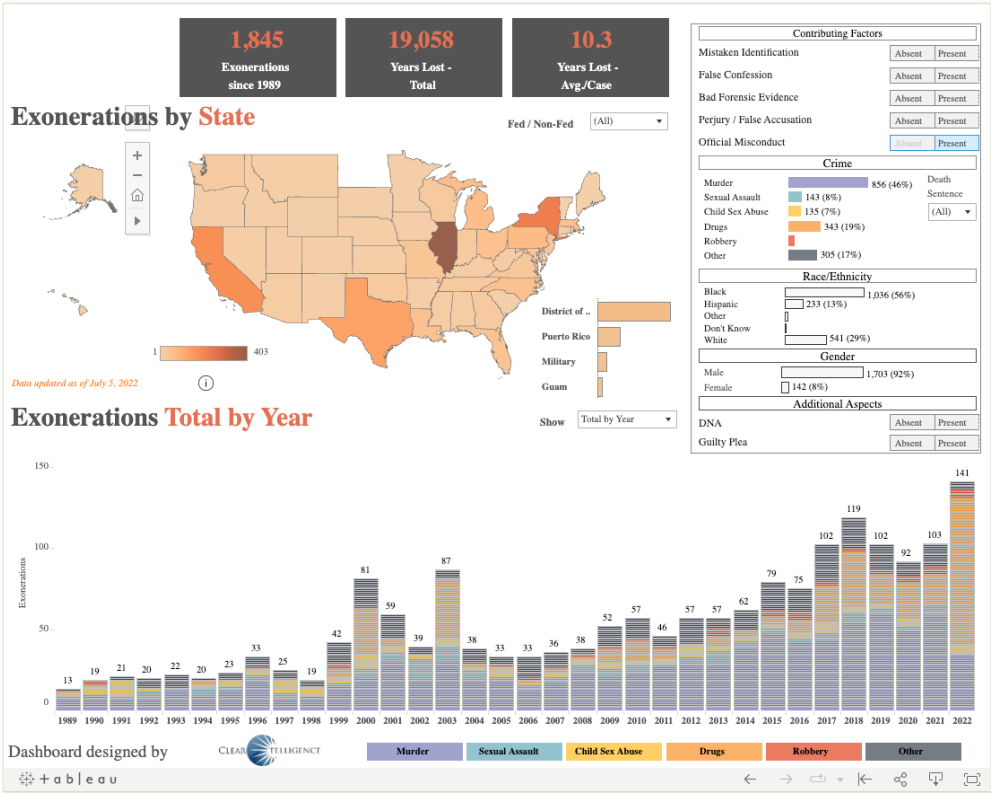
> Defendants exonerated in 2021 spent 1,849 years incarcerated for crimes they did not commit, an average of 11.5 years per exoneree. These figures underestimate the actual amount of time they lost. The Registry does not include the often substantial periods — sometimes several years — that exonerees spent in jail awaiting trial. Time lost to incarceration also does not include the substantial hardships many exonerees face upon release from prison. A number of 2021 exonerees spent substantial time in prison. We recorded 14 cases in which exonerees spent more than 25 years in prison; in two of these cases, exonerees served more than 45 years in prison for crimes they did not commit. One of them, Anthony Mazza, was exonerated of a murder in 2021, for which he served 47 years and two months — the longest period of incarceration of any exoneree in the Registry.

(NRE Annual Report 2021 Report at p. 7).

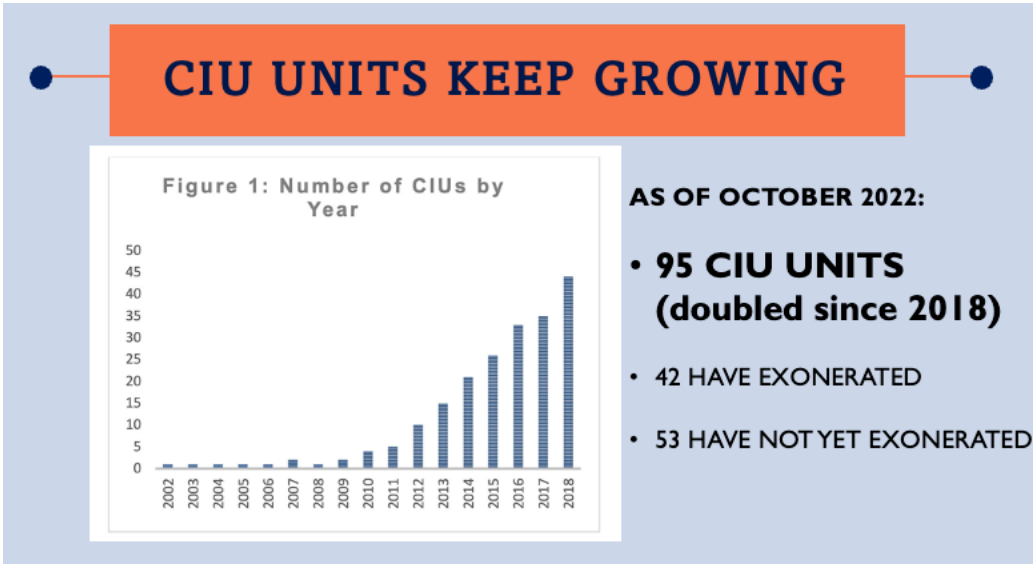
In years past, a convicted petitioner challenging a conviction on either or both these grounds would have to file one or more motions with the trial court or otherwise appeal through the judicial system, proving that there was "new" evidence that the petitioner was not involved in the crime or did not receive a fair trial. In such a case, the county prosecutor would determine whether or not to defend the conviction and oppose the release of Petitioner. However, the winds have substantially shifted and now convicted prisoners have a new avenue to potentially open the prison gates – the Conviction Integrity Unit ("CIU") within the office of the same prosecutor who originally procured the conviction.

Recently, more and more prosecutors have created CIUs in their offices. A CIU is a unit within a state or county prosecutors' office dedicated to reviewing claims of innocence. No state law mandates that a prosecutor's office has a CIU. Rather, it is entirely within the elected or head prosecutor's discretion to decide whether or not to have a CIU and, if so, how that unit will operate. A prisoner has no constitutional or state law right to have his or her case reviewed by the unit, and the CIU's decision to accept or reject a case is not appealable. The NRE credits CIUs with setting aside 61 convictions in 2021.

Here is a graph from the NRE, highlighting the rise in convictions being set aside based on "official misconduct." Each of these reversed convictions will likely lead to a lawsuit. Since the average reversed conviction case is 11.5 years and plaintiffs routinely request $1,000,000 per year of incarceration, and the upward trend in these cases should be carefully followed by municipalities potentially facing hire exposure litigation.



CIU units are also on the rise. As of September 2022, there are 95 CIUs across the country. 10 years ago, there were only 10 CIUs. According to the graph, there was 1 CIU in 2002. Based on the current trend, we can expect this number to grow to approximately 1,000 CIUs by 2032. As such, if your local prosecutor's office does not have a CIU, it is safe to assume the office will establish a CIU soon.



What is a Conviction Integrity Unit?

A Conviction Integrity Unit ("CIU") is a unit within a prosecutor's office that investigates claims of innocence to determine whether there is new evidence that the Petitioner was not the person who committed the offense. The CIU is not a court, and its work is not governed by any court rules of procedure. Once a person submits a request for investigation, the CIU reviews the application and determines whether it will conduct an investigation. In addition to the director, CIUs often employ additional attorneys and investigators to conduct re-investigations. A CIU will then typically reviews the underlying criminal investigation, the trial transcripts, and any "new" evidence submitted by Petitioner.

As you might imagine, many of the cases reviewed by the CIU involve convictions that occurred 10, 20, or even 30 or more years ago. Of course, everyone is aware of reversed convictions based on evidence that can now be tested because of advancements in testing technology. But what about cases where witnesses recant or a person claims that a document was withheld decades ago at the time of the original criminal trial? In many reinvestigations, officers and witnesses either do not remember the case or have passed away. Still, the CIU has the authority to analyze whatever evidence remains, including reassessing testimony from the preliminary examination and the criminal trial, as well as re-interviewing witnesses who may now recant their sworn testimony or simply not recall important details.

Following its investigation, the CIU will make a recommendation to the elected prosecutor who then decides whether to approve or deny an applicant's petition. If approved, the prosecutor and applicant stipulate to setting aside the applicant's conviction and the prosecutor typically agrees not to retry the former convict. This last part is especially significant because the CIU and prosecutor essentially circumvent the judicial process without necessarily making any record of why the prosecutor came to the conclusion that the conviction was not reliable.

Importantly, most CIUs have the same stated eligibility standards. In the main, CIUs state that they will only review claims of factual innocence, meaning they did not commit the crime, plus the new evidence or information cannot have been argued before in any court, including appeals or a petition for writ of habeas corpus. However, each CIU includes a catchall provision wherein the CIU reserves the discretion to investigate any claim in the interest of justice. If used frequently, this last clause will no doubt nullify the stated conditions of eligibility. And, since investigations and decisions by a CIU are extra-judicial, there is no appeal or other judicial oversight in the process.

CIU Leadership

A report published by the Massachusetts Conviction Integrity Working Group, in conjunction with the Massachusetts Bas Association, titled Conviction Integrity Programs: A Guide To Best Practices For Prosecutorial Offices, highlighted a speech Attorney Barry Scheck gave in 2019:

> On May 9, 2019, the MCIWG participated in a dialogue with Attorney Barry Scheck, Co-Founder of and Special Counsel to the National Innocence Project and Professor of Law and Co-Director of the Innocence Clinic at Benjamin N. Cardozo School of Law. He is a national expert and a leading scholar on conviction integrity. Attorney Scheck discussed a number of exonerations involving leading CIUs in the United States and provided a history

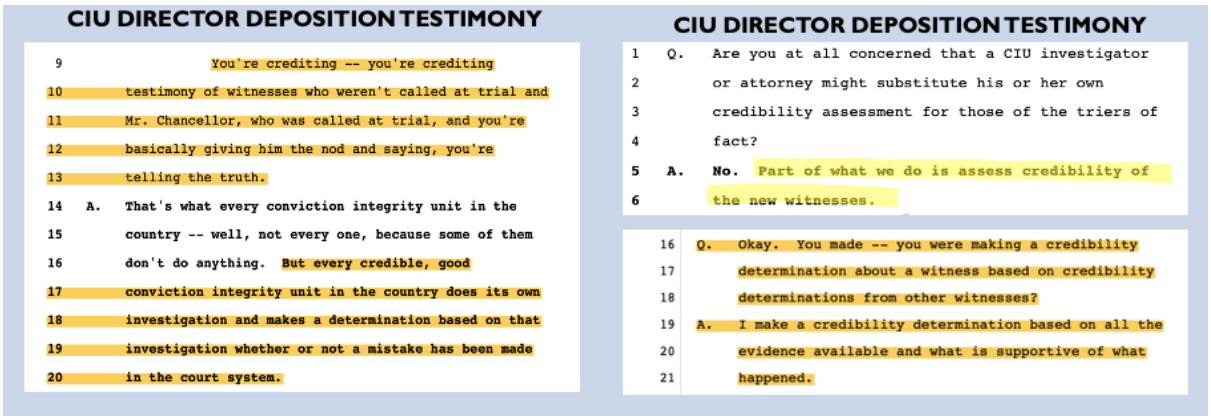
of CIUs and law enforcement misconduct registries. He emphasized the importance of CIUs and defense counsel collaborating in a joint search for justice. **He stressed the importance of structuring CIUs to be independent of appeals units and of having attorneys with innocence or defense practice backgrounds to lead, or at least participate meaningfully in, CIUs.**

In fact, many CIUs are led by former criminal defense attorneys, here are just a sample:

- **Wayne County, MI** - CIU Director worked at State Appellate Defender for more than 25 years
- **Philadelphia, PA** - Attorney on staff was a Sr. Project Attorney at the Death Penalty Moratorium Implementation Project
- **Washington DC** - CIU Director worked as the Director of the Mid-Atlantic Innocence Project for 2 years
- **Indianapolis, IN** - CO-CIU Director worked as a Public Defender for more than 9 years
- **Dallas, TX** - CIU Deputy Chief worked as a Public Defender for more than 9 years
- **Austin, TX** - CIU Director worked as a Public Defender for more than 10 years
- **Nashville, TN** - CIU Director worked as a criminal defense attorney for more than 10 years
- **Tampa, FL** - CIU Supervisor worked as a criminal defense attorney for than 16 years
- **Orlando, FL** - CIU Chief worked as a Public Defender for more than 11 years
- **St Louis, MO** - CIU Chief worked as a Public Defender for more than 11 years
- **Baltimore City, MD** - Sentencing Review Unit Chief worked as a Public Defender for more than 14 years
- **Bronx County, NY** - CIU Chief worked in a public defender type role for over 20 years
- **Queens County, NY** - CIU Director was a staff attorney at the Innocence Project for 7 years
- **Prince George's County, MD** - CIU attorney worked as a Public Defender and at the Innocence Project

CIUs Unilaterally Decide the Credibility Of Witness Recantations

Here is testimony of a CIU Director acknowledging that her team makes credibility determinations when interviewing people in re investigations. These decisions are most critical when evaluating the veracity of a witness's recantation of decades old testimony. The CIU has sole discretion in crediting recantations.



CIU DIRECTOR DEPOSITION TESTIMONY

You're crediting -- you're crediting testimony of witnesses who weren't called at trial and Mr. Chancellor, who was called at trial, and you're basically giving him the nod and saying, you're telling the truth.

A. That's what every conviction integrity unit in the country -- well, not every one, because some of them don't do anything. But every credible, good conviction integrity unit in the country does its own investigation and makes a determination based on that investigation whether or not a mistake has been made in the court system.

CIU DIRECTOR DEPOSITION TESTIMONY

Q. Are you at all concerned that a CIU investigator or attorney might substitute his or her own credibility assessment for those of the triers of fact?

A. No. Part of what we do is assess credibility of the new witnesses.

Q. Okay. You made -- you were making a credibility determination about a witness based on credibility determinations from other witnesses?

A. I make a credibility determination based on all the evidence available and what is supportive of what happened.

Challenging the CIUs Findings With An Expert

Although there is a small subset of cases where convictions were overturned based on DNA or other objective evidence, most reversed convictions today are attributed to witness recantations. Sometimes these witness recantations are procured by the convicted persons or their legal team. Sometimes the recantations are procured by prosecutors of the CIU. Regardless, the circumstances surrounding these recantations should be carefully scrutinized before one jumps to the conclusion that a conviction was genuinely wrongful. Attorneys defending reverse conviction lawsuits should consider retaining an expert to evaluate the re-investigative efforts of the CIU.

Here are some issues that should be considered when analyzing a CIU Re-Investigation:

- Did the CIU interview all available witnesses?
- Were witnesses allowed to review their testimony prior to the CIU interview?
- Were the witness interviews thorough?
- Did the CIU ask leading questions during witness interviews?
- Did the CIU record witness interviews?
- Did the CIU interview the detectives?
- Did the CIU conduct all available forensic testing?
- Did the CIU retain its own experts?
- Did the CIU review recorded prison calls?
- Did the CIU search for any contact between plaintiff and recanting witness?
- Did the CIU collect all relevant records and transcripts?
- Did tunnel vision and confirmation bias play a role in the CIU's investigation?