ATTACHMENT C

Law Division Policies & Procedures

POLICIES

Last Updated October 2020 - Not to Be Distributed Outside of DAO Law Division

Category	
Case Type	**Action Required/Position Taken**
"Basil Brooks"	
"Basil Brooks" Reasonable Doubt Instruction (Judge Renee Hughes)	**If objection is preserved**: agree that the instruction was a structural error and that defendant is entitled to a new trial **If objection is not preserved**: only argue the prejudice prong of ineffectiveness test; do not argue other grounds
Brady Claims	
Significant, Prejudicial *Brady* Allegations/ Prosecutorial or Police Misconduct	Consult with Nancy/Paul
Discovery	
Counseled Request for DNA Testing	Generally agree. If in doubt, consult with Nancy
Counseled Request to Review DAO and/or PPD File(s)	Generally agree, subject to defense counsel executing a Confidentiality and Non-Disclosure Agreement (obtain from Unit Supervisor)
Immigration	
Potential Immigration Consequence for Defendant Based on Position Taken/ Argument Made in Commonwealth Brief	Consult with Caleb Arnold, DAO Immigration Counsel
Individuals with Intellectual Disabilities/Juveniles	
LWOP for a Juvenile Convicted of Murder	Agree that sentence is unconstitutional, unless defendant has been found to be incorrigible
LWOP for an Individual 18–21 years old	Identify these cases for Nancy/Paul
LWOP for an Individual with an Intellectual Disability	Consult with Nancy/Paul
40+ Year Prison Term for a Juvenile Convicted of Murder (Who has not been found to be incorrigible)	Acknowledge contrary precedent, but argue that we believe that the sentence violates the U.S. Constitution
Juvenile/Individual with an Intellectual Disability Convicted of Murder Where the Defendant's Confession Post-*Miranda* Waiver Is the Primary Evidence	Consult with Nancy/Paul
Parole/Probation	
VOP After a *Daisey-Kates* Hearing Where Defendant Has Been Acquitted of the Offense that Triggered the Violation or Offense Is Nolle Prossed	Agree that VOP court has abused its discretion
VOP for Technical Violation Where the Only Basis is that Probation Is "an Ineffective Vehicle To Accomplish Rehabilitation"	Agree that VOP court has abused its discretion

Incarceration for Technical Violation of Probation Where the Only Basis for Incarceration Is "To Vindicate the Authority of the Court"	Consult with Nancy/Paul
VOP Solely for Failure To Pay Court Costs/ Fines Where Defendant Claims Inability To Pay	Agree that a person who is not able to pay cannot be violated solely for failure to pay costs/fines
PCRA	
IAC Claim Seeking Nunc Pro Tunc Reinstatement of Direct Appeal Rights	If (1) the petition is timely; (2) defendant claims he requested, and defense counsel did not file, a direct appeal; (3) defense counsel has no record/recollection contradicting defendant; and (4) defense counsel does not oppose us doing so—then concede
PCRA Time Provisions	Do not even describe the PCRA time provisions as "jurisdictional" in nature; rather, describe them as "time provisions," like any other statutory time provision
PCRA Public Records Presumption	In response to both counseled and *pro se* petitions, do not argue that a defendant is *presumed* to know matters of public record for purposes of determining whether an allegedly newly-discovered fact was previously "unknown"
Untimely Petition Claiming Patently Illegal Sentence that Exceeds the Statutory Maximum	Acknowledge contrary precedent, but argue that we believe that the Court has jurisdiction to review the merits
Search/Seizure	
Police Hold an "Informational Witness" Involuntarily, Without Probable Cause/*Miranda* Warnings, and for an Extended Period of Time	Consult with Mike Erlich
Sentencing	
Death Penalty (Any)	Consult with Nancy/Paul
Claim that Court Failed To Consider a Defendant's Ability To Pay When Imposing Costs/Fines, Either at Sentencing or at Any Other Point in the Proceedings	Agree that a court that refuses to consider the burden on an indigent defendant to pay costs/fines has abused its discretion
Challenge to an Above-Guideline Sentence or to a Sentence Above the Commonwealth's Recommendation	Consult with Nancy/Paul
DUI Penalty Enhancement Where Prior DUI Resulted in ARD	Agree that such enhancement is improper

SORNA	
In General	Consult with Nancy/Paul. Various SORNA challenges currently pending before the PA Supreme Court
Restriction Imposed on Sex Offender's Use of a Computer and/or the Internet	Consult with Nancy/Paul. Generally, we will oppose total restrictions on computer/internet use
****Miscellaneous****	
First Sentence of [Counter-]Statement of the Case in Briefs	Begin with a procedural statement (e.g., "A jury convicted defendant of [crimes]."), rather than a factual summary (e.g., "Defendant [committed a crime].")
How To Refer To Defendant/Appellant/Petitioner	This is a matter of personal preference, but be consistent
Waivers, Time Provisions, and Other Procedural Bars	Generally, avoid relying exclusively on these arguments when they are only procedural in nature; also review and address the merits of the substantive claim

PROCEDURES

Last Updated October 2020 - Not to Be Distributed Outside of DAO Law Division

Category	
Case Type	**Action Required**
Attendance	
Appeals Team Meetings, PCRA Unit Meetings, and Fed. Lit. Unit Meetings, and Law Division Meetings	Attendance is *mandatory*. If you have an unavoidable conflict, notify your team leader/Unit supervisor *beforehand* to be excused
Conflicts	
Conflicted **Judge** Screened from Case (e.g., Judge Temin)	**Footnote**: Pursuant to Rule 1.12(c)(12) of the Pennsylvania Rules of Professional Conduct, Judge [**NAME**] has been disqualified from participation and screened
	Delete screened judge's name from the cover sheet and signature line of the brief
	Email the screened judge (and CC Richard Glazer) the case name and docket # and inform the judge that (s)he has been screened
Conflicted **Non-Judge** Screened from Case (e.g., former defense counsel)	**Footnote**: Pursuant to the Conflict Resolution Protocol of the Philadelphia District Attorney's Office, Assistant District Attorney [**NAME**] has been disqualified from participation and screened
	Delete screened prosecutor's name from the cover sheet and signature line of the brief
	Email the screened prosecutor (and CC Richard Glazer) the case name and docket # and inform the prosecutor that (s)he has been screened
Extension Requests	
Cases in Pennsylvania Superior Court	For matters in the Pennsylvania Superior Court, lawyers generally should not seek more than one extension; except in extraordinary circumstances, lawyers should file their briefs on or before the due date; and in any event, any 3d (or more) extension request must be personally approved by Appeals Unit Supervisor Larry Goode

Police Misconduct	
Defendant Claims/You Discover that Detective Nordo Was Materially Involved in the Investigation/Trial	(1) Complete the *Law Division CIU File Transfer Memo* and print three copies; (2) Staple one copy to our file and deliver the second copy to Sara Walenta; (3) Save and email an electronic copy of the memo to Sara Walenta and Frank McDevitt, with your Unit Supervisor and Nancy cc'ed; and (4) Deliver our file and case materials to Sara Walenta. **Note**: Mark any files delivered to Sara after 3:00 p.m. with the following day's date
Quashal—Technicalities	
One Notice of Appeal (Filed **after** June 1, 2018) with More than One CP-Docket # Listed	**Footnote** that the Commonwealth does not take a position on the matter, but acknowledge that Pa.R.A.P. 341 and the Pennsylvania Supreme Court's holding in *Walker*, 185 A.3d 969, may preclude review
One Notice of Appeal (Filed **before** June 1, 2018) with More than One CP-Docket # Listed	**Footnote** acknowledging the *Walker* decision regarding quashal, but explain that quashal is unnecessary because defendant's notice of appeal was filed before the *Walker* decision
Correct # of Notices of Appeal Filed, but Each Notice Lists More than One Docket #	Argue that this format does not violate *Walker*. *See Commonwealth v. Johnson*, 236 A.3d 1141 (Pa. Super. 2020) (en banc).
Victim Services	
Significant Potential that Case Outcome May Change or that Defendant May Obtain Relief	Consult with Heather Wames, Law Division Victim Services Coordinator
Case in Which DAO Concedes Relief that Could Result in a New Trial/Change in Sentence	Consult with Heather Wames, Law Division Victim Services Coordinator

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Memorandum

To: All Staff of the District Attorney's Office

From: District Attorney Krasner

Date: March 15, 2019

RE: Police Subpoena Policy

On September 4, 2018, the District Attorney's Office (DAO) increased efficiencies within our police subpoena policy by issuing subpoenas through the new DA - Workstation (DAWS).

Effective March 15, 2019, the DAO is implementing an updated police subpoena policy to in order to reduce court-related overtime costs.

The goal of this policy is to both send police court subpoenas via DAWS with more than 48 hours' notice[1] and to reduce the amount of police subpoenas that lead to court-related overtime costs. Both the DAO and the Philadelphia Police Department will conduct internal reviews on a regular basis in efforts to evaluate whether this policy is curtailing excessive overtime.

Police Subpoena Policy

1. WHEN TO SUBPOENA
   - Effective immediately, ADAs and all other staff that assist in subpoenaing police officers for court must send the subpoenas using DA Workstation (DAWS) as soon as possible after a case is continued.
     - **This means that subpoenas must be sent as part of your RETURN WORK not as part of your prep work. This includes cases that are leaving arraignment or a pretrial room (such as 404 or a SMART room).**

[1] Philadelphia Police Directive 6.2 (attached) states that "[o]fficers who do not receive at least 48 hours in advance of the time they are directed to appear for a required court appearance, other than a preliminary hearing, scheduled for a date the officer is not scheduled to work, shall be paid a minimum of 4 hours of overtime at a rate of 2.5 time the employee's regular rate..."

- Subpoenas sent after 5:30 PM on a business day are received the following business day. For example, a subpoena sent Monday before 5:30 PM must be for no sooner than Thursday, and subpoena sent after 5:30 PM must be for no sooner than Friday. Subpoenas sent after 5:30 PM on Fridays and during the weekend will not be received by the police until Monday (see "Deadlines to Subpoena" chart).

- If you are sending a police subpoena with less than 48 hours' notice due to an unforeseen circumstance, you are responsible for forwarding the 75-590 to your supervisor with an explanation as to why a late subpoena was sent.

2. WHO TO SUBPOENA

- **Only necessary police witnesses should be subpoenaed for court**. When preparing cases, ADAs should cancel unnecessary police witnesses. Specifically for preliminary hearings, staff should ensure they are only subpoenaing the appropriate witnesses for court (i.e. the surveillance officer on a PWID case or a single officer on an auto theft case).

- Under no circumstances should any staff subpoena all of the witnesses listed in DAWS/PARS for a case without evaluating the necessity of each witness. Supervisors should periodically review subpoenas being sent to determine where additional training is needed.

3. STAFF RESPONSIBLE FOR SUBPOENA

- ADAs are ultimately responsible for the police personnel subpoenaed. Paralegals subpoenaing on behalf of an ADA must select that ADAs name in DAWS so that the ADA is ultimately responsible for the subpoena.

- ADAs are responsible for ensuring the accuracy of their contact information on the verification page of DAWS, including phone number and unit assignment.

NOTE: The Standards and Accountability Division will provide each district/unit with an updated court notice recall register quarterly and/or upon request.

d. When it is necessary to notify an officer by telephone or email, ensure the name, rank and badge number of the ORS or their designee who notified the subpoenaed officer and how notification was made is documented on the court notice. Also, ensure this information is noted in the court notice book and on the district/unit's S&R.

e. Officers who do not receive notice at least 48 hours in advance of the time they are directed to appear for a required court appearance, other than a preliminary hearing, scheduled for a date the officer is not scheduled to work, shall be paid a minimum of 4 hours of overtime at a rate of 2.5 time the employee's regular rate (designated on the DAR by entering "Y" in the field "not given 48 hours notice"). The only exception is Preliminary Hearings.

1) The 48-hour notification starts when the officer is notified. The overtime rate will not apply to duplicate court notices for the same court case which are received less than 48 hours of the court date provided that the first notice was received 48 hours or more before the scheduled date.

2) If an officer has court already scheduled on their regular day off and they receive an additional court notice for a different case with less than 48 hours notice, they are not entitled to the additional overtime rate. The officer was previously scheduled for court and the new notice did not cause a disruption in the officer's schedule.

3) All other court notices received with less than 48 hours notice, except as mentioned in the above paragraphs, will be entitled to the 2.5 overtime rate. This includes court notices that are continued from the previous day which are less than 48 hours notice.

f. When an employee is transferred or detailed to another district/unit, notify the pertinent district/unit of the notice by immediately rerouting the notice via the Departmental computer system (Refer to Computer Training Bulletin #11-2), and make the appropriate notification on the district/unit's S&R.

B. Notifying supervisors of subpoenaed personnel will:

1. Ensure that Case Preps are not scheduled for an officer's SDO. Refer to Section 4-B-3.

2. Ensure subpoenaed personnel are promptly notified upon receipt of a court notice.

DEADLINES TO SUBPOENA

48 HOUR NOTICE DEADLINES

WHEN SUBPOENA IS SENT	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
	COURT DATE MUST BE NO SOONER THAN:						
BEFORE 5:30PM	THURSDAY	FRIDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	THURSDAY
AFTER 5:30PM	FRIDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	THURSDAY	THURSDAY

Municipal Court Unit - Perfetto Memo

From: Christopher Lynett, Assistant Chief, Municipal Court Unit
To: Members of the District Attorney's Profetto Working Group
Date: 5/29/2019

A. Outline

In April 2019, the Supreme Court of Pennsylvania announced its decision in Commonwealth v. Perfetto, 2019 WL 1866653 (Pa. 2019). Our Supreme Court held that where a defendant was charged with summary traffic offenses and misdemeanor crimes arising out of the same criminal episode, 42 Pa.C.S. § 110 (the compulsory joinder statute) required that all matters be tried together. Thus, if a defendant, like Marc Perfetto, is prosecuted and adjudicated for traffic tickets that stem from the same criminal episode as other misdemeanor offenses, then the Commonwealth is barred for prosecuting him at a future proceeding on those related misdemeanors.

This memo is intended to help inform and guide ADAs in the Municipal Court Unit in handling Section 110 motions brought pursuant to Perfetto.

B. Perfetto – Facts and Holding

A Philadelphia police officer stopped Marc Perfetto in July 2014 because his headlights were out. As a result, the Commonwealth charged Perfetto with the summary citation of driving without headlights, 75 Pa.C.S. § 4301(a)(a), and three counts of driving under the influence, 75 Pa.C.S. § 3802(a)(1), (d)(1), and (d)(2).

Two months later, on September 4, Perfetto was found guilty of the summary traffic offense *in absentia* by a Traffic Court hearing officer. Meanwhile, the Commonwealth filed a notice of jury demand on the DUI charges and, after a preliminary hearing, the matter proceeded to trial in the Court of Common Pleas. Before trial, however, Perfetto filed a motion to dismiss under Section 110. The trial court granted the motion on the basis that the four prongs of the compulsory-joinder statute had been satisfied—*i.e.*, that: (1) the former prosecution resulted in an acquittal or conviction; (2) the current prosecution was based upon the same criminal conduct or arose from the same criminal episode as the former prosecution; (3) the prosecutor was aware of the instant charges before the commencement of the trial on the former charges; and (4) the current offense occurred within the same judicial district as the former prosecution.

The Supreme Court of Pennsylvania ultimately affirmed the trial court's order, holding that the four prongs of the Section 110 analysis had been satisfied and the Commonwealth failed to proffer any basis to overcome the compulsory-joinder requirement. Specifically, the Court rejected the Commonwealth's claim that 42 Pa.C.S. § 112 permitted both prosecutions because the Municipal Court "had *jurisdiction* to adjudicate all of [Perfetto]'s charges"—all of which were graded as summary offenses or misdemeanors. Thus, so long as *the prior court could have adjudicated all of Perfetto's claims in a single proceeding*, Section 110 barred any subsequent prosecution.

C. **42 Pa.C.S. Sections 110 and 112**

The Supreme Court in Perfetto specifically addressed 42 Pa.C.S. §§ 110(1)(i)-(iii) and 112. A copy of Section 110, commonly referred to as the compulsory-joinder statute, is attached to this memo.

For Section 110 to apply, the defendant must demonstrate that: (1) the former prosecution must have resulted in an **acquittal or conviction**; (2) the current prosecution is based upon the **same criminal conduct or arose from the same criminal episode as the former prosecution**; (3) **the prosecutor was aware of the instant charges before the commencement of the trial on the former charges**; and (4) **the current offense occurred within the same judicial district as the former prosecution.**

Even if all of these requirements are met, Section 112 (a copy is likewise attached) provides an exception to compulsory joinder that permits a subsequent trial under limited circumstances. Relevant here, a later prosecution is permissible if "[t]he former prosecution was before a court which lacked jurisdiction **over . . . the offense**" or "was procured by the defendant **without the knowledge of the appropriate prosecuting officer** and with the **purpose of avoiding the sentence** which might otherwise be imposed."

Accordingly, the Commonwealth can invoke Section 112 to avoid the compulsory-joinder provision in cases where the first court (the Municipal Court, either traffic or general division) lacked jurisdiction to hear certain offenses. In Philadelphia, the Municipal Court has jurisdiction over: (1) summary offenses; (2) misdemeanors; and (3) felonies punishable by up to five years' imprisonment (PWID Marijuana). 18 Pa.C.S. § 1123(a)(2). Thus, because the Philadelphia Municipal Court had jurisdiction over both the traffic citation and the misdemeanor DUI, the exception in § 112 was inapplicable to Perfetto's case.

D. Perfetto Motions

First and foremost, Section 110 motions that invoke Perfetto are just that: **motions where a defendant bears the burden of satisfying all four elements of Section 110**. Thus, defense counsel will need to produce copies of the Traffic Court docket, which will allow us to either confirm or refute his/her Section 110 motion.

In any case where a Section 110 motion is raised, ADAs should ask for all of the relevant documents and then request to place the case on hold so you can review the file. If counsel only has electronic copies on his/her phone, request hard copies for yourself and the court to review. In the event that counsel will not produce hard copies, request the court order him/her to do so in order to allow us a fair response.

a. Preliminary Hearing Files or Cases Where a Felony Should be Charged

If an attorney raises a Perfetto claim on a case set for a preliminary hearing (or a case where we believe a felony should be charged), please follow the protocol below:

Cases with a complaining witness who has appeared: Assert that a Section 112 exception applies and, thus, Section 110 does not bar the subsequent prosecution because the Municipal Court lacks jurisdiction to enter "an acquittal or conviction" as to the pending felony charges.

If the court is entertaining the motion to dismiss that day, **request a hold for a supervisor to appear and call a supervisor**. Ideally we will put on evidence and then request the court HUA the Section 110 motion.

WE SHOULD NOT BE REQUESTING CONTINUANCES IN CASES WITH VICTIMS OR CIVILIAN WITNESSES WHO ARE PRESENT.

Cases with POs Only: Assert that Section 112 does not bar the subsequent prosecution of a felony. If the court requests further briefing on the issue, request that we put our case forward and HUA the Section 110 issue so we can file a brief. If the court is not inclined to follow that suggestion, request a date so we can submit case law and briefing on the issue. If the court wishes to adjudicate the issue that day, call a supervisor and place the case on hold until he/she arrives.

IN ANY FELONY CASE WHERE THE COURT GRANTS A SECTION 110 MOTION AT THE PRELIMINARY HEARING STAGE, IMMEDIATELY PASS THE FILE TO A SUPERVISOR.

b. **Trial Rooms**

Before Trial:

1. Look for any langue referencing a TVR/Traffic Citation.
2. If a citation was issued, look for it here: http://www.phillacourts.us/TrafficDockets/name/
3. Look up the TVR if you have access to the Traffic Court System.
4. If you locate the citation, determine if it is active or closed.
5. If active, confirm issued date and defendant is same.
6. If it is open, email robert.daisey@phila.gov ASAP with the MC Docket #, Defendants Name, DOB, License Number, and Citation # and ask for that to be withdrawn.

If the traffic ticket has been adjudicated, we need to determine if it was via a mail-in plea (email, U.S. mail, or paid in person without a hearing) or after a hearing (either defendant appeared or was tried in absentia).

If it was via mail-in plea or in person without a hearing, then a subsequent prosecution is NOT barred under Commonwealth v. Gimbara, 835 A.2d 371, 377 (Pa. Super. 2003). In that case, the Superior Court held that the third prong—*i.e.*, that "the prosecutor must have been aware of the current charges before the commencement of the trial for the former charges"—was not met because the mail-in plea deprives the Commonwealth of the opportunity to join the cases at the summary-traffic hearing. The Superior Court explained that:

> [T]he Commonwealth does not control the plea process in summary proceedings where a defendant pleads by mail rather than appearing in person. When a defendant appears in person before a district justice, the prosecuting officer may prevent the entry of different pleas, thus exercising the burden placed upon the Commonwealth by Section 110. Where a defendant mails in his pleas, such an opportunity is not presented, because the prosecuting officer has no notice of when the pleas come into the district justice's office. N.T., 4/9/02, at 6. **Where there is no opportunity for the Commonwealth to exercise its obligation under Section 110, the purposes of Section 110 would not be advanced.**

Gimbara, 835 A.2d at 377 (bold emphasis added).

If the matter was adjudicated after a hearing of any sort, Perfetto applies. In those cases, the ADA should review the relevant Traffic Court documents and the file. If after that review the ADA concludes that Section 110 and Perfetto apply, he/she should say that Perfetto controls and that you have no additional argument.

The trial court should GRANT the motion. However, some courts are requiring us to withdraw cases. So long as the Traffic Docket is satisfactory, you can withdraw if the court requires you to do so.

3/25/19

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Effective Immediately

Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (*Giglio* Information)

During prior administrations, the Philadelphia District Attorney's Office (DAO) had arrangements with local law enforcement agencies regarding how each agency would disclose police officer misconduct to the DAO. Said arrangements and any resulting policies were developed in response to a prosecutor's constitutional obligations to disclose favorable evidence, no matter where in the government it is held, to the defense.

In recognition of a law enforcement officer's special status as a witness in a criminal case *and* as a prosecution-team member, the current administration has reviewed prior arrangements and has adopted a new police officer misconduct disclosure policy. As a consequence, **effective immediately**, the DAO issues this mission statement and request for compliance from each law enforcement agency filing criminal charges with the DAO.

Mission Statement

The DAO has an affirmative duty to critically inquire as to an officer's conduct, personnel history or information from a personnel file that might constitute exculpatory, impeachment or mitigating information in a particular criminal case (hereinafter referred to as misconduct). In the specific context of officer personnel files, *Brady* requires the DAO to direct the custodian of the files to inspect them for exculpatory evidence and inform the prosecution of the results of that inspection. *United States v. Dent*, 149 F.3d 180, 191 (3rd Cir. 1998) (citing *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963)). These types of inquiries and directives are only meaningful if the DAO then properly obtains and timely discloses necessary information regarding the identified misconduct to the defense. Pa.R.Crim.P. 573(B)(1)(a). *See also*, *US v. Bagley*, 473 U.S. 667 (1985).

All misconduct disclosure procedures apply to "officers," defined as peace officers, jailers, and civilian employees acting in a law enforcement capacity and employed by county or city law enforcement or any other law enforcement agency with jurisdiction in Philadelphia County, as well as arson investigators employed by county or city fire agencies within Philadelphia County.

The DAO is required to exercise due diligence in light of our statutory discovery obligations under Pa.R.Crim.P. 573(B)(1)(a) and our constitutional responsibilities under *Brady* and its progeny to ensure that all defendants receive a fair trial. Failure to disclose such evidence can result in the reversal of a conviction and, in extreme cases, prosecution of violators. *See Brady*, 373 U.S. at 87. It can also result in conviction of the innocent while the guilty go free. The United States Supreme Court has long held that evidence that could potentially assist in the defense of an individual accused of a crime must be disclosed to the defense. The law also places the duty to disclose squarely on prosecuting attorneys; accordingly, information known to law enforcement agencies, even if not disclosed by those agencies to the prosecution, is still imputed to the prosecution. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Comm. v. Collins*, 957 A.2d 237, 254 (Pa. 2008). In furtherance of this stated mission, an internal office database has been created in the DAO to maintain all qualifying information.

These efforts by the DAO in no way reduce the independent *Brady* obligations of other law enforcement agencies , including where the DA fails to meet its *Brady* obligation. Officer privacy rights, to the extent that they may exist, will be safeguarded under circumstances that do not violate the law.

Reporting Policies and Procedures

1. Misconduct Defined and Law Enforcement Agency's Obligation to Notify DAO

A. General Obligation to Disclose

- The DAO will rely on the professional policing practices of our partners in law enforcement to notify us of any potentially qualifying misconduct by officers that should be disclosed to the defense. Each respective law enforcement agency must determine whether there are any instances which fall into any of the categories listed below and, if so, make those instances known to the DAO.

- However, the enumerated definitions and categories provide a non-exclusive list of conduct, violations and offenses that implicate disclosure. Any list is not meant to be exhaustive, nor can it be exhaustive. Prosecutors, who are charged with the responsibility over "all criminal and other prosecutions, in the name of the Commonwealth," are "forced to make judgement calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the potential evidentiary record." *Kyles*, 514 U.S. at 438-39.

B. Specific Requests

- With the above caveat in mind, the DAO is directing the custodian of records in each law enforcement agency to examine current and future officers' personnel files and current and future officers' conduct and notify the DAO as soon as possible when:

  1) an officer is named in a criminal complaint or indictment, or is the subject of an ongoing criminal investigation for any crime by any agency other than a non-criminal traffic violation;

2) an officer has been charged with a felony or misdemeanor, other than a non-criminal traffic violation, resulting in a conviction or pretrial diversion;

3) an officer is the subject of a pending investigation, sustained finding, or conclusion by the law enforcement agency, at any administrative or disciplinary level, for any of the following:

a. misrepresentation or failure to disclose a material fact on the officer's employment application;

b. untruthfulness or deception regarding facts in a report, statement, or testimony at a hearing or other official proceeding or investigation concerning conduct of the officer or others;

c. conduct that would be a violation of an individual's constitutional rights;

d. bias or prejudice against an individual, class, or group of persons;

e. improper use of force against an individual; or

f. altering, tampering, concealing, or misuse of evidence – with the exception of legitimate manipulation in the normal scope of law enforcement business (such as amending a report to correct a typographical error);

4) an employee resigns, receives a demotion, or is subject to other disciplinary or employment-related action when an investigation is imminent or pending involving any matter listed in subsection 1, 2, 3(a) – (f) above, or in relation to 5 below; or

5) in the case of an expert witness, the law enforcement agency has information related to the expert's performance deficiencies that affect the integrity of the expert's conclusion or opinions.[1]

2. Compliance Procedure

A. Law Enforcement Agency Process

- Furnish to the DAO the officer's name, payroll number, badge number; date of birth; and
    1) a description of the misconduct if there is a pending investigation; or

[1] Performance deficiencies that affect the integrity of the expert's conclusions or opinions include a reportable event required to be disclosed to the agency's accrediting body. Any subsequent action by the accrediting body, or any subsequently required root-cause analysis, should also be disclosed to the DAO. A reportable event is one which 1) impacts the fundamental reliability of the overall laboratory/agency work product such that it poses a significant risk to processes, results, test/calibration items or judicial proceedings; or 2) does not impact the fundamental reliability of the overall laboratory/agency work product but does cast substantial doubt on the quality of the work product. A reportable event does not include nonconformity with applications of standards, procedures or policies that are limited and appropriately addressed during quality assurance or control protocols and attendant conducted root cause analysis, provided that such nonconformity is contained and disclosed within the bench notes of any affected case(s).

2) all relevant documents and information if there has been a sustained finding regarding the misconduct.

- State whether the disclosure is classified as a "pending investigation" or "sustained finding." Pending investigation or sustained finding is defined in a manner consistent with the law enforcement agency's individual rules and procedures.

- Update the DAO of any changes to classifications, including a notification of requested removal from the database where warranted as a result of the investigation.

- Err on the side of transparency; contact the DAO if in doubt as to whether the conduct requires disclosure.

B. District Attorney Process

- Categorize the disclosure as either "pending" or "final," as relayed by the law enforcement agency, and notify the law enforcement agency of inclusion in the database. The "pending" category will contain information submitted about pending formal investigations. If pending allegations are sustained, the inclusion will be re-categorized as final. If the allegations are not sustained, the case may be removed from the database.

- Update the appropriate law enforcement agency regarding any reclassification or removals.

- Classify any allegations that, if sustained would lead to a "final" classification, but in which the officer resigns or is terminated before the investigating body makes formal findings as "final." Further, the DAO shall maintain this information in the database unless and until good cause is shown for its removal.

- Notify the law enforcement agency of information independently discovered by the DAO that may warrant inclusion in the database. If the independently discovered information is a claim of untruthfulness from conduct occurring during judicial proceedings, the individual prosecutor must immediately report such allegation to the prosecutor's supervisor for the investigation and initiation of appropriate charges, if any.

- The DAO will require Assistant District Attorneys (ADAs) to check the database as soon as practicable (at charging and when officer subpoenas are issued) and notify defense counsel of inclusions. "Pending" notices should normally be made to the defense as a matter of course. Provided, however, in the rare circumstances where there is reason to believe that disclosure may unfairly prejudice the Commonwealth or the individual officer, the disclosure shall first be submitted to the court under seal with a request for a court ruling on the duty, if any, of the DAO to disclose to defense counsel. Notice shall be provided to defense counsel where this procedure is invoked.

- Disclosure information will be used to meet the Commonwealth's obligation under the law with respect to cases that we prosecute.

- The decision as to whether an officer in the database will be called as a witness will be made on a case-by-case basis.
- There will be a rebuttable presumption not to call an officer who is included in the database for:
  1) criminal conduct involving deceit or untruthfulness; and/or
  2) untruthfulness or deception regarding facts in a report, statement, or testimony at a hearing or other official proceeding or investigation concerning on-duty conduct of the officer or others.
- **Disclosure does not equal admissibility and, where appropriate, the ADA will object to the admissibility of the disclosed evidence through written motions. Where appropriate, the DAO will also seek protective orders to protect the privacy concerns of officers where determinations are not final.**
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Version 3.0 – Revised 7/30/2019

LAWRENCE S. KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
THREE SOUTH PENN SQUARE
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215-686-8000

Effective Immediately

Mission Statement and Request for Compliance Regarding Police Misconduct Disclosure (*Giglio* Information)

During prior administrations, the Philadelphia District Attorney's Office (DAO) had arrangements with local law enforcement agencies regarding how each agency would disclose police officer misconduct to the DAO. Said arrangements and any resulting policies were developed in response to a prosecutor's constitutional obligations to disclose favorable evidence, no matter where in the government it is held, to the defense.

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All misconduct disclosure procedures apply to "officers," defined as peace officers, jailers, and civilian employees acting in a law enforcement capacity and employed by county or city law enforcement or any other law enforcement agency with jurisdiction in Philadelphia County, as well as arson investigators employed by county or city fire agencies within Philadelphia County.

The DAO is required to exercise due diligence in light of our statutory discovery obligations under Pa.R.Crim.P. 573(B)(1)(a) and our constitutional responsibilities under *Brady* and its progeny to ensure

that all defendants receive a fair trial. Failure to disclose such evidence can result in the reversal of a conviction and, in extreme cases, prosecution of violators. *See Brady*, 373 U.S. at 87. It can also result in conviction of the innocent while the guilty go free. The United States Supreme Court has long held that evidence that could potentially assist in the defense of an individual accused of a crime must be disclosed to the defense. The law also places the duty to disclose squarely on prosecuting attorneys; accordingly, information known to law enforcement agencies, even if not disclosed by those agencies to the prosecution, is still imputed to the prosecution. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Comm. v. Collins*, 957 A.2d 237, 254 (Pa. 2008). In furtherance of this stated mission, an internal office database has been created in the DAO to maintain all qualifying information.

These efforts by the DAO in no way reduce the independent *Brady* obligations of other law enforcement agencies , including where the DA fails to meet its *Brady* obligation. Officer privacy rights, to the extent that they may exist, will be safeguarded under circumstances that do not violate the law.

Reporting Policies and Procedures

1. Misconduct Defined and Law Enforcement Agency's Obligation to Notify DAO

A. General Obligation to Disclose

- The DAO will rely on the professional policing practices of our partners in law enforcement to notify us of any potentially qualifying misconduct by officers that should be disclosed to the defense. Each respective law enforcement agency must determine whether there are any instances which fall into any of the categories listed below and, if so, make those instances known to the DAO.

- However, the enumerated definitions and categories provide a non-exclusive list of conduct, violations and offenses that implicate disclosure. Any list is not meant to be exhaustive, nor can it be exhaustive. Prosecutors, who are charged with the responsibility over "all criminal and other prosecutions, in the name of the Commonwealth," are "forced to make judgement calls about what would count as favorable evidence, owing to the very fact that the character of a piece of evidence as favorable will often turn on the context of the potential evidentiary record." *Kyles*, 514 U.S. at 438-39.

B. Specific Requests

- With the above caveat in mind, the DAO is directing the custodian of records in each law enforcement agency to examine current and future officers' personnel files and current and future officers' conduct and notify the DAO as soon as possible when:

  1) an officer is named in a criminal complaint or indictment, or is the subject of an ongoing criminal investigation for any crime by any agency other than a non-criminal traffic violation;

  2) an officer has been charged with a felony or misdemeanor, other than a non-criminal traffic violation, resulting in a conviction or pretrial diversion;

3) an officer is the subject of a pending investigation, sustained finding, or conclusion by the law enforcement agency, at any administrative or disciplinary level, for any of the following:

a. misrepresentation or failure to disclose a material fact on the officer's employment application;

b. untruthfulness or deception regarding facts in a report, statement, or testimony at a hearing or other official proceeding or investigation concerning conduct of the officer or others;

c. conduct that would be a violation of an individual's constitutional rights;

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f. altering, tampering, concealing, or misuse of evidence – with the exception of legitimate manipulation in the normal scope of law enforcement business (such as amending a report to correct a typographical error);

4) an employee resigns, receives a demotion, or is subject to other disciplinary or employment-related action when an investigation is imminent or pending involving any matter listed in subsection 1, 2, 3(a) – (f) above, or in relation to 5 below; or

5) in the case of an expert witness, the law enforcement agency has information related to the expert's performance deficiencies that affect the integrity of the expert's conclusion or opinions.[1]

2. Compliance Procedure

A. Law Enforcement Agency Process

- Furnish to the DAO the officer's name, payroll number, badge number; date of birth; and
  1) a description of the misconduct if there is a pending investigation; or
  2) all relevant documents and information if there has been a sustained finding regarding the misconduct.

- State whether the disclosure is classified as a "pending investigation" or "sustained finding." Pending investigation or sustained finding is defined in a manner consistent with the law enforcement agency's individual rules and procedures.

[1] Performance deficiencies that affect the integrity of the expert's conclusions or opinions include a reportable event required to be disclosed to the agency's accrediting body. Any subsequent action by the accrediting body, or any subsequently required root-cause analysis, should also be disclosed to the DAO. A reportable event is one which 1) impacts the fundamental reliability of the overall laboratory/agency work product such that it poses a significant risk to processes, results, test/calibration items or judicial proceedings; or 2) does not impact the fundamental reliability of the overall laboratory/agency work product but does cast substantial doubt on the quality of the work product. A reportable event does not include nonconformity with applications of standards, procedures or policies that are limited and appropriately addressed during quality assurance or control protocols and attendant conducted root cause analysis, provided that such nonconformity is contained and disclosed within the bench notes of any affected case(s).

- Update the DAO of any changes to classifications, including a notification of requested removal from the database where warranted as a result of the investigation.

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Version 3.1 – Revised 3/2/2020

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9/14/18

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POLICIES REGARDING: (1) DISCLOSURE OF EXCULPATORY, IMPEACHMENT, OR MITIGATING INFORMATION, (2) OPEN-FILE DISCOVERY

District Attorney Lawrence S. Krasner

Effective Date: 10/1/2020

Subject to any future changes in the law, this sets forth the office's policies regarding: (1) the disclosure of exculpatory, impeachment, or mitigating information, pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and its progeny; Rule 573 of the Pennsylvania Rules of Criminal Procedures; Rule 3.8 of the Pennsylvania Rules of Professional Conduct; and Rule 3.8(g) & (h) of the American Bar Association Model Rules of Professional Responsibility, as well as (2) open-file discovery.

I. The Disclosure of Exculpatory, Impeachment, or Mitigating Information

A. THE LAW AND ETHICS

- In Brady, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963).
- Pa.R.Crim.P. 573(B)(1)(a) requires that a prosecutor disclose "[a]ny evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth."
- Pa.R.P.C. 3.8(d), in turn, requires a prosecutor in a criminal case to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."
- ABA Model R.P.C. 3.8 (g) addresses a prosecutor's post-conviction obligation to disclose Brady evidence by specifically stating that "[w]hen a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that

evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

- ABA Model R.P.C. 3.8 (h) also requires a prosecutor to seek to remedy a conviction when he or she is aware of clear and convincing evidence which establishes that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit.

B. GUIDANCE

Information is *exculpatory* if it tends to excuse, justify, or absolve the guilt of a defendant. *Impeachment* information refers to a subcategory of exculpatory information that can be used to attack the credibility of a Commonwealth witness. Although it may sometimes be more difficult to identify, courts have treated impeachment information as significant because the truthfulness and reliability of a given witness may ultimately be determinative of a defendant's guilt or innocence. Information is *mitigating* if it tends to reduce the moral blameworthiness of the defendant.

While such definitions are facially simple, any application of these definitions to a given case requires a fact-specific analysis with the understanding that disclosure compliance is contextual.

It is important to understand, however, that questions of evidentiary materiality should *not* factor into a prosecutor's determination of which pieces of information qualify as exculpatory, impeaching, or mitigating. A prosecutor has the obligation to disclose exculpatory, impeaching, or mitigating evidence—full stop.

For purposes of these Policies, this office considers the court-determined constitutional obligations laid down in Brady and its progeny to be co-extensive with the rules-based obligations observed by the Commonwealth set out in the rules of criminal procedure and professional conduct as well as the ABA Model Rules' extension of prosecutorial disclosure obligations in the post-conviction realm.

C. POLICY

Assistant district attorneys must understand and comply with their constitutional, statutory, and ethical duties to disclose exculpatory, impeaching, and mitigating information to the defense. These duties exist regardless of the particular form of the information (i.e., written v. oral, recorded v. unrecorded) and regardless of whether the criminal case is resolved via plea or trial.

In the event that an assistant district attorney is uncertain about disclosure or concludes that disclosure is in fact not required, that attorney shall consult with his or her supervisor regarding the matter. In cases where an assistant district attorney decides to withhold information, he or

she must document and be prepared to articulate a basis for that decision. If additional guidance is needed regarding whether information falls within an assistant district attorney's constitutional, statutory, or ethical disclosure obligations, the Conviction Integrity Unit should be consulted.

Any disclosure of exculpatory, impeaching, and mitigating evidence shall be recorded in an approved office disclosure form and shall occur as soon as practicable. Because a prosecutor's statutory and ethical duty to disclose such information is a continuing obligation, if new information becomes known to or comes into the possession of an assistant district attorney, the existence of that information shall be promptly disclosed to the defendant or the court.

A prosecutor's Brady obligation is based on due process and exists to ensure a defendant a fair trial as it unfolds. However, in light of the ABA Model R.P.C.'s extension of Brady obligations to the post-conviction stage, if an assistant district attorney acquires information which casts doubt upon the correctness of a conviction, he or she shall adhere to Rule 3.8(g) and (h) by promptly disclosing to the defense any new Brady information that is acquired or learned post-trial.

Intentional failures to disclose exculpatory, impeaching, or mitigating information will not be tolerated and will be subject to discipline.

II. Open-File Discovery

A. OVERVIEW

Open-file discovery ("OFD") refers broadly to a concept of prosecutorial transparency, wherein the prosecution provides the defense with everything in its file, irrespective of evidentiary materiality. Proponents of OFD emphasize the ways in which the practice coheres with arguably the most elemental tenet of our legal system, the pursuit of truth.

More pointedly, OFD has several significant advantages:

- *Fairness*: Since defendants in criminal trials typically wield less resources, OFD gives them the opportunity to level the legal playing field by accessing information that would otherwise be cost-prohibitive.
- *Informed Decision-Making*: Informed defendants can make more deliberate decisions about whether to accept a plea or proceed to trial when they know the full weight of the evidence against them.
- *Efficiency*: OFD conserves prosecutorial and judicial resources by encouraging defendants who fully understand the weight of the evidence against them to plead guilty.
- *Error reduction*: Because OFD requires full disclosure without regard to materiality, prosecutors are not faced with the kind of discretionary disclosure decisions that can result in inadvertent or erroneous evidentiary suppression.

B. CURRENT LEGAL TERRAIN

Presently, there is no national model for OFD, with states falling along a continuum with respect to how much information prosecutors must disclose to the defense. Although this policy draws from the precepts of OFD insofar as it seeks to excise the question of materiality from evidentiary analysis, the OFD policy is not assuming any position on the logistical issues associated with implementing OFD office wide. With that said, this office is actively working with IT and the Executive Team to create an electronic infrastructure and case management system capable of maintaining case files in such a way as to allow for efficient identification of information disclosable pursuant to OFD while also ensuring privileged information exempt from OFD is maintained separately so as to protect the confidentiality of that information (i.e., witness safety, grand jury and work product).

III. GOAL

All criminal defendants deserve a fair trial and reasonable access to justice thereafter. Whether intentional or negligent, prosecutorial suppression of exculpatory, impeaching, and/or mitigating information at the plea, trial, or post-trial stage can result in flawed adjudications and unwarranted convictions, which directly undermines perhaps the most basic tenet of our legal system, the pursuit of truth.

In enacting these policies and committing to adopting OFD as soon as practicable, this office demonstrates an ongoing commitment to the kind of fair criminal law practice that will invariably reinforce its legitimacy in the eyes of the community it serves.

M E M O

To: CIU

From: Michael Garmisa, ADA

Interim Supervisor, CIU

Date: 1/9/2022

Re: CIU Guidelines for Handling Secret Grand Jury Information.

Grand Jury Background

The Investigating Grand Jury is empaneled and supervised by a Common Pleas Judge designated by the President Judge of the First Judicial District. The Investigating Grand Jury has the authority to investigate, which includes subpoena-power enforced by the possibility of criminal contempt. 42 Pa.C.S. § 4548. Typical cases are not brought to the attention of the Investigating Grand Jury. Instead, a case may only be submitted to the Investigating Grand Jury when "the investigative resources of the grand jury are necessary for proper investigation." 42 Pa.C.S. § 4550; *see also In re County Investigating Grand Jury of April 24, 1981*, 500 Pa. 557 (1983) ("Traditionally in Pennsylvania, we have been more restrictive in the interpretation of the powers vested in investigating grand juries than has been the practice in many other jurisdictions."). The attorney for the Commonwealth may be present at Investigating Grand Jury proceedings. 42 Pa.C.S. § 4548.

In Philadelphia, Assistant District Attorneys ("ADA") in the investigative units and the Homicide units have utilized the Investigating Grand Jury. The Special Investigations Unit ("SIU") typically supervises the administrative tasks of all cases submitted to the Investigating Grand Jury. Historically, supervisory approval at the First-Assistant level has been required to submit a case to the Investigating Grand Jury.

Grand Jury Secrecy

Proceedings before the Investigating Grand Jury are secret. 42 Pa.C.S. § 4549. The court controls the transcripts of grand jury proceedings, and maintains their secrecy Pa.R.Crim.P. 229; 42 Pa.C.S. § 4549. ADAs are permitted by the Court to access information occurring before the Investigating Grand Jury in connection with "the performance of their duties" and are sworn to secrecy. 42 Pa.C.S. § 4549. Additional laws govern the confidentiality of some information. *See generally* 18 Pa.C.S. § 9101, *et seq.* (Criminal History Record Information Act); *In re: Fortieth Statewide Investigating Grand Jury* 647 Pa. 489 (2018) (addressing constitutional right to protection of reputation and grand jury reports). "Other persons," such as non-ADA administrative personnel and law intern/externs may also access grand jury information as necessary, and "shall be

sworn to secrecy… and shall not disclose any information pertaining to the grand jury." Pa.R.Crim.P. 231 (c); § 4549 (b).

Individuals must be sworn to each individual Investigating Grand Jury. (This is different from the custom and practice of the Indicting Grand Jury). Interns and externs will generally not be sworn to the currently sitting Investigating Grand Jury, if any. Therefore, open ongoing investigation should not be discussed with interns/externs.

Everyone Must Affirmatively Protect the Secrecy of Grand Jury Information

ADAs and other persons "shall be in contempt of court if they reveal any information which they are sworn to keep secret." 45 Pa.C.S. § 4549 (b). "The supervising judge of [the Investigating Grand Jury] has the continuing responsibility to oversee grand jury proceedings, a responsibility which includes insuring the solemn oath of secrecy is observed by all participants." *In re Dauphin County Fourth Investigating Grand Jury*, 610 Pa. 296, (2011). Any violation of grand jury secrecy will be reported to the supervising judge of the investigating grand jury. Violations of grand jury secrecy are taken very seriously. *See generally Commonwealth v. Kane*, 2018 Pa. Super. 137, 188 A.3d 1217 (2018) (Pennsylvania Attorney General Kane was convicted and incarcerated for obstructing an investigating into the leaking of secret grand jury information).

Attorneys for the Commonwealth should take affirmative steps to preserve the secrecy of grand jury proceedings by protecting wider categories of information than the minimum required by the Investigating Grand Jury Act, and have been criticized for failing to do so. *See In re Dauphin County Fourth Investigating Grand Jury*, 610 Pa. 296, 329 (2011) (discussing investigation into violations of grand jury secrecy and finding "[h]ad the [Dauphin County] District Attorney's Office been more attentive to its obligations to preserve secrecy… the question of breach of secrecy may well never have arisen.").

General Best Practices to Protect Grand Jury Information:

At a minimum the following information must be kept secret:

- Transcripts or accounts of the testimony of grand jury witnesses.
- The Investigating Grand Jury Submission.
    - This includes the existence of the investigation, and the subject-matter and/or target of an investigation.
- Documentary evidence obtained or reviewed by the grand jury (including exhibits, subpoena returns, and search warrant returns).
- Information that reveals the identities of witnesses.
- Deliberations or questions of the grand jury, or any other material that might reveal the content of grand jury proceedings (including the failure to seek or obtain a Presentment).

- Generally, the questions of jurors will be redacted from the testimony transcripts prior to disclosure.

- The identity of a grand juror.
  - Pay special attention to any document (i.e. a Presentment) that might be signed by the foreperson. The foreperson's signature will always be redacted prior to any disclosure.

Consistent with the principles of *In re Dauphin County Fourth Investigating Grand Jury* the following guidelines shall be observed when working on a project with grand jury information:

- The following information shall be treated as covered by grand jury secrecy (unless disclosure is approved by a supervisor):
  - Internal Memos concerning the Grand Jury, which might be prepared prior to the filing of the submission.
  - The location and meeting times of the grand jury.
  - The identities of investigators, witnesses, prosecutors, court reporters, paralegals, police officers, judges, and other personnel who assisted in the grand jury, but who did not appear as witnesses.
  - Any information an ADA described as grand jury material (including summaries of investigations, or potential future investigations).
- Grand Jury information shall not be disclosed to anyone, unless you know that the person you are speaking to has already been sworn to secrecy.
  - Grand jury information should not be discussed with anyone unless the ADA knows the other person has already been sworn to secrecy. (All members of the CIU are sworn to the grand jury).
- Grand Jury materials should generally not be transmitted through email.
  - Email is not a secure method of communication. It is not encrypted.
  - Emails are frequently mis-sent, accidentally forwarded.
  - Emails are frequently requested as discovery during unrelated third-party litigation, and subject to sweeping e-discovery productions. The process of removing grand jury information from e-discovery keyword searches is time-consuming, and prone to error.
- **Special concerns for Intern/Externs:**
  - Interns will generally not be sworn to the currently sitting grand jury (if any), and therefore will not have access to information about ongoing investigations.
  - **Interns/Externs shall not discuss grand jury information with faculty, because faculty are not sworn to secrecy.** The faculty is aware of this limitation and will not ask you to discuss grand jury materials.
  - The intern/extern will not use any written memorandum containing grand jury information as a writing sample. This rule applies even if the memorandum has been redacted, unless an ADA has provided written

approval. Because it is often impossible to sufficiently redact a memorandum, approval will rarely be granted.

- Grand Jury transcripts, exhibits, documents, or copies thereof shall never be removed from the DAO.

Special Considerations for CIU Cases

Over the years, the DAO has utilized the Investigating Grand Jury to investigate homicides. Therefore, Investigating Grand Jury information may be present in the trial boxes of a case being reviewed by the CIU.

Sometimes this Grand Jury information has been disclosed to the defense prior to trial (upon application of the Commonwealth and pursuant to a disclosure order by the Supervising Judge of the Investigation Grand Jury). Sometimes, this information has not been disclosed. And sometimes, some grand jury information has been disclosed (certain witness transcripts) while other grand jury information (different witness transcripts) has not been disclosed.

This presents a special problem for CIU, which generally permits the defense to review the entire DAO trial file, pursuant to the Discovery and Cooperation Agreement ("DCA"). This is consistent with the principal of providing open-file discovery, which furthers fairness and the interests of justice. The DAO file should not be made available to the defense until it has been inventoried.

If grand jury materials are discovered during the inventory process, the ADA should attempt to determine whether this information is still subject to grand jury secrecy. For example, if the file contains an appropriate disclosure order then the materials may be made available to the defense pursuant to the existing order. Similarly, if the materials have been used as exhibits in prior proceedings (trial, or PCRA evidentiary hearings) then the ADA may treat those exhibits as already having been disclosed.

However, there may be situations (because files are often incomplete) where it is not immediately obvious whether the disclosure of grand jury information has previously been authorized and/or disclosed. In those situations, the CIU will not make the trial boxes/grand jury information available to the defense until a new disclosure order is obtained from the Supervising Judge.

The application for a disclosure order will make clear that that the request for a disclosure order is prophylactic, and that disclosure may already have been authorized. The disclosure order will contain protective conditions and will be served on the defense attorney when discovery is provided.

The CIU investigation of the case will often involve an investigation into whether this information has in fact already been disclosed; or put another way, has been suppressed from the defense. If the information was never disclosed to the defense

claims under *Brady/Giglio*, new evidence, and/or government interference may follow. Other times, further investigation may reveal the information was previously disclosed, or (for other reasons) is not legally dispositive of the current claims (*i.e.* not material).

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DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
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215-686-8000

December 18, 2019

Lieutenant Governor John Fetterman, Chairman
Lieutenant Governor's Office
Pennsylvania Board of Pardons
333 Market St, 15th Floor
Harrisburg, Pennsylvania 17126-0333

SENT VIA REGULAR MAIL AND E-MAIL C/O SEC. BRANDON FLOOD (bflood@pa.gov)
CC CARLA HAGY (chagy@pa.gov)
CC HAYLEY BARRETT (habarrett@pa.gov)

Re: Philadelphia District Attorney's Office – Approach and Guidelines for Review of Clemency and Commutation Applications

Dear Chairman Fetterman:

As you know, the Philadelphia District Attorney's Office ("DAO") has endeavored over the past several months to provide input to the Board of Pardons as to the merits of each clemency applicant requesting commutation of their life sentence prior to any public hearing on that application. As we have informed the Board, the DAO now provides that input pursuant to an approach of open-minded and individualized assessment of each request, rather than a reflexive, categorical inclination toward opposition.

In previous administrations, the effective policy and practice of the DAO was to apply a presumption whereby the DAO opposed most, if not all, commutation applications. The new position of the DAO instead takes seriously its responsibility to provide in-depth, holistic, evidence-based, and individualized assessment to each and every request for clemency, with a grounding in the facts, and an open mind toward moving away from that previous status quo. As part of an approach that prioritizes public safety and wise use of scarce resources, the DAO has supported, and will continue to support, many clemency applications involving aging inmates who no longer, by dint of their age, condition, and record of rehabilitation, pose a continuing threat to society—where the costs of continued incarceration are so great, but do not come with concomitant benefits to the public. Prevention of future crime requires wise use of resources that

could support education, treatment, policing, and other efforts more effective in preventing crime than corrections.

We write now to advise the Board about the contours of our assessment process, so that the Board may understand our input in individual cases, without an exhaustive recounting of the particulars in each and every communication we send to the Board. We are providing a copy of this letter to each member of the Board in the hopes that it will illuminate our process and our thinking as you consider our recommendations and input with regard to individual applications.[1]

Victim Contact

At the outset, we note that our approach involves making every reasonable effort to identify, locate, and contact the surviving next of kin to the victim, based on the often-limited information and resources available, in order to provide information about a commutation application and serve as a resource for questions and concerns. In every case where we are successful in reaching the victim's next of kin, we proactively discuss the Office of Victim Advocate ("OVA") as a resource, as well as the option of formally registering with OVA if they have not done so already. We also work collaboratively with OVA on these efforts as much as is practicable and appropriate.

General Approach

As you may have noticed, our present approach to commutation requests has led us to support requests where the applicant has served a substantial, reasonable, and appropriate amount of time in prison, and we are satisfied that there would be little public safety risk should the applicant's request be granted. While other issues and concerns are present in individual requests and given due weight, these two issues—time served, and public safety—are of paramount importance as we consider whether to support an individual request for a commutation.

While we endeavor to provide clear feedback to the Board, sometimes we are compelled to offer more nuanced and substantive feedback about specific concerns or reservations, rather than a simple answer of "support," "oppose," or "no opinion." In those cases, as in all other cases, we strive to provide feedback that is useful; we are always happy to speak with any member of the Board, or his or her staff, about any underlying issues in a clemency application at any time during the clemency process.

As a general rule, certain cases involving particularly severe or egregious issues are considered under more stringent standards by the DAO, and applicants whose cases fall into those categories are generally held to a higher burden of persuasion in order to garner the support of the DAO. Nevertheless, they are assessed according to the same protocol and rubric as the

[1] A copy of this letter will also be attached as an exhibit to individual letters in all future requests for input on commutation applications.

larger class of cases generally, and every applicant is given a holistic, in-depth, and individualized assessment.

When assessing either these "higher-burden" cases or the greater class of cases, the DAO looks both to information regarding developments in the years since the underlying offense as well as information regarding the offense itself. We are mindful that the facts of the underlying cases are all painful and remain salient and pointed memories to the loved ones of the victims who were harmed in those cases. However, we are also mindful of the maxim popularized by Bryan Stevenson, that each of us is more than the worst thing we have done, and endeavor to balance the crime itself with the history of how each applicant has spent their time in the years since.

Factors Considered in Individualized Review

The primary factors that we consider are the amount of time already served, and the potential risk to public safety should an applicant's request for commutation be granted. (While we do make all reasonable efforts to locate, contact, and discuss clemency applications with the families of victims, we are mindful that we, as representatives of the Philadelphia District Attorney's Office, do not serve as the "voice" of the victims, and that victims have their own avenue for reaching out to the Board of Pardons in clemency cases.) We also consider, as appropriate and on a case-by-case basis, factors relating to the underlying prosecution of the case, any special vulnerabilities of the applicant while incarcerated, and any other relevant factor under a holistic, "totality of the circumstances," approach.

Amount of Time Served

When it comes to amount of time served, our general approach is that we will, in most cases, only seriously consider supporting a commutation application if the applicant has served a substantial, reasonable, and appropriate proportion of their sentence. We look to sentences for similar crimes in this and other jurisdictions for guidance where available and appropriate, and to plea offers extended by this and other offices under similar circumstances to the applicant's case.

Public Safety

Public safety is the most expansive, and in some ways, the most important factor in our analysis and review of commutation applications. We consider the applicant's record of rehabilitation during incarceration, including but not limited to the following sub-factors:

- the applicant's disciplinary record (including consideration not just of the number of disciplinary citations, but also the classes or types of such citations, the underlying facts of those incidents (where appropriate), the context of those citations, and the trajectory of the disciplinary record;

- whether the applicant has taken advantage of any available educational, vocational, character-building, therapeutic, or otherwise-rehabilitative programming while incarcerated;
- the applicant's own words in their clemency application or in any interviews or other sources, as those records reflect on their current character, disposition, and insight; and
- any expression of remorse, responsibility, and/or perspective on their conviction and the underlying offense, as well as the applicant's candor about the same, to the extent it bears upon the risk to public safety.

We consider as very important to our assessment of risk to public safety the applicant's present age, and whether the applicant has, by virtue of their age and the period of incarceration, "aged out of" any expected further serious criminal activity. As the Board is undoubtedly aware, rates of recidivism for those inmates who are released at older ages are markedly low; one Pennsylvania study found that, of inmates who were released at the age of 50 or older in 2003, only 1.4% were convicted of new crimes in the two years following their release.[2]

We similarly consider the applicant's present physical condition and health; the applicant's pre-offense criminal record and background; any history of post-offense criminal prosecutions; any history of escape or escape attempts (which has been shown to be positively correlated with recidivism risk[3]); an applicant's re-entry plan and support system, including any history of substance abuse and a plan to address the same; whether or not the applicant is supported in their clemency application by the Secretary of the Department of Corrections[4]; any relevant references from family, SCI staff, educators, program staff, or peers who know and can speak to their sense of the applicant's character and potential recidivism risk; any immigration issues that pertain to public safety risk; and our overall assessment of the applicant's disposition, character, and psychological/psychiatric/neuropsychological health (including, where appropriate, any history of mental illness, diagnoses, treatment, and/or compliance).

Some considerations relating to public safety resemble those often propounded at trial or a penalty phase as "mitigation"-type evidence (*e.g.*, young age at the time of the offense; mental health history; history of abuse). We believe it is appropriate to consider these factors primarily in the light of how they relate to the applicant's record of rehabilitation and their present

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[2] Advisory Committee on Geriatric and Seriously Ill Inmates, Joint State Government Committee of the General Assembly of the Commonwealth of Pennsylvania, A Report of the Advisory Committee on Geriatric and Seriously Ill Inmates (2005). Needless to say, this 1.4% rate of recidivism includes many minor and non-violent offenses; the rate of violent recidivism is even lower.

[3] See, *e.g.*, Joan Nuffield, *Parole Decision-Making in Canada: Research Towards Decision Guidelines*, Solicitor General of Canada (1982); Eva Mulder, Eddy Brand, Ruud Bullens, and Hjalmar van Marle, "Risk Factors for Overall Recidivism and Severity of Recidivism in Serious Juvenile Offenders," *Int'l J. of Offender Therapy and Comparative Criminology*, 55(1) (2011) at 126.

[4] We understand that the support of the Secretary is unusual and telling, and we view the Secretary's recommendation for clemency as very persuasive in many, if not most, cases.

relevance to the risk to public safety. In the case of those who were over 18 but still young at the time of their crimes, many of the social science findings in juveniles that, the Supreme Court has said, lessen their "moral culpability" (*e.g.*, greater "transient rashness, proclivity for risk, and inability to assess consequences") also apply to young adults. Those factors also "enhance[] the prospect that, as the years go by and neurological development occurs," such a person's "deficiencies will be reformed" and the threat that person posed will have dissipated. *Miller v. Alabama*, 567 U.S. 460, 472 (2012).

For similar reasons, we do not draw hard and fast lines relating to the degree of homicide for which an applicant was convicted, nor to relative culpability among co-defendants during the commission of the offense. All of these factors are part of a holistic review that prioritizes attempting to assess the public safety risk of a commutation in an individual case, and are relevant primarily to that extent.

While no one can predict the future with any certainty, we strive as we consider the potential risk to public safety of a commutation to rely, where possible, on real, empirical evidence rather than lay intuitions, truisms, or anecdotes. We are always seeking to improve our knowledge in these areas, which will help us make decisions with confidence as we go forward.

Integrity and Fairness Considerations

We may also, in an appropriate case, consider issues that concern whether the DAO believes there to have been some underlying concern regarding fairness that warrants support of a clemency application. This can include whether the DAO considers there to have been law enforcement, prosecutorial, or judicial misconduct (even or especially where that misconduct was deemed not legally actionable); whether the DAO considers the applicant to have received deficient or ineffective assistance of counsel; whether there has been any relevant change in the law or in legal practice (*e.g.*, that would mean a defendant in like circumstances would not receive the same sentence); whether supporting commutation would give effect to a jury's verdict (*e.g.*, in assessing the comparative roles of co-defendants, or rendering partial acquittals); whether supporting commutation could address a disparity in the individual case or across a wider class of cases; and/or whether the applicant points to any special vulnerabilities that render continued incarceration unduly and particularly harsh (*e.g.*, the applicant has been assaulted; the applicant identifies as LGBTQ and has safety concerns; the applicant has health and/or disability issues; etc.).

Common and Systemic Considerations

We also consider structural factors that are common to many of the cases of the most meritorious commutation applicants: the need to reduce mass incarceration where over 2,000 inmates out of Philadelphia have no avenue for parole and meritorious commutation applicants present some of the lowest recidivism risks, empirically, of any inmates in the prison system; honoring the advice given to and expectations held by some of the longest-serving inmates

regarding the availability of commutations as a practical matter in Pennsylvania when they, *e.g.*, accepted plea bargains with life sentences; aligning Pennsylvania practice with that of most other states, which contemplate the possibility of parole for at least some inmates serving "life" sentences; prioritizing efficiency and reasonable, realistic cost-benefit analyses that balance the cost of continued incarceration of aging inmates specifically against the value of ensured incapacitation-by-incarceration for those aging inmates, as compared to the cost of a hopefully-minimal risk of recidivism against the value of non-incarceration to the applicant and to the community[5]; and the wisdom of putting an end to ongoing appellate or collateral litigation, freeing up additional time and resources among many stakeholders.

Totality of the Circumstances

In every case, the DAO gives appropriate weight to any factor that is relevant in that case. We understand that clemency is fundamentally discretionary, and we feel that to attempt to predict, pre-categorize, and essentially pre-judge every one of the thousands of cases that might appear, would be unwise. The factors described above are guidelines for thoughtful consideration, not hard-and-fast criteria, and are always weighed appropriately in the appropriate case. We believe that no one issue should be dispositive in all cases, across the board, as a matter of policy.

Please do not hesitate to contact me if you or any other member of the Board has questions about our protocol in general or with regard to any individual commutation application. We aim to be a resource to the Board as you consider these important requests. Thank you for taking our input into consideration in these cases.

Sincerely,

Patricia Cummings

Supervisor, Conviction Integrity & Special Investigations Unit

[5] Well over 5,000 Pennsylvanian inmates are serving sentences of life without parole; nearly 2,700 of them were convicted in Philadelphia. Each of those inmates costs, conservatively, $42,000 per year to incarcerate, and that expense only grows as an inmate ages, even as the inmate's risk of recidivism declines. The average yearly cost for an inmate over 50 years old is currently $68,000. See American Civil Liberties Union, At America's Expense: The Mass Incarceration of the Elderly (2012).

INTERNAL MEMORANDUM

To: Law Division

From: CISIU

Date: April 30, 2019

Re: Policy for Conviction Integrity Review of Nordo Claims

- The Law Division (PCRA, Appeals, Federal Litigation) shall transfer cases to the CISIU where:
    - the prosecutor determines Nordo was involved[1] in the investigation or trial, OR
    - the defendant claims[2] Nordo was involved in the investigation or trial.
- Prosecutors shall make every effort to determine whether Nordo was involved in the case as soon as practicable.
- If Nordo was involved in the case, the Law Division will utilize DAWS to obtain the current disclosure packet and then make the appropriate Nordo PMD. A dated coversheet memorializing the PMD shall be placed in the Law Division file.
- Immediately after the Nordo PMD is made, the case should be transferred to the CISIU (however, no file should be transferred less than 10 days before a scheduled court listing or filing deadline without supervisor approval).
- The Law Division prosecutor is responsible for court appearances/filings on the case before it is transferred
- **Do not send an email request to CISIU in order to transfer the file once it is determined Nordo was involved - email requests do not constitute a transfer.**
- Instead, all transfers shall be made by completing a *Law Division CIU File Transfer Memo* (by email from the Law Division paralegal to the CISIU paralegal, and a hardcopy with the file) and delivering the file to the CIU.

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1 This includes taking any investigative action, whether or not that evidentiary action or the results of the action were introduced at trial or motion.

2 In cases where the defendant's claim of Nordo's involvement appears unlikely or frivolous, the prosecutor may conduct further investigation before making the Nordo Police Misconduct Disclosure (PMD) and referral to the CISIU. Nordo was employed by the PPD on June 23, 1997 and was terminated on September 18, 2017.

- Once the file has been officially transferred, the CISIU prosecutor is responsible for court appearances/filings on the case.
- Based on the nature of Nordo's misconduct and the individual facts of the case, the CISIU may reject a case at two different stages.
    - First, The CISIU will make an initial screening of the case based on knowledge of the SIU investigation and CIU standards. Following the initial screening the CISIU may accept or reject the case.
    - Second, following the initial screening, the CISIU will investigate the case. If further investigation establishes the case doesn't meet CISIU standards, the CISIU shall promptly transfer the case back to the Law Division.
- The CISIU may reject cases where Nordo-misconduct occurred, but other CISIU standards are not satisfied.
- If CISIU rejects the case, it will transfer the file to the Law Division, using the *Law Division CIU File Transfer Memo*.
- The Law Division prosecutor is responsible for court appearances/filings on the case after it is rejected and returned to the Law Division.
- The Law Division will treat cases returning from CISIU like any other Law Division case—with awareness that a CISIU rejection is not a finding that there was no Nordo-misconduct.
- The Law Division paralegal and CISIU paralegal will maintain lists of cases that have been transferred for the reference of the prosecutors in the respective units.
- In cases where CISIU has rejected the case AND the defendant makes a serial Nordo claim, the Law Division may consult with the CISIU to determine whether a serial transfer is warranted. The CISIU may accept serial referrals, but the referring prosecutor should state the reason for the serial referral in the *Law Division CIU File Transfer Memo* (i.e. new/previously unpresented evidence).

CONVICTION INTEGRITY UNIT

PRO SE SUBMISSION

SCREENING MEMO

DISTRICT ATTORNEY'S OFFICE
CONVICTION INTEGRITY UNIT
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PHILADELPHIA, PENNSYLVANIA 19107-3499
215-686-8000

Last Updated 03/05/20

LAWRENCE S. KRASNER
DISTRICT ATTORNEY

Case and Reviewer Information

Name: _____ Date Submission Complete: _____

CP Number: _____ Reviewed by: _____

Sentencing Date: _____ Date of Review: _____

Lead Charge: _____ | _____ Circle one: Non-trial Jury Trial | Waiver Trial

Disposition type: ☐ Negotiated Guilty Plea ☐ Non-negotiated GP ☐ Guilty ☐ Other: _____

Decline Screen

☐ Mandatory – No Jurisdiction

- ☐ Case is not in Philadelphia County.
- ☐ Defendant is not convicted. Circle one: Pretrial Favorable Outcome Other
- ☐ Defendant is not serving a sentence.

☐ Discretionary - Resources

- ☐ Misdemeanor ☐ SORNA Only ☐ Legal Question Only
- ☐ Not Compelling ☐ Immigration ☐ Probation

Re-Submission Screen

Search SharePoint. Is this a resubmission? YES | NO

If NO, skip to New Submission section.

Note: A resubmission = a case that was previously rejected. (If you're looking at information for a case that has never been closed, then it's just "additional info" for a submission.)

If resubmission:

☐ Pull the CIU's old paper file.

☐ Review old submission + any CRU/CIU memos + new submission.

☐ Does the resubmission or the CIU have *additional substantive info*? (Can be facts or legal claims.)

YES → (1) Briefly Describe (elaborate in Additional Comments if necessary)

(2) Place in resubmission queue.

NO → Reject or Decline [resubmission – NNB (no new basis)]

New Submission

☐ Create paper file.

☐ Create SharePoint file.

☐ Add data to Case Management Database.

☐ Locate documents + add to paper file + complete Documents Included section below.

☐ Submit to designated paralegal for priority screening.

Documents Included

☐ Submission Form

☐ dtBank Search complete

☐ Docket(s) [CP + appeals]

☐ Appellate Opinion(s) [not in dtBank]

☐ Other:

Screening Result

☐ Decline
- ☐ Mandatory
- ☐ Discretionary

☐ Reject/Decline Resubmission

☐ Ready for Review

☐ Other:

Queue:

☐ Priority Queue

☐ Regular Queue

☐ Resubmission Queue

Additional Comments

To: Law Division

From: Conviction Integrity & Special Investigations Unit

Date: August 21, 2019

Re: SUGGESTED GUIDELINES FOR DEFENDING CONVICTIONS WHERE NORDO CLAIMS ARE RAISED, AND THE CIU REJECTS CASE

The CIU and the Law Division have agreed to work together to identify and review all cases where Nordo played an investigative role in the interviewing of potential witnesses (hereinafter referred to as Nordo cases). Given the nature of the criminal investigation and prosecution of Nordo, the CIU has been designated as the DAO unit charged with reviewing Nordo cases to determine whether Nordo's involvement compromised the integrity of any resulting conviction and sentence. If the CIU determines that Nordo's involvement compromised a conviction, the CIU will litigate the issue in the appropriate court. If the CIU is unable to determine whether Nordo's involvement compromised a conviction, the CIU will refer the case to the Law Division – with the understanding there will likely be further litigation where defendants will plead and seek to prove Nordo's misconduct.[1] It is the latter scenario that is the subject of this memorandum..

The desired goals of establishing guidelines for defending convictions where Nordo claims have been raised are two-fold. First, the CIU hopes to further procedural justice by focusing the litigation on the legitimate legal issue in dispute—the materiality of Nordo's misconduct—and resolving the Nordo-claim with a merits analysis. Second, the CIU, in conjunction with the SIU, wants to protect the victims of Nordo's sexual assaults from the trauma of being required to testify at dozens of hearings to prove the facts alleged by the DAO in a criminal information.

In an effort to achieve both of those goals, the CIU suggests that certain guidelines be followed. These guidelines have been developed in light of the unique facts that have been identified in the Nordo prosecution, the CIU's review of dozens of Nordo cases and the law regarding *Brady* and its progeny.

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[1] In general, the CIU may reject a case for failing to meet its internal criteria. However, a CIU rejection does not serve as an endorsement or legal opinion on the integrity of the conviction, nor does it mean that an assessment has been made regarding the merits of the materiality of Nordo's misconduct to the individualized facts of the case. Similarly, a CIU rejection does not constitute an opinion on the merits of non-Nordo claims raised in the petition.

Criminal Prosecution of Nordo

Philip Nordo ("Nordo") joined the Philadelphia Police Department on June 23, 1997. He was transferred to the Homicide Division at the rank of detective on November 10, 2009. He was suspended with the intent to terminate on August 3, 2017, and terminated on September 18, 2017. He was terminated by the direct action of Commissioner Ross, and so there was no PBI hearing.

On February 7, 2019, a Philadelphia County Investigating Grand Jury returned a presentment that was accepted by the supervising judge of the investigating grand jury, and ordered filed under seal. On February 19, 2019, Nordo was arrested on a body warrant. On February 25, 2019, Nordo was indicted by an indicting grand jury. Nordo was informed against at CP-51-CR-0001856-2019. His first trial date is scheduled for October 28, 2019, but a defense motion for a continuance was granted and a new trial date will be selected on August 26, 2019.

The presentment alleges various acts of official oppression in which Nordo utilized his position within the PPD to: engage in coercive conduct to witnesses and defendants; commit acts of sexual assault, and defraud the City of Philadelphia by submitting fraudulent crime-reward packets. The presentment alleges crimes against three named individuals, as well as *other acts* evidence against an additional three witnesses. The earliest criminal act alleged in the information occurred as a course of conduct between January 1, 2003 and December 31, 2017. The earliest *other act* alleged in the information occurred on April 9, 2005, inside East Detective Division. The District Attorney's Office had actual knowledge of the April 9, 2005 incident/*other act* at least as early as May 13, 2005.

Law Division Litigation

When defending a conviction, law divisions prosecutors may not take a position that is factually inconsistent with the redacted presentment in *Commonwealth v. Nordo*.[2]

[2] The Commonwealth should not take factually inconsistent theories in different criminal prosecutions. *See Lambert v. Blackwell*, 387 F.3d 210, 246 (3rd. Cir. 2004) (discussing cases where prosecution took contradictory theories in two separate trials to convict two individuals where no new significant evidence came to light as "foul blows" by the prosecution that deprives the defendant of due process and fundamental fairness); *Commonwealth v. Koehler*, 36 A.3d 121, 138 (Pa. 2012) (Assuming arguendo that constitution prohibits inconsistent theories of prosecution against a single defendant but finding prosecution theories were harmonious).

Adhering to this rule is consistent with our professional obligation as "minister of justice and not simply that of an advocate," which includes "specific obligations to see that the defendant is accorded procedural justice." Pa.R.Prof.Resp. 3.8 Comment 1 (Special Responsibilities of a Prosecutor).

The defense claims regarding Nordo's misconduct will typically sound in *Brady* and jurisdictional exceptions to the PCRA's time-bar will have been pled. *See Commonwealth v. Hawkins*, 598 Pa. 85, 93 (2006) (a *Brady* violation will fall within the *government interference* exception where petitioner pleads and proves that the information could not have been obtained earlier with the exercise of due diligence); *Commonwealth v. Lambert*, 584 Pa. 461, 467-68 (2005) (PCRA court has jurisdiction under the *newly discovery evidence* exception to review a Brady claim even if the withheld information was not material for Brady purposes, so long as the facts supporting the Brady claim were known to the police and not known to the petitioner until the PCRA petition was filed).

Concede and Stipulate to the Facts Contained in the *Commonwealth v. Nordo* Presentment

Generally, where no material facts are in dispute the PCRA court may grant relief without a hearing, *see* Pa.R.Crim.P. 907 (1); deny relief without a hearing, *see* Pa.R.Crim.P. 907 (2); or grant or deny relief without hearing while ordering an evidentiary hearing on other issues, *see* Pa.R.Crim.P. 907 (3).

When filing an answer to an amended petition, the DAO should not contest any factual assertions in the petition that are supported by the facts alleged in the Nordo-presentment. Where the law division defends a conviction with a Nordo claim, the issue should be resolved on the pleadings where the materiality of Nordo's misconduct is evaluated in relation to the individual facts of the conviction being challenged.

To the extent that a petitioner claims Nordo-misconduct is different in kind or scope[3] to the facts alleged in the presentment, the prosecutor should offer to stipulate[4] to the Nordo-presentment as proven facts, and exercise discretion about whether to dispute misconduct that is different in kind or scope to the misconduct described in the presentment.

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[3] The Law Division should refer additional allegations of different Nordo-misconduct to the CISIU for further criminal investigation.

[4] "A stipulation is a declaration that the fact agreed upon is proven." *Commonwealth v. Rizzuto*, 777 A.2d 1069, 1088 (Pa. 2001), *abrogated on other grounds by Commonwealth v. Freeman*, 827 A.2d 385 (Pa. 2003). "Parties may by stipulation resolve questions of fact or limit the issues, and, if the stipulations do not affect the jurisdiction of the court or the due order of the business and convenience of the court they become the law of the case." *Id.* at 73 (quoting *Parsonese v. Midland National Ins. Co.*, 706 A.2d 814, 815 (Pa. 1998)) (alterations in original). Although the practice of stipulating to agreed-upon facts is common, there is limited caselaw on the issue—because stipulations necessarily involve agreement by the parties, they are rarely the subject of appellate disputes.

Brady Claims

Suppression of Favorable Evidence Has Occurred

Since at least January 1, 2003—the date of the first criminal offense alleged in Nordo's information—Nordo's misconduct has been suppressed from the defense. *See Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (Brady requires disclosure by the prosecution not only of information actually known to the prosecutor, but also information in the prosecutor's office, the police, and other acting on behalf of the prosecution). Additionally, since at least April 9, 2005—the date of a PPD IAD memorandum to the DAO—the DAO had knowledge of a complaint (subsequently supported by criminalistics and DNA testing) that Nordo sexually assaulted a suspect in an EDD interview room. *See Commonwealth v. Hallowell*, 383 A.2d 909, 911 (Pa. 1978) (knowledge of one prosecutor attributable to all prosecutors in the same office).

Nordo's misconduct was subject to disclosure under *Brady*. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (information is favorable to the accused when it is exculpatory or impeaching). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434.

In *Smith v. Cain*, 565 U.S. 73 (2002), the Court considered a *Brady* claim arising on post-conviction AEDPA review based on the State's failure to disclose statements to police that impeached a witness' in-court identification of the defendant. After considering the state's argument that the withheld statements were not material because the inconsistency could be explained by fear of retaliation, although there was no record-evidence of intimidation, the Court found a *Brady* violation under AEDPA's deferential standard. Specifically, the Court found the information material because although the state offered a reason why the jury "could" have disbelieved the impeaching information, the Court had "no confidence that it would have done so." *Smith*, 565 at 630-31.

Materiality

In order to effectively argue that Nordo's misconduct was not material to the conviction, the law division prosecutor will need to be familiar with the facts of the Nordo presentment. This is especially true with respect to cases that require evidentiary hearings because the evidentiary hearing will elucidate whether Nordo's involvement tainted the investigation and trial to the point of violating *Brady*. For this reason, adherence to these guidelines will be easier (and most efficient) if one designated prosecutor handles Nordo cases involving a *Brady* claim, especially the cases where the claims warrant an evidentiary hearing.

CONVICTION INTEGRITY UNIT

Protocols and Procedures

CONTENTS

I. INTRODUCTION

A. Governing Principles

The Conviction Integrity Unit (CIU) endeavors to review past convictions for credible claims of actual innocence, wrongful conviction, and, where feasible, sentencing inequities. This process is afforded to petitioners regardless of whether they are pro se or represented by an attorney. The CIU is committed to ensuring that all pro se submissions receive a thorough and equitable review.

The review process is initiated by paralegals and then transferred to assistant district attorneys (ADAs), who investigate claims by considering all available files and evidence. A CIU investigation should consider evidence that was not part of the trial record. If the CIU determines that relief is warranted, prosecutors work collaboratively with defense counsel or pro se petitioners to develop and litigate claims.

This protocol has three purposes: First, it provides an overview of the CIU's case review process. Second, it details specific administrative procedures[1] at each stage of the case review. Third, it outlines protocols that govern overall case management, such as confidentiality and information sharing, case supervision, and database management and data collection.

B. Overview of CIU Review Process

There are five main case review phases: Intake, initial paralegal review [for pro se cases only], ADA review and investigation, acceptance, and closure. (Any terms in **bold** will be defined *infra*, Part I.C; each of these steps is detailed in Part II.)

Paralegals take the lead during the intake and initial review phases, consulting with ADAs as needed. During intake, paralegals track and review the many letters that attorneys, defendants, family members, and other people submit to the CIU. They determine whether or not that correspondence constitutes a **submission**. They generate a CIU case number and create a paper and electronic file for each submission. All submissions are screened to determine if there is any basis to decline them or reject a resubmission.[2] Any attorney submissions are then passed to the CIU Supervisor, who then assigns the submission to an ADA for further review and investigation.

Paralegals conduct an initial review of any pro se submissions. During each review, they complete a CIU Initial Submission Review form, collect relevant case documents that are easily accessible, and then review those documents and record their initial impressions of the case. That file is then added to the queue of cases for the weekly pro se submission working group to review and potentially assign to an ADA for further investigation.

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[1] As an administrative guide, it is not intended to rigidly govern the substantive review of each case, which is necessarily unique to each case.

[2] Paralegals reject a resubmission if there is no additional information that may possibly support relief.

When a submission reaches the ADA review and investigation phase, it becomes part of an ADA's regular case load. The ADA immediately fills out a Victim Contact Information form and gives it to the CIU Special Assistant to verify and update the information. (Ordinarily, no contact with the victim(s) or their family is initiated until late in the investigation.) The ADA shall request and review the District Attorney's Office (DAO) records and any available police department records. Police department records are scanned and Bates-stamped. Both types of records are shared with defense counsel, subject to the Discovery and Cooperation Agreement (DCA) that both ADAs and defense counsel sign. Based on the particular needs of an investigation, the ADA will also attempt to locate and test any physical evidence, locate and (re-)interview any witnesses, and pursue any other relevant evidentiary investigations that may not already be reflected in the record of the case. The CIU then holistically evaluates all of this evidence to determine whether it validates the applicant's claims of innocence, wrongful conviction, or sentencing inequity. If so, the CIU accepts the case.

After the CIU accepts a case, it must inform the victim(s) or their surviving family members of the results of the investigation. It also pursues any viable form of relief by working collaboratively with the applicant. Relief is most often available in state court, but if that remedy is unavailable, the CIU may litigate in federal court and/or support a clemency application.

A CIU case is closed when it is declined and/or rejected, when a court grants relief, or when all avenues for relief are denied.

C. Key Definitions

1. Submissions

The CIU receives a large volume of correspondence from both attorneys and non-attorneys. Some of this correspondence – but not all – will qualify as a **submission**. Note that only submissions can be considered open cases, and therefore, only submissions receive unique CIU case numbers. The CIU broadly construes correspondence as a submission whenever possible, especially when the sender is pro se and writing about their own case. In order for correspondence to constitute a submission, it must contain sufficient information to begin a review of the case (e.g., name and docket number) and some indication of the issue (e.g., innocence, sentencing).

2. Open vs. Accepted

a. Open

A submission or case is considered **open** if there has not yet been any formal decision to accept or close the case. The case generally remains "open" throughout the initial paralegal review and ADA review and investigation stages.

b. Accepted

If, after thorough review and investigation, a CIU ADA determines that a petitioner is likely innocent, was wrongfully convicted, or was inequitably sentenced, the ADA will then research any and all possible avenues for relief (including federal relief and clemency, if state relief is unavailable). The ADA will discuss the case with the CIU Supervisor, who will determine whether a case can be **accepted** for pursuit of relief. If a case is accepted, then the CIU ADA will collaborate with defense counsel or the pro se applicant to pursue any viable avenue for relief. If there is any pending litigation regarding this case, then the CIU ADA must notify both the Law Division and the court of the CIU's involvement.

3. Case Closure Language

The CIU reviews a case until it can be disposed of in one of three ways: declined, rejected, or accepted. Note that a case can be closed for multiple reasons, and in those situations, all applicable bases for closing the case should be listed for data collection purposes.

a. Declined

A submission is **declined** outright, as a threshold consideration, if it falls into one or more of the following categories:

- The applicant's case is outside of Philadelphia County;
- There is no federal or state jurisdiction over a case, because the applicant is no longer "serving a sentence," as defined by current law;[3] or
- The applicant has not been convicted (e.g., the case is still pretrial).

Paralegals always screen pro se submissions to determine whether there is a basis to decline them. However, a case can be closed at any point in the review process if it is discovered that there is a basis to decline the case. Any submission that is not declined outright will be "worked up" for an initial review. (See part II.B)

b. Rejected

A submission is **rejected** if, after a thorough initial review, one or more of the following determinations is made:

- The applicant is not actually innocent or not wrongfully convicted (NAI/NWC);
- There is no new evidence to demonstrate innocence or a wrongful conviction (NNE);

[3] Pennsylvania's Post-Conviction Relief Act (PCRA) statute limits relief to only those petitioners who are still serving a sentence, as defined by state law and case law. This definitely includes people who are currently incarcerated, on parole, or on probation. This may also include very limited collateral consequences of a criminal conviction, such as the requirement to register as a sex offender, but it decidedly does not include immigration consequences of a conviction.

- The applicant is guilty of 1st or 2nd degree murder (sentencing)[4] (G-1/2);
- There is no new evidence warranting downgrading to third-degree murder (NNE-3); or
- Some other basis for rejection (e.g., file cannot be located, file has been destroyed).

II. PROCEDURES GOVERNING CIU CASE REVIEW

A. Intake

The CIU receives correspondence from defendants,[5] defendant's relatives, and attorneys on a daily basis. An assigned paralegal processes all correspondence by date stamping and scanning the correspondence and maintaining it in a database.

Note that, due to limited resources, paralegals do not respond to all mail. Instead, paralegals will ensure that pro se submissions include as much information as needed to begin an investigation, and that case declinations are communicated to pro se applicants.

Any correspondence related to an existing CIU file is placed in the paper file and uploaded to the electronic file. If an ADA is assigned to the case, the paralegal shall also inform the ADA of the existence of that correspondence.

Any correspondence that doesn't belong in an open file proceeds through intake analysis as follows:

1. Attorney Submissions

If a paralegal receives an attorney submission on a case with no existing CIU file, the paralegal:

1. creates a new CIU file (electronic and paper versions) with a unique CIU case number (*see* Part III.A);
2. logs the submission into the Attorney Submissions spreadsheet and creates a new database entry (*see* Part IV.B);
3. runs a decline / previous submission screening (*see* Part II.A.3);
4. mails an Attorney CIU Submission Checklist (5 pages) to defense counsel;[6]
5. mails a Continuances Letter to defense counsel and cc's Judge in any pending PCRA, Appeal, etc.;
6. adds a copy of the attorney submission letter to the Attorney Submissions binder located in the CIU Supervisor's office; and

[4] Due to current limitations of the PCRA, only "new evidence" that a murder was a third degree rather than first or second could warrant post-conviction relief in state court. If the investigation reveals that the applicant is, in fact, guilty of first- or second-degree murder, the submission will be closed as G-1/2. If the investigation is inconclusive but there is no new evidence supporting guilt of third-degree murder, then the submission is closed as NNE-3.

[5] Correspondence directly from a defendant is referred to as "pro se mail" or "jail mail."

[6] This serves two purposes: First, it confirms receipt of an attorney submission. Second, by completing this checklist, defense counsel helps identify claims and expedite the ADA investigation.

7. provides the paper file to the CIU Supervising Attorney for further assignment to an ADA.

Whereas pro se submissions go through both an intake and an initial review process, attorney submissions usually do not require a dedicated paralegal review layer, and once and attorney submission is assigned, the ADA will proceed directly to the review and investigation stage (*see* Part II.C).

2. Pro Se Correspondence & Submissions

Whenever a paralegal receives correspondence from a non-attorney that doesn't belong with an existing case, the paralegal makes two determinations:

1. Is the person actually represented by an attorney?
2. Is it a submission?

If, according to Common Pleas or appellate dockets, the person appears to be currently represented by an attorney, the paralegal writes a form letter[7] to the attorney to see if they are actually representing the applicant in their CIU submission, and encloses the Attorney CIU Submission Checklist. The paralegal must "cc" the pro se applicant. If an attorney is representing the person, the case then gets diverted to the CIU Supervisor, rather than proceeding as a pro se submission. If the attorney does not respond to this letter within **60 days**, then the submission is construed as a pro se submission.

When considering whether correspondence is a submission, the paralegal should search for all correspondence that that person may have sent to the CIU by searching H:\Conviction Integrity Unit\Exported Attachments. If all correspondence has insufficient information to be a submission, then the paralegal may send a form letter requesting more information, along with the Submission Form/ Request for Review (16 pages).[8] The form letter will include a notice that the applicant's file will be closed in **60 days** if the CIU does not receive a response.

Sometimes a person will write several letters that, even if combined, do not have enough information to constitute a submission. If the paralegal has already sent a Submission Form and the letters are nonresponsive to that form, then it cannot be opened as a case or further reviewed.

Any pro se correspondence that does not constitute a submission is scanned and uploaded as a PDF to H:\Conviction Integrity Unit\Exported Attachments.

If the correspondence *is* a submission (even if more information is needed), then the paralegal does the following:

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[7] Available at: H:\Conviction Integrity Unit\~FORMS\Protocols, forms.

[8] Some pro se submissions are extremely detailed and have documents attached. In this case, it may not be helpful to send the full Submission packet. If the paralegal thinks there is already ample information to begin working up the case, then the paralegal can consult with an ADA to see if the Submission form is necessary.

1. creates a new CIU file (electronic and paper versions) with a unique CIU case number or reopens the old CRU/CIU file (*see* Part III.A);
2. logs the submission into the Pro Se Submissions spreadsheet and creates a new database entry (*see* Part IV.B);
3. runs a decline/ previous submission screening (*see* Part II.A.3); and
4. proceeds to the initial review stage (*see* Part II.B).

3. Decline & Previous Submission Screening

As mentioned above, paralegals screen both attorney and pro se submissions to determine if it should be declined, and close those cases rather than either passing them to the CIU Supervisor or proceeding to the initial review stage. Paralegals also determine whether a case was previously submitted to the CIU. If the paralegal can determine that there is no additional information in the re-submission that could possibly warrant reconsidering the case, then they shall automatically reject the re-submission. If there is any additional substantive information, the paralegal should err on the side of caution and either consult with an ADA or simply re-open the submission. If the paralegal reopens a submission, the old case number is used, and the paralegal must note in the CIU Submission Initial Review form that this is a re-submitted case.

The flowchart found in **Appendix 1** provides guidance for decline and previous submission screenings.

B. Initial Review [Pro se Cases]

During the initial review of a pro se submission, the paralegal works up the case so that there is adequate information for the pro se working group to discuss it and decide on next actions.

First, the paralegal looks at the CIU Submission Initial Review form. At the top of that form, there is a checklist of documents[9] that are often easily available to the paralegal without additional document requests. The paralegal will print everything available from that checklist, place those documents in the paper file, and complete the checklist to reflect what has been placed in the file.

Second, the paralegal reviews all of the available documents to familiarize themself with the issues raised in the case and what further investigation may be needed. The paralegal uses this information to complete the rest of the CIU Initial Submission Review Form.

C. ADA Review and Investigation

If a case is accepted for further review, an assigned ADA conducts an independent investigation into the applicant's conviction.

[9] Those documents include the person's submission form, the docket(s), any appellate opinions, any PCRA filings or opinions, and a dtBank search for any additional documents.

Upon assignment, the ADA immediately does the following:

1. Fills out a Victim Contact Information Form,[10] and gives it to the CIU Special Assistant, who verifies current and correct contact information.
2. For attorney submissions, sends two documents to defense counsel:
    a. Discovery and Cooperation Agreement (DCA): Defense counsel signs and returns the DCA; the ADA then signs it, retains the original (electronic and paper copies), and sends a fully executed copy to defense counsel. The DCA outlines the CIU's collaborative process.
    b. Waiver and Consent form: Both the defendant and defense counsel sign this form. It authorizes the CIU to speak with defense counsel and access the client file regarding any non-privileged matters and documents.

ADAs then attempt to locate the following information, depending on investigation needs and availability:

- all available transcripts (*see* Part III.B.3);
- all available DAO records (*see* Part III.B.1);
- the Philadelphia Police Department file (a/k/a H-file or M-file in homicide investigations) (*see* Part III.B.2);
- relevant witnesses to (re-)interview (*see* Part III.C);
- any relevant physical evidence that has not been destroyed and may need (re)testing (*see* Part III.D); and
- any other evidence that might contribute to an overall finding that the applicant is actually innocent or wrongfully convicted, regardless of whether that evidence was part of the original trial record.

The ADA should complete an Investigative Case Review Memo, located at H:\Conviction Integrity Unit\~FORMS\Protocols, forms. This memo is a threshold—so long as an ADA's notes are on file and include at least this information, those notes can be substituted in place of the memo.

If the ADA's investigation does not support a claim for relief, then the ADA proceeds to case closure (*see* Part II.E).

If the investigation supports a claim for relief, then the ADA prepares to discuss the case with the CIU Supervisor, considering all avenues of possible relief.

[10] Victim contact is a critical facet of the CIU's work. This information must be gathered as early as possible in the ADA's investigation, but there is otherwise no bright-line rule dictating exactly when victim contact must be initiated. Instead, ADAs evaluate when to contact victims on a case-by-case basis, considering, for instance, whether the victim or family member is a witness, the extent of the victim's or family members' prior involvement in the case, and the nature of the issue(s) involved in CIU review. The default position is that the CIU does not initiate victim contact until the investigation is concluded and relief is warranted.

D. Acceptance / Pursuit of Relief

If the ADA's investigation validates the applicant's claim of innocence, wrongful conviction or sentencing inequity, then the ADA must discuss the case with the CIU Supervisor to determine whether the case should be accepted. If a case is accepted, then the ADA must:

- research all possible avenues for relief;
- communicate pursuit of relief with the CIU Supervisor on an ongoing basis;
- if litigation is pending, and CIU involvement is not already known, inform both the DAO's Law Division and the court;
- inform the victims of the results of the investigation; and
- work collaboratively with defense counsel or a pro se applicant to pursue any viable form of relief.

Pursuit of relief most often involves litigation in state court. If there are no available remedies in state court in an otherwise meritorious case, then the CIU may litigate the case in federal court and/or support a petition for clemency.

E. Closure

A case will be closed when it is declined and/or rejected, when a court grants relief, or when all avenues for relief are denied. A paralegal's initial screening of an application will usually determine whether there is a basis to decline a case (*see* Part II.B, *supra*). A paralegal's initial screening may also indicate whether there is a basis to reject a case, particularly if the case was previously rejected under NAI/NWC or G 1/2 grounds (*see* Part II.B., *supra*). Otherwise, cases are generally only rejected during a pro se working group or after a more thorough ADA investigation is conducted.

The following process applies to all case closures:

1. Notification to Applicant of Case Closure

Whenever a case is declined or rejected at the initial paralegal review stage, a CIU paralegal sends a closing letter. Paralegals should work from a form letter where possible (available at H:\Conviction Integrity Unit\~FORMS\Form Letters.

For cases that are rejected after an ADA review, an ADA should send the letter.

A copy of the case closure letter must be placed in the physical file.

2. Double-Check Paper File and Any Ordered File(s) for Completeness.

If a paralegal screened a case and it was never assigned to an ADA, then the paralegal should double-check the paper file to ensure that it is complete. At a bare minimum, the file should include anything that the applicant sent to the CIU, any DCA or Waiver & Consent forms signed by the applicant or their attorney, the Common Pleas docket sheet, and the paralegal's CIU Initial Submission Review form.

If a case is assigned to an ADA, then that ADA is ultimately responsible for (1) double-checking the CIU file to make sure that all essential documents are on file; (2) double-checking the DAO box(es) against the initial DAO inventory to verify that everything that was initially in each box is back in that box;[11] and (3) completing an inventory to reflect what is now in the additional CIU box(es). ADAs may, however, delegate some of the review to a paralegal or intern.

If a case is accepted and a CIU ADA appears at any substantive court listings (beyond scheduling conferences, continuance requests, or other purely administrative matters), the assigned ADA must also submit transcript requests for any and all notes of testimony from substantive listings. Transcript request forms can be found at: H:\Conviction Integrity Unit\~FORMS\Protocols, forms\file title: "Transcript Order Form – District Attorney." The form must be emailed to transcripts@courts.phila.gov, and a copy should be retained in the paper and/or electronic file.

See Part III.A for more specific information on what should be in a complete CIU file.

3. Complete the Appropriate Case Closure Form.

If a paralegal declines or rejects a case, then they need not complete a full closing memo. Instead, they may complete the CIU Initial Submission Review form to indicate that the case is declined or rejected without further investigation.

If a case is rejected or closed after an ADA investigation, then an ADA Case Closure form must be completed, added to the paper CIU file *and* uploaded to the electronic file (blank forms are available at H:\Conviction Integrity Unit\~FORMS\Protocols, forms). If an ADA investigates a case, then that ADA must complete the closing memo, even if they delegate other aspects of case closure.

4. Complete Database Entry

At all times, there are designated ADAs and all paralegals who complete database entry for all closed cases. When a CIU staff member closes a case, they must email a designated database manager, attaching a copy of the closure memo.

When completing the database entry, CIU staff member includes location of closed physical file.

[11] For any cases where we have an *original copy* of the H-file, the same must be done with the H-file before returning it. Because PPD no longer sends out original copies of the H-file, this should only apply to the CIU's oldest cases.

At this time, we collect limited data on all cases closed by the CIU and extensive data on exonerations. The CIU is still developing data collection and reporting policies.

5. Update Electronic File to Indicate Case Closure

In SharePoint, the electronic file name should be updated to include the basis for closing the case.

Example: "2017-0001 – Jane Smith (Rejected)"

The file should then be moved to the Closed cases folder.

6. Store or Return Paper Files

All files created by the CIU are stored within the CIU. CIU files are not sent to GRM or division/unit that referred the case or is doing simultaneous work on the case, unless approved by the CIU Supervisor.

Files that are closed by a paralegal during the initial review stage can be temporarily stored in a paralegal's desk. Eventually, those closed files must be migrated to the filing cabinet in the CIU file room on Floor 17 ½.

If the case was accepted by the CIU, the conviction was vacated, and the case was nolle prossed, then *all* files relied on in the CIU review or copies of those files must be stored in the CIU file room on Floor 17 ½.

Otherwise, if DAO boxes were borrowed from another attorney who used the boxes for ongoing litigation, and that litigation is still unresolved, then those boxes should be returned to the ADA. An email should be sent to confirm that the boxes have been returned, and a copy of that email should be kept in the CIU file. Before returning any files, it is imperative that the CIU file has a complete inventory of what is contained in those returned files.

All requested GRM boxes should be given to paralegals, because paralegals track the locations and returns of those boxes.

III. DETAILED ADMINISTRATIVE PROCEDURES

A. File Maintenance

Paralegals create both paper and electronic files for all submissions.[12] Only submissions receive unique CIU case numbers. If a paralegal closes a case during the initial review stage, the paralegal is responsible for file maintenance. For cases that proceed to investigation and

[12] Non-submissions do not require individual files.

litigation stages, the ADA who primarily handled a case is ultimately responsible for ensuring that the completed files thoroughly document the CIU's investigation.

At this time, some ADAs primarily rely on electronic files and others primarily rely on paper files. During investigation or litigation, ADAs should create and maintain files suited to their particular file-keeping style. When a case is closed, however, the ADA must make sure that all key documents are in a paper file, as outlined below. Paper files are ultimately stored in CIU storage on Floor 17 ½.

1. Case Number & Naming Conventions

Paralegals scan and upload PDFs of all correspondence for new submissions or non-submissions using the following file naming convention: FirstNameofDefendant_LastNameofDefendant_DateOfReceiptStamp. As discussed in Part II.A.2, *supra*, any non-submission correspondence is uploaded to H:\Conviction Integrity Unit\Exported Attachments.

Any submissions that are reopened will maintain their old CIU case number. Any new submissions are assigned a unique case number, which is a year and serial case number (e.g., 2019-4, for the fourth new submission in 2019).

2. Paper Files

For all **attorney** submissions, the paralegal creates a redwell as soon as the submission arrives. For all **pro se** submissions, the paralegal creates a small physical file (a manila folder) when the submission arrives, and only creates a redwell if the submission proceeds to the ADA review and investigation phase. For complex cases (especially those that proceed to litigation), multiple redwells are organized in at least one CIU box.

a. Small Files (Single manila folders and single redwells)

All redwells and small/pre-investigation pro se files are labeled with the defendant's name, docket number, and CIU number.

Generally, a single manila folder will suffice for (1) cases that are automatically declined or rejected during the paralegal's initial screening, and (2) pro se cases that are still in the paralegal's initial review stage.

When paralegals create redwells, the following manila subfolders will be added to the redwell:

(1) Submission folder [includes any executed contracts or agreements]
(2) Correspondence
(3) Victim contact information
(4) Defense investigation
(5) CIU investigation
(6) Work product

(7) Court pleadings
(8) Docket(s) [include Common Pleas docket + any open appellate dockets]

At the close of an ADA investigation that does not proceed to litigation, the ADA will make sure that paper copies of all documents generated during the investigation are organized into the redwell, as outlined above. The ADA can add additional folders as needed. If there is more than one redwell, that case should have its own box, and will generally be considered a "large file."

b. Large Files (Boxes)

For cases that proceed to complex investigations or litigation and generate more than one redwell, there will be at least one CIU box in addition to the existing DAO boxes. (Even if an existing DAO box is not full, the CIU will create an additional CIU box, because the CIU file is always maintained separately from the DAO file.) ADAs will determine their own CIU box organization. Here is a suggested format for a complex case (particularly where there are 3 or more DAO boxes):

- One box for the key Pre-CIU record, which includes:
  - Bates stamped H-file (preferably in a 3-ring binder)
  - Copy of all available notes of testimony (could be annotated by an ADA or intern)
  - Key evidence in DAO/police possession *before* the CIU investigation, organized by subject
    - These files should represent what was available in DAO boxes and H-file, regardless of whether it was previously disclosed to defense or not.
    - For *Brady* evidence, files may also include an index of where in each box/ H-file each item was located (especially if it was located in a non-intuitive location, like a mislabeled folder).
    - No documents in these files should have any markings made by CIU staff—they must be preserved as we found them.
  - Any key court opinions or other pre-CIU filings

- One box for the CIU's records:
  - Admin redwell
    - Intake/submission
    - Contracts/ agreements
    - Victim Contact
    - Correspondence (including any important[13] emails)
    - Indexes (e.g., DAO box inventory, H-file inventory, Notes of Testimony summaries) – these may also be cross-copied to Work Product redwell
    - Any internal transfer file

[13] Important emails must be saved to the electronic file, printed and placed in the paper file, or both. Important emails include (but are not limited to) substantive correspondence between parties about the case, communications by and to the court, communications with witnesses, and requests for forensic testing. The assigned ADA will determine whether an email is sufficiently important to save. However, keep in mind that emails are deleted within 45 days unless archived, so emails should be saved or printed throughout the case.

- Court documents redwell
  - Court orders & communications
  - Docket(s) [CP docket and any pending appellate docket]
  - Subfolders for each major filing (w/exhibits) [including the petitioner's filings, if CIU intervened in pending litigation]
  - Transcripts from substantive court listings where CIU appeared.
- Work product redwell
  - Ideally, drafts of joint stipulations or other CW filings (final submissions will be in Court docs redwell)
  - Any index or summary created to analyze case or organize files (maybe also cross-posted to Admin file)
  - Any substantive CIU memos (maybe also cross-posted to Admin file)
  - Any documents/transcripts with extensive ADA/intern notes.
  - Typed or handwritten notes re: substantive issues (admin memos could go in admin folder)
  - Any case presentations
- CIU Investigation redwell
  - Separate files for each issue investigated.
  - Include all investigation and dot-connecting that CIU did that was not previously done, according to PPD records and DAO boxes.
    - Examples: DNA (re)testing, additional interviews of witnesses, key documents from other cases that were not necessarily available in DAO boxes or H-files for this case (e.g., an alternate suspect's similar conviction), records of officer misconduct.
- CIU Discovery released to Defense redwell
  - Must include any documents that CIU passed to defense that was not already made available to defense.
- Defense Investigation redwell
  - Should include any documents defense passed to us that was not otherwise available in our records.
- Media Coverage redwell
  - This should include any information that CIU discloses to press or other sources that are not directly involved in case.
  - This may include articles, podcast transcripts, or other coverage that CIU either participated in or relied on as part of investigation.

3. Electronic Files

At this time, the CIU's electronic files are not as robust as paper files (which seems true for DAO record-keeping in general). Generally, copies of all files that were electronically generated during a case should be saved to that case's electronic file. Although it is not mandated that a full copy of the CIU file be kept electronically, any and all electronically-generated files must be kept in a shared case file in SharePoint (rather than on an ADA's desktop or individual folder in the shared drive).

At the close of a case, electronic files should ideally include, at a minimum:

- Notes of testimony that were uploaded to Court Reporting System
- The Bates stamped H-file
- Submissions and executed contracts/agreements
- Any typed memos, inventories, and notes
- Any important email correspondence regarding the case.
    - This is especially important because emails are currently deleted after 45 days, and because it is generally more time-efficient to save emails than to print and file them.

B. Requesting Files and Transcripts

1. DAO Files

A review of DAO boxes will be an important part of the ADA's investigation. All requests for DAO boxes should go through CIU paralegals. CIU paralegals shall keep a database of the requests for DAO boxes (GRM Inventory Log, located at H:\Conviction Integrity Unit\GRM & H-File Inventory), including the date the boxes for a particular case are ordered and the date that the boxes come into this office.[14] When the boxes come into the office, the CIU paralegal that ordered the boxes will notify the requesting CIU ADA. The requesting CIU paralegal will retrieve the boxes if they are not directly delivered to the CIU floor.

Important: During any DAO box/file review, **do not remove** the original documents from the box (with the exception of notes of testimony). If the reviewer comes across documents pertinent to the case review, the reviewer must make a copy of the document(s) and return the original to the same location where it was found in DAO file. The reviewer should assign the document an appropriate Bates number and label the copy with the Bates number.[15] In the inventory of DAO files, note where the Bates-numbered document(s) came from (box number and any necessary details of its location within the box), as well as a description of the document.

a. CIU Review of DAO Files

After receiving the DAO box(es), the assigned ADA conducts a general review of the contents to:

- Determine if the boxes received are actually associated with the case under review;

[14] Most DAO box orders will be directed to GRM, for which only the paralegal should have access to order GRM files. However, for older cases, the list of boxes in city archives should also be checked: H:\Conviction Integrity Unit\Boxes in city archives.

[15] For example, there are 3 DAO boxes for the case *Commonwealth v. Jane Doe*. The reviewer only finds 100 pages in Box 2 to be relevant to the investigation and not elsewhere in the record. Each of those 100 pages will have a Bates stamp in the bottom right corner, numbered from "JD (DAO box 2) 000001" to "JD (DAO box 2) 000100." Detailed instructions on how to Bates stamp documents are located at: H:\Conviction Integrity Unit\ Interrogation_Confession Project\DLA Piper Protocols and Forms\title: "Scan and Bates Stamp Procedures."

- Do a general inventory of the items in each box (e.g. notes of testimony in box 1, trial file in box 2, direct appeal in box 3, PCRA in box 4, federal court in box 5, etc.).
    - Note: The assigned ADA shall create a word document to reflect this inventory, for use in a later more detailed inventory[16] of the boxes should that become a necessary for case review or permitting counsel to review the DAO files;
- The ADA will provide this inventory to the ordering paralegal within a week of receiving the boxes so that the paralegal can place this information into the GRM form; and
- CIU paralegals will then create two CIU labels: (1) for the DAO boxes which contain the defendant's name, the CP number, and the number assigned to the box (e.g. Box 1 of 3); and (2) a label reflecting the general inventory for that box.

b. Review of DAO files by Defense Counsel

Upon request of defense counsel, the CIU will permit defense counsel to review the DAO files related to the particular case. However, prior to permitting defense counsel to review the files, the assigned ADA shall have completed a full inventory of the boxes to be reviewed. In addition, defense counsel must sign an acknowledgement of their review of DAO files (the acknowledgment should contain the specific files reviewed by defense counsel).[17] Ideally, the files provided to defense counsel are Bates stamped. The written correspondence will document what was provided to defense counsel. In addition, if defense counsel requests copies of any documents from the DAO files, the assigned ADA must also retain a copy of the documents, as proof of what was provided to defense counsel.

2. PPD Records / H-Files

When requesting the Philadelphia Police Department's ("PPD") homicide file or H-file, fill out this form: H-File Request Form, which is located in two places: H:\Conviction Integrity Unit\~FORMS and H:\Conviction Integrity Unit\GRM & H-File Inventory.

a. Form Completion & Submission

Email the completed form to the CIU supervisor and copy CIU paralegals. The CIU Supervisor will email the request to the PPD contact and copy CIU paralegals on the email. All requests for the H-file must go through the CIU Supervisor. CIU paralegals will track these requests in an excel spreadsheet, including the date the request was made, the date the copies and H-file were ready to be viewed, and the date the copy of the H-file was picked up (spreadsheet located here: H:\Conviction Integrity Unit\GRM & H-File Inventory).

[16] A detailed inventory template is located here: H:\Conviction Integrity Unit\ DLA Piper Protocols and Forms\title: "DAO Box Inventory Template."
[17] A CIU form letter for this acknowledgement is located here: H:\Conviction Integrity Unit\~FORMS\Protocols, forms.

b. H-File Review and Retrieval

PPD should make the physical H-file available for review within two weeks.[18] The assigned ADA will review the original physical file. The CIU Supervisor will provide the PPD 24-hours' notice of when the assigned ADA intends to go to PPD to review the H-file. All H-file reviews will commence in the morning around 9 am and will not go past 3 pm.

The PPD policies regarding H-file review change periodically. As of this writing, a PPD employee must observe any review of the original file. Sometimes the PPD designates an employee who copies the PPD file, and, absent unusual circumstances, the PPD may deliver copies of the files to us within 48 hours of the review of the physical file. If the PPD does not have personnel to copy the file, then CIU staff may copy the file on site (two people should go together).

Once the copy of the H-file is delivered to the CIU, the CIU paralegal will document the date of the receipt. The CIU paralegal will then scan the H-file and Bates stamp the scanned H-file.[19] The CIU paralegal will then deliver the scanned and Bates stamped H-file, as well as the copy of the H-file provided by PPD, to the assigned ADA, and have them sign a form noting or confirm in an email that they received the H-file.

c. Review of H-files by Defense Counsel

After receiving a signed copy of the DCA and upon request of defense counsel, the assigned ADA will provide to defense counsel an electronic copy of the Bates-stamped H-file. This should not be provided to defense counsel before it is Bates stamped. When the assigned ADA provides the H-file, the accompanying email/letter should explain that, pursuant to a policy instituted by the PPD, the physical H-file is not permitted to leave PPD. The letter should also explain that the assigned ADA reviewed the physical file at PPD and has been provided with a copy of the H-file by PPD. The CIU is now providing defense counsel with Bates-stamped copy of the entire H-file[20]

The H-file will not be produced to defense counsel absent providing a fully executed DCA to the CIU. Ideally, defense counsel will have signed the DCA when defense requests the H-file. If the DCA is not signed, this should not delay the CIU's initial request for the H-file.

3. Transcripts

When an ADA begins an investigation, they should search Court Reporting System to determine which transcripts have already been uploaded, and save those transcripts to the electronic file. Many CIU cases will have uploaded transcripts, because transcripts are generally automatically ordered during appellate and PCRA proceedings, and most CIU cases have an appellate history.

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[18] PPD agreed to the two-week timeframe, although they rarely, if ever, follow it. As a result, always request the H-file as soon as possible, because of the time it takes to receive it.

[19] *See supra* note 14.

[20] The form letter for H-file disclosures is located here: H:\Conviction Integrity Unit\~FORMS\Protocols, forms\title: "LT defense attny re H file disclosure."

If a transcript is unavailable, the ADA should check the DAO box(es) for a copy. ADAs should not mark up these transcripts—they should be preserved as they were when the CIU received the DAO box(es). If the ADA wishes to annotate a transcript, that transcript should be scanned to the electronic file and printed.

If transcripts for substantive[21] court listings are unavailable in Court Reporting System or the DAO box(es), the ADA should ask defense counsel for these transcripts and then check the Quarter Sessions file.

C. Conducting Interviews

Witness interviews are a vital aspect of many CIU investigations. An assigned ADA may want to locate and re-interview witnesses already interviewed during the PPD investigation or who testified at a preliminary hearing, trial, or post-trial hearing. It may also be possible to locate "new" witnesses that are discovered during the course of the CIU investigation, but who were not documented in discovery or the initial trial or post-conviction records. In either situation, the protocol is fundamentally the same:

- The ADA should fill out an Investigation Request form (located here: H:\Conviction Integrity Unit\~FORMS\ Protocols, forms);
- The ADA discusses the potential interview plan with the CIU Supervisor;
- If the plan is approved, the ADA speaks with defense counsel to determine whether defense counsel will join in the interview; and
- the ADA gives the Investigation Request form to the Special Assistant;
- The Special Assistant then locates the witness, and, if needed, coordinates an interview time with the ADA.

If an interview is conducted, at least one CIU staff member must be present. Interns cannot interview people alone. Ideally, two CIU staff members should be present or an audio or video recording should be made.

Interviews should be documented in either a memo form or a "question and answer" (Q&A) format using the CIU's Investigation Interview Record form (available at: H:\Conviction Integrity Unit\~FORMS\Protocols, forms\ titled "CIU Witness Interview Form"). As a preliminary precaution, before launching into the Q&A portion of the interview, all interview subjects must be informed of who is interviewing them (names and employment), the general subject matter of the interview, and whether the interview is being audio or video recorded.[22]

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[21] I.e., listings that were not merely scheduling conferences or other administrative matters.

[22] The CIU generally does not record interviews, but there may be circumstances where a recording will be strategically helpful. In any case where the staff member wishes to record an interview, by Pennsylvania law, the interviewer must secure the interviewee's consent to record the interview. That consent must be documented.

Interviewers must also ask at the outset whether the person reads and understands the English language and whether they are currently under the influence of drugs or alcohol.

At least one CIU staff member's contact information should be provided to the person interviewed.

D. Physical Evidence & Evidentiary Testing

Whenever possible, ADAs should ascertain whether there is any physical evidence that may exist that has been untested or tested with limited results or outdated scientific methods. If so, they should attempt to verify whether that evidence still exists.

ADAs should first draft a DAO Forensic Testing Request form, located at: H:\Conviction Integrity Unit\Forensic Testing Requests.

Before submitting any request for evidentiary testing, ADAs must consult with ADA Carrie Wood and/or with the CIU Supervisor to request an inventory of all physical evidence and determine whether evidentiary testing is feasible and how to approach a request for testing.

Copies of evidentiary inventory and testing requests must be kept in both of the following locations: (1) the paper file, as outlined in Part III.A.1; and (2) H:\Conviction Integrity Unit\Forensic Testing Requests.

IV. OTHER CIU POLICIES

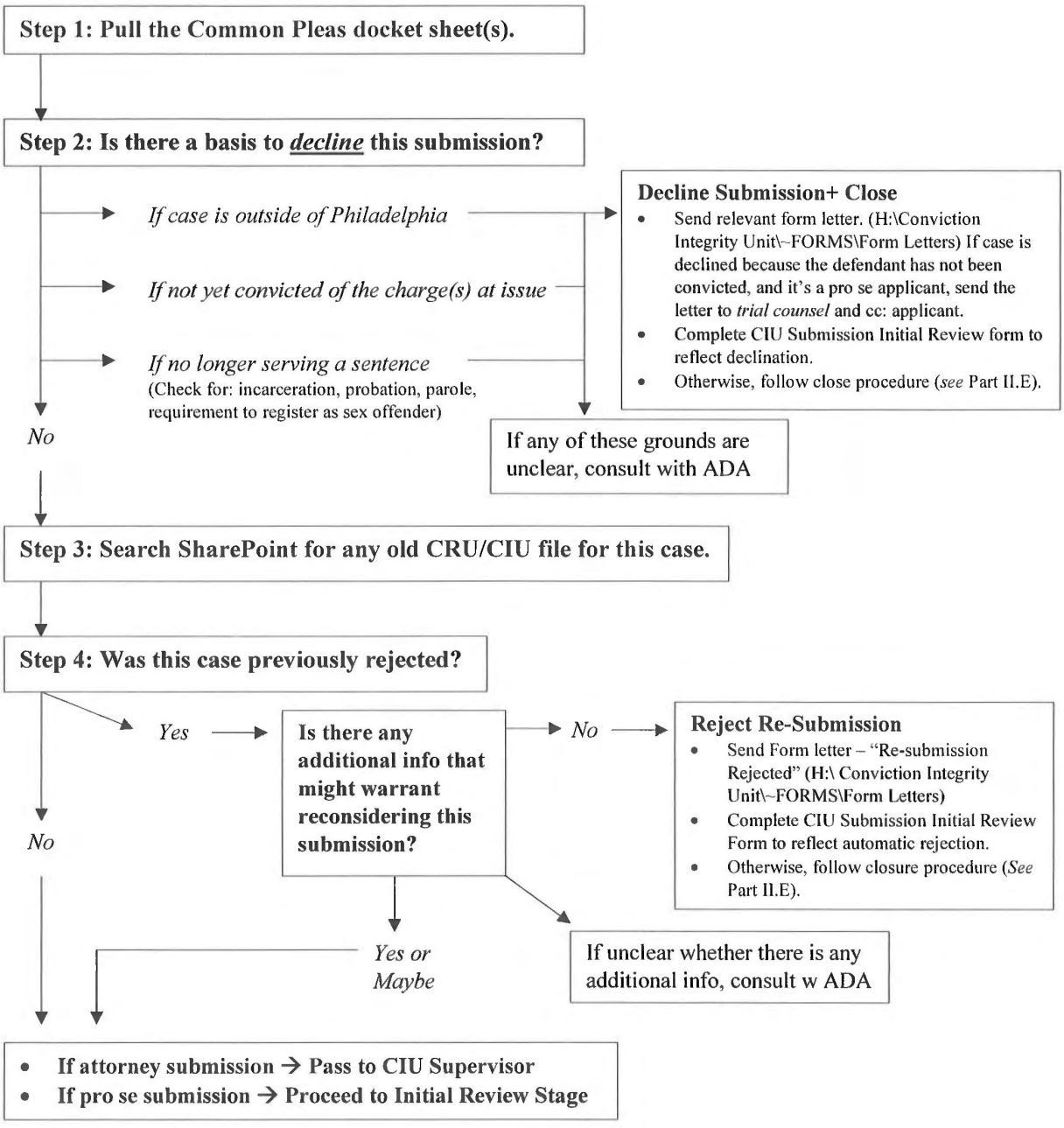
Note: These written policies are still in development.

A. Supervision

B. Sharing Information & Confidentiality

C. Data Collection, Management, and Reporting

Appendix 1:


Step 1: Pull the Common Pleas docket sheet(s).
Step 2: Is there a basis to decline this submission?
If case is outside of Philadelphia
If not yet convicted of the charge(s) at issue
If no longer serving a sentence
(Check for: incarceration, probation, parole, requirement to register as sex offender)
Decline Submission+ Close
Send relevant form letter. (H:\Conviction Integrity Unit\~FORMS\Form Letters) If case is declined because the defendant has not been convicted, and it's a pro se applicant, send the letter to trial counsel and cc: applicant.
Complete CIU Submission Initial Review form to reflect declination.
Otherwise, follow close procedure (see Part II.E).
If any of these grounds are unclear, consult with ADA
No
Step 3: Search SharePoint for any old CRU/CIU file for this case.
Step 4: Was this case previously rejected?
Yes
Is there any additional info that might warrant reconsidering this submission?
No
Reject Re-Submission
Send Form letter – "Re-submission Rejected" (H:\ Conviction Integrity Unit\~FORMS\Form Letters)
Complete CIU Submission Initial Review Form to reflect automatic rejection.
Otherwise, follow closure procedure (See Part II.E).
No
Yes or Maybe
If unclear whether there is any additional info, consult w ADA
If attorney submission → Pass to CIU Supervisor
If pro se submission → Proceed to Initial Review Stage

LAWRENCE S. KRASNER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE
CONVICTION INTEGRITY UNIT
THREE SOUTH PENN SQUARE
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PHILADELPHIA DISTRICT ATTORNEY'S OFFICE
CONVICTION INTEGRITY UNIT PROTOCOLS AND PROCEDURES

The Conviction Integrity Unit ("CIU") endeavors to review past convictions for credible claims of actual innocence, wrongful conviction, and, where feasible, sentencing inequities. This process is afforded to *pro se* petitioners and those who are represented by an attorney. Credible claims are determined through the review of all available files and evidence. Reinvestigations are also conducted to determine if new evidence exists and/or exculpatory evidence was suppressed in prior proceedings. The review process is conducted by prosecutors who coordinate and collaborate with defense counsel in order to litigate defendant's claims and, where appropriate, to provide the defendants with relief.

The procedures outlined below constitute a general overview of the CIU's protocols for intake, filing, investigation, and case closure. Several of the CIU's forms and checklists are attached as appendices.

I. Processing and Intake for *Pro Se* Submissions

a.) *Pro se* submissions are created through the dissemination of a 16-page Submission and Consent form in which the defendant can outline their claim of wrongful conviction/actual innocence, cite new evidence, and consent to CIU review process. (Appendix A). In some circumstances, letters (i.e. "DIY" submissions) with enough information for a preliminary review to be done, will be accepted as well. These "DIY" submissions must have case identifiers and clearly lay out their claims of innocence or wrongful conviction.

b.) The CIU receives correspondence from defendants, defendant's relatives, and attorneys on a daily basis. An assigned paralegal will process this correspondence by stamping and scanning it. One of the Pro Se Team (PST) paralegals then logs the correspondence in the case management database. If the defendant is contacting the CIU to request a submission form, they are sent the Submission and Consent form using the Form Request letter. (Appendix B)

c.) The PST paralegal responds to all other correspondence with the Correspondence Acknowledgement Letter (Appendix C).

d.) When a Submission and Consent form is submitted the PST paralegal first sends the Submission Acknowledgement Letter (Appendix D). The PST paralegal also creates a case management database entry. The PST paralegal then begins filling out the Pro Se Submission Screening Memo (Appendix E), which walks them through the following steps:

i. The PST paralegal first determines if there is a reason for a mandatory declination. These reasons include if the case is outside of the CIU's jurisdiction (Philadelphia County), the defendant has not been convicted, or the defendant is not currently incarcerated or on parole. There is no mechanism in Pennsylvania to challenge a judgment when a defendant is no longer on probation or parole. [1] So, the CIU does not accept defendants who are no longer serving a sentence of parole. The CIU does not accept defendants who are currently on probation due to its limited resources. If the PST paralegal has determined the case can be declined, they notify the defendant using the appropriate form letter (Appendix F).

ii. The PST paralegal will then determine if the submission is a re-submission. If it is a re-submission, the PST paralegal will evaluate whether the re-submission contains any new information when compared to the original submission. When there is new information, the PST paralegal will send a Re-Submission Acceptance Letter (Appendix G). They then will place the physical file into the re-submission queue for preliminary review. When there is no new information, the PST paralegal sends a Re-Submission Declination Letter (Appendix H).

iii. If the submission is NOT a re-submission, the PST paralegal creates a physical file generated for preliminary review. A digital file is also created and stored on a shared drive accessible to all CIU personnel. Finally, the PST paralegal will determine which queue the case should be in, the priority queue or the regular queue. The priority queue is for cases that the PST paralegal believes is important for an ADA to review soon. The regular queue will be reviewed as the CIU is able to get to them.

e.) Once files are created and prioritized, they are subjected to an informal preliminary review by the CIU staff of prosecutors and PST paralegals. This informal review process results in either declination or discretionary declination [2] of a defendant's request for review, declination following review, assignment to paralegal staff for further work-up, or acceptance for further review by a prosecutor.

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[1] Eligibility for relief under the Pennsylvania Post Conviction Relief act is limited to petitioners who are "currently serving a sentence of imprisonment, probation or parole for the crime ..." 42 Pa.C.S. § 9543(a) (1); *Commonwealth v. Smith*, 17 A.3d 873, 904 (Pa. 2011). Eligibility for federal habeas relief is likewise limited to those who are in custody or under supervision as a result of the judgment they challenge. 28 U.S.C. § 2254(a); *see Garlotte v. Fordice*, 515 U.S. 39 (1995)).

[2] Prior to January 1st, 2020, the CIU declination category only included what is defined as mandatory declination as discussed *supra* in I d) i). However, due to the volume of submissions and the limited resources of the CIU, effective January 1st, 2020, the CIU created a new category of discretionary declinations – cases involving submissions that either on their face or after a limited work up are not compelling enough to warrant a further review and an investigation.

i. Work-up is performed by printing and filing any available dockets, appellate opinions, appellate briefs, PCRA pleadings, etc., that will assist in the CIU's preliminary review.

ii. Declinations following review are determined based on lack of new evidence (as defined by Title 42 PA C.S. § 9545 (b)), where it is apparent that the defendant's sentence is legally appropriate (e.g., claims of innocence of first degree murder under circumstances that would still subject the defendant to the same mandatory life sentence for second degree murder or complaints regarding a mandatory sentence for a crime to which the defendant admits guilt), or frivolity.

f.) If accepted for further review and investigation, the submission is assigned to a PST paralegal or prosecutor, and it becomes an active part of their daily caseload.

II. Processing and Intake for Attorney Submissions

a.) Submissions from counseled defendants are received in the same manner as *pro se* submissions and are processed and maintained in similar ways. Although the CIU receives a high volume of attorney submissions, they are dwarfed by the number of *pro se* submissions by an order of magnitude.

b.) Attorney submissions have generally been worked up by counsel and often include in-depth analysis, copies of important records to be reviewed, and the products of defense investigations. Because attorney submissions are fewer in number and generally more developed, they are maintained in a separate attorney submission spreadsheet with tabs separating assigned cases from unassigned and closed cases.

c.) To confirm receipt of a counseled request for review, the defendant's attorney is sent a 5 page checklist to complete and return to the CIU. (Appendix I). This checklist provides the CIU with an overview of the defendant's case and procedural history, the relevant docket number(s), a brief history of the defendant's prior representation, and any witness or victim contact information that the attorney has obtained through discovery or their investigation.

d.) If a paralegal determines from the docket that the case submitted for review has current litigation pending, the paralegal will then send a Continuances Letter (Appendix J). This letter was created so that the Law Division, who is handling that litigation, is aware of the request for CIU review and so that all interested parties are familiar with CIU protocols regarding requests for continuances.

e.) The decision when to assign a case for review is based on a multitude of factors. The factors considered include the nature of the claim, how long the defendant has been in prison, when the submission was received, the information provided, and the investigation necessary to determine if any of the claims have merit or warrant relief.

f.) Once a case has been accepted for review, it is assigned to a prosecution team, and the assignment is noted in the attorney submission spreadsheet.

g.) After the case is assigned to a prosecution team for review, his or her attorney is sent a Discovery and Cooperation Agreement and a Waiver and Consent form (Appendix K). The Waiver and Consent form provides the CIU limited access to the defense file to investigate claims such as IAC or *Brady* claims and must be signed by the defendant and returned to the CIU.

h.) Assigned cases become a regular part of the prosecutors' caseloads, and the prosecution team then conducts in-depth investigations. CIU prosecutors often coordinate and collaborate with defense counsel to conduct their investigations.

III. Investigations and Case Review

a.) The prosecution team is responsible for conducting an independent investigation into the defendant's conviction.

b.) Upon assignment, the prosecution team immediately fills out a Victim Contact Information form. (Appendix L). This form contains all available contact information for the victim(s) and/or the victim's family members in the defendant's case.[3] In addition to filling out the form, the prosecution team shall make sure basic information regarding victim contact is provided to Heather Wames (or other designated victim advocate) so she can input it into DAOCMS.

c.) If not already available, District Attorney's Office records are ordered from storage and inventoried. Any available police records are obtained from the police department, scanned, and bates-stamped.[4] Both the District Attorney's Office and police files are shared with defense counsel, subject to the Discovery and Cooperation Agreement discussed above.

d.) The District Attorney's Office and police files are reviewed for evidence such as potential *Brady* material and evidence of other police or prosecutorial misconduct.

e.) If a defendant is requesting CIU review based on new evidence such as recantations or DNA testing that was not previously available, the CIU makes every effort to locate

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[3] Victim contact is a critical facet of the CIU's work. There is no bright-line rule dictating when it is appropriate to make initial contact. Instead, CIU attorneys evaluate when to contact victims on a case-by-case basis, and consider numerous factors, such as the extent of the victim's or family members' prior involvement in the case and the nature of the issue(s) involved in CIU review.

[4] The Philadelphia Police Department maintains all homicide investigation files perpetually but disposes of older, non-homicide files.

relevant witnesses and physical evidence. The CIU then conducts a holistic investigation to determine if the new evidence supports relief.

f.) If the CIU's investigation validates a defendant's claims of innocence, wrongful conviction or sentencing inequity, the CIU will inform the victims of the results of their investigation and support the defendant's efforts to obtain legally appropriate relief.

g.) When the prosecution team concludes relief is warranted, the team is responsible for preparing the necessary draft pleadings and paperwork (e.g. Answer and Stipulations) to be filed with the Court.

h.) The District Attorney must approve all agreements for relief before filing.

IV. Case Closure

a.) If a *pro se* case is declined or the CIU has exercised its discretion to decline the case, a PST paralegal will send the defendant a Declination form letter (Appendix M) or a Discretionary Declination form letter (Appendix N), stating that their request for review has been declined and that a CIU declination should have no bearing on any other litigation related to their case. The case is then marked as "Declined following Review" or "Discretionary Declination" in the case management database and the shared drive.

b.) If a counseled case is declined, either due to a lack of follow-up contact from an attorney or based on the CIU's determination that the CIU cannot support a request for relief at this time, a declination letter is sent to the defendant's attorney. The prosecution team will then complete a CIU Case Closure form (Appendix O), and the case will be marked as "Declined" in the attorney submission spreadsheet and shared drive.

Appendix A
Pro Se Submission and Consent Forms

CONVICTION INTEGRITY UNIT (CIU)
SUBMISSION FORM/REQUEST FOR REVIEW

NAME: _____

INMATE NUMBER: _____ DATE OF BIRTH: _____

SOCIAL SECURITY NUMBER: _____

CURRENT CORRECTIONAL INSTITUTION AND ADDRESS:

_____

_____

_____

COUNTY OF CONVICTION: _____

ARRESTING POLICE DEPT.: _____

DATE OF CONVICTION: _____

COURT CASE DOCKET NUMBER: _____

Please return this application to:
DISTRICT ATTORNEY'S OFFICE
CONVICTION INTEGRITY UNIT
THREE SOUTH PENN SQUARE
PHILADELPHIA, PENNSYLVANIA 19107-3499

Please complete this submission form as fully as possible.
If you do not know the answer to a question, you may leave it blank.

WARNING: THE DISTRICT ATTORNEY'S OFFICE'S CANNOT PROVIDE YOU WITH INFORMATION AS TO WHEN THE REVIEW OF THIS SUBMISSION WILL BE COMPLETED. HOWEVER, DUE TO THE HIGH VOLUME OF REQUESTS, IT WILL BE SOME TIME BEFORE WE CAN REVIEW YOUR SUBMISSION. PLEASE READ THE CONSENT FORM CAREFULLY.

Agreement To Have CIU Review Your Case

(INITIAL EACH LINE AFTER READING)

1. I certify that all of the statements in this application are true and accurate. 1. _____
2. I acknowledge that providing false information will result in a declination of my submission to the CIU. 2. _____
3. I understand that I have no right to a CIU review, and that there is no right of appeal from declination by the CIU. 3. _____
4. I understand that the CIU is not my attorney. 4. _____
5. I am not currently represented by counsel on the case for which I am seeking review by the CIU. 5. _____

DATE: _____

SIGNATURE: _____

PRINT NAME: _____