



Michael T. Dougherty, District Attorney
Boulder County District Attorney's Office
Conviction Integrity Unit

Memorandum

To: Conviction Integrity Unit	From: Michael Dougherty, District Attorney
Subject: CIU Procedure	Date: April 29, 2019

PURPOSE:

To detail the procedure and protocol for presenting a post-conviction claim of actual innocence to the Boulder County District Attorney's Office ("BCDA") for review. This procedure is completely independent of any previously filed or on going post-conviction litigation or appellate filings. The Conviction Integrity Unit ("CIU") will thoroughly and carefully review all claims submitted through a multi-agency collaborative effort led by District Attorney Michael Dougherty.

SUMMARY:

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

The CIU will consist of Boulder County District Attorney Michael Dougherty, CIU Coordinators who are Deputy District Attorneys and Investigators for the Boulder County District Attorney's Office, and Conviction Integrity Board members from outside agencies and law firms.

Chief Trial Deputy Fred Johnson, Deputy District Attorney Mark Grimaldi, and Investigator Marci Lieberman are designated as the CIU Coordinators. Any questions concerning the procedures described below may be directed to the CIU coordinators.

The Conviction Integrity Board (“CIB”) is comprised of members representing the Colorado Public Defender’s Office, the defense bar, the University of Colorado Law School, Alternative Defense Counsel, and the Boulder County District Attorney’s Office.

**BOULDER COUNTY DISTRICT ATTORNEY'S OFFICE
CONVICTION INTEGRITY UNIT PROTOCOL**

I. OVERVIEW

The CIU is established for the review of convicted offenders' extrajudicial post-conviction claims of actual innocence.

Under the direct supervision of the District Attorney Michael Dougherty, the CIU Coordinators will work collaboratively with the CIB to organize the work and will lead all investigations of meaningful claims of actual innocence where the pursuit of truth and justice requires CIU's review.

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

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

II. CIU REQUIREMENTS AND INTAKE PROCESS

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

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

A. Claims of actual innocence

1. All requests must be submitted in writing. In order for the Conviction Integrity Unit to carry out a preliminary review of a conviction, the following prerequisites must be met:
 - a. The conviction occurred in the Boulder County Courts;
 - b. The applicant must currently be a living person and presenting his/her claim of actual innocence where the pursuit of truth and justice requires CIU's review;
 - c. There must be a claim of actual innocence and not solely a claim based on a legal issue (previously raised and/or could have been raised at the trial or during the appellate process);
 - d. Credible evidence of innocence must exist;
 - e. Credible evidence must be evidence not fully considered by the trial jury or the parties at the time of the guilty plea.
 - f. The claim must not be frivolous; and
 - g. The applicant must sign a written "limited" waiver of certain procedural safeguards and privileges (See Consent and Waiver form), agree to cooperate with the CIU, and agree to provide full disclosure regarding all requirements of the CIU.
2. The request shall include the applicant's name, case number, an explanation of the claim and evidence of innocence and, if applicable, a recommendation as to how the CIU can further investigate applicant's claim.
3. The CIU does not review strictly legal challenges such as procedural errors or rulings unless there is an obvious material error or ruling that necessitates such review in light of an accompanying credible claim of actual innocence.

4. Claims involving self-defense or defense of others will not be considered by the CIU at this time.
5. The CIU will not consider cases based solely on a request that a lawful sentence be amended or reconsidered.
6. Priority will be given to those cases where the applicant is currently incarcerated solely for the crime for which he or she claims innocence. Felony convictions will be given priority over misdemeanor convictions.
7. An applicant or applicant's counsel may submit a written application to the CIU. If the applicant is represented by counsel, all communication will be through the applicant's attorney unless there is an express written waiver by both counsel and the applicant.

B. Post-Conviction Motions

All appeals, post-conviction relief petitions, ineffective assistance of counsel motions, motions to withdraw guilty pleas, and new trial motions will be handled by the BCDA's Appeals Unit. The Appeals Unit Supervisor shall notify the CIU of any of the above motions claiming actual innocence that meets the above prerequisites.

III. **CONVICTION INTEGRITY UNIT REVIEW PROCESS**

A. Initial Review

After receiving a written request, the CIU Coordinator will assign the request a case number and index the request.

The CIU members and CIB will have access to the tracking system for all claims and associated applications in the event they choose to review a particular claim.

The CIU Coordinator(s) will review each request and supporting documentation. If a request that is received does not include the necessary information for review, the CIU may return the application to the requesting party for completion prior to reviewing the claim.

B. Accepted Claims and Rejected Claims

If the CIU Coordinator determines that the prerequisite criteria are not met, the applicant and/or legal representative will be notified that no further action will be taken.

If the applicant is determined to have submitted a claim that qualifies for review, the applicant will be notified the case is under review, and the CIU Coordinators will present the case to the CIB for review.

Victim Rights Act notification will be made by a victim advocate from BCDA in accordance with statutory requirements.

In the event that a CIB member believes a claim rejected by the CIU Coordinator is a valid claim, the CIB member can present that claim to CIU for acceptance to the review process.

District Attorney Michael Dougherty retains final decision making authority on accepted and rejected claims for review.

C. Review Process for Accepted Cases

When a case is accepted by the CIU for review, the CIU Coordinator or the CIB member who deems the claim appropriate for review will present the application to the CIU. After the claim is presented, the District Attorney, the CIU coordinators, and the CIB will discuss how to proceed with investigating the claim of innocence and related evidence.

- a. The investigation procedure is unique for each case and may include without limitation, in the sole discretion of the CIU, the following :
 - A complete review of the case file, appellate record, post-conviction motions and all relevant evidence;
 - Information from a cooperating defendant, or the defendant's counsel,
 - Information from cooperating witnesses, and/or confidential informants;
 - Brady/Giglio material (Brady v. Maryland (1963) 373 U.S. 83 and its progeny and Giglio v. United States (1971), 405 U.S. 150);
 - Any recantation evidence;
 - Transcripts of proceedings;
 - Attorney's file where consent is given in writing;

- An identification case checklist.

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

If at any point during the review and investigation process, it is determined that the case does not meet the criteria for an application, the CIU may choose to take no further action on the claim, or continue the review at the sole discretion of the CIU. The applicant will be notified if the CIU decides to take no further action on a claim.

If, the CIU determines that the case meets the criteria of an actual claim of innocence, an in-depth review and re-investigation may be conducted.

D. In-Depth Review and Re-Investigation

1. If an accepted case is reviewed and meets the criteria for a claim of actual innocence, the CIU Coordinator will designate a CIU member or members to review the innocence claim as soon as possible. The designated CIU member will prepare, for the CIU, a memorandum outlining the merits of the claim and all pertinent information warranting further review or investigation.
 - a. A Conviction Integrity Unit Coordinator will supervise the review of the cases that warrant further consideration of the merits.
 - b. A thorough review will be given to all such claims, which may include but not be limited to: DNA test results by a certified laboratory that exonerates and/or incriminates or tends to incriminate a person other than the applicant; interviews of other persons claiming responsibility for committing the crime(s); victim and/or witness recantations; misidentification of the applicant; untruthful statements made by an informant/confidential informant/cooperating witness/co-defendant statements; a credible alibi that existed at the time of the trial but was not introduced through no fault of the applicant; and any evidence that bears on innocence.
 - c. Many post-conviction claims of actual innocence may include reviewing the entire case file, reviewing appellate files and briefs, or addressing any open issues with the Deputy District Attorney and Defense Attorney who handled the case. Other claims may require a more thorough examination including, but not limited to, further case investigation, interviews, a review of defense counsel files, additional scientific testing, and a review of any existing or new evidence. Each case will be carefully and independently weighed and reviewed on its own merits.

- d. Claims made by an applicant who has pled guilty to a crime(s) are subject to a higher standard of acceptance by the CIU due to the presumption that a plea of guilty is entered knowingly, intelligently, voluntarily, and, in some instances, with the assistance of counsel. This presumption may only be overcome with credible, compelling evidence such as explicitly documented evidence in the court record.
2. Standard of review by CIU members for presentation to the District Attorney: Preponderance of the evidence as to actual innocence defined herein by the Colorado Supreme Court committee on civil jury instructions as: That it is more probably true than not.
3. Based upon a thorough and completed investigation, the CIU Coordinator and/or the CIB member will make a final recommendation to the CIU. That recommendation may include without limitation the following findings:
 - a. A valid claim of actual innocence is present.
 - b. A valid claim is not present.
 - c. More information and/or investigation is needed.
4. If a majority of the members of the CIU determine that a valid claim of innocence is present, the memorandum, the vote, and the recommendation to grant the applicant's claim shall be presented to the District Attorney.
5. Dissenting CIU members may include an individual memo to the District Attorney outlining their positions.
6. If the District Attorney agrees with the CIU's recommendation that a valid claim of innocence is present, the District Attorney will receive input from the CIU and determine, in the District Attorney's sole discretion, what relief to grant, which may include without limitation a motion filed with the Court by the BCDA.
7. In the event that the District Attorney disagrees with the CIU's recommendation that a valid claim of innocence is present, the CIU may ask the District Attorney to re-evaluate the evidence and reconsider the applicant's claim. The CIU's request for reconsideration must be in writing and must outline the specific reasons warranting the District Attorney's reconsideration.
8. The District Attorney will make the final decision after re-evaluating the evidence and reconsidering applicant's claim.

9. Should the District Attorney, after reconsideration, agree with the CIU's recommendation that a valid claim of innocence is present, the District Attorney will receive input from the CIU and determine, in the District Attorney's sole discretion, what relief to grant, which may include without limitation a motion filed with the Court by the BCDA. If the District Attorney, after reconsideration, decides that no claim of actual innocence is present, the decision is final and not subject to further review by anyone, including the appellate process.
10. The CIU Coordinator, with the assistance of a victim advocate from BDCA, will make every reasonable effort to notify and receive input from the victim(s), his or her family member(s), or their representative, if applicable, prior to a determination by the District Attorney that a valid claim of actual innocence is present.
11. The final decision will be communicated, in writing, to the applicant or to his or her legal representative if represented by counsel. The duration of the process cannot be predicted due to the complexities, extensive nature, review, and investigative process involved. Each claim will be carefully and thoroughly reviewed and, when necessary, re-investigated. Each case will be assessed based on their unique case-by-case facts and evidence of the claim.
12. If an applicant is not represented by counsel, and the District Attorney determines, or the circumstances require that the applicant receive representation, the BCDA will file the appropriate motion with a request for oral hearing with the Court. The CIU is a volunteer peer review panel only and, therefore, neither the CIU—as an independent peer review panel—nor any member of the CIB will be a party to or participate in any litigation of any kind. It is also understood that no member of the CIB represents, or provides legal advice to any party, individual or entity, and the CIB members' participation in the CIU does not create an agency or fiduciary relationship or duty between any CIB member and anyone, or any entity. It is also understood that participation on the CIU by the District Attorney, or any lawyer, member, or staff of the BCDA, does not disqualify the District Attorney or anyone at the BCDA from conducting their normal duties in relation to the applicant and/or any information or individuals discussed by the CIU.
13. Each case shall be maintained according to the following procedure:
 - a. The CIU shall create and maintain a tracking system that will record the name of the applicant and the ultimate outcome of the claim;
 - b. Completed files will be maintained pursuant to the Boulder County District Attorney's Office Record Retention Policy.
 - c. If the court case is reopened, discovery will be made available.

- d. Exculpatory evidence obtained during the course of the investigation will be provided to the applicant or to his or her attorney.

E. Ultimate Determination

1. At all times during the CIU's review process, the Boulder County District Attorney's Office has complete discretion and authority to review an applicant's claim and accept or reject the claim based upon the District Attorney's review of all relevant evidence. The BCDA's decision on the merits of the claim is final and is not subject to further review by anyone or any entity, including without limitation appellate review by any court or administrative agency.