



DENVER DISTRICT ATTORNEY'S OFFICE POLICY

ACTUAL INNOCENCE POLICY & PROTOCOL

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The Denver District Attorney's duty to fairness and justice does not end at sentencing.¹ Prosecutors must seek justice and not just convictions. The Conviction Review Unit ("CRU") endeavors to review past convictions for plausible claims of actual innocence or wrongful conviction. This process is afforded to *pro se* applicants and those represented by an attorney. The credibility of claims is 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 the Director of Conviction Review in collaboration with defense counsel to investigate applicant's claims and, where appropriate, to support the applicant's request for relief.

The procedures outlined below constitute a general overview of the CRU's mandate and protocols for reviewing actual innocence claims including eligibility, intake, investigation, case review, stakeholder involvement, transparency, and case closure.

ELIGIBILITY CRITERIA:

The following criteria must be met for the CRU to initiate a review of a claim:

1. The conviction was obtained in the City and County of Denver;
2. A plausible claim of actual innocence² exists;
3. There is a substantial basis to believe that credible evidence of innocence exists; and,
4. The claim must not be frivolous.
5. The applicant must currently be a living person.

The generally accepted understanding of actual innocence is that the evidence exonerates the defendant from any criminal responsibility for the offense. Applications that merely disagree with the outcome of the case without potential evidence of actual innocence are not eligible for review.

There must be potential for credible evidence that provides a substantial basis to believe that the applicant is actually innocent. This credible evidence may be developed through the CRU's investigation. Particular attention shall be given to newly discovered evidence or evidence supporting wrongful conviction due to issues concerning forensic science, misidentification,

¹ ABA Criminal Justice Standard 3-1.2(b)-(f)

² Actual innocence means the applicant had no involvement in the underlying crime.



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prosecutorial misconduct or *Brady*/discovery violations, false confessions, jail/confidential informants, alibis, and witness recantation.

Claims made by an applicant who has pleaded guilty to a crime(s) are subject to a higher standard of acceptance by the CRU 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.

The CRU will review any level of offense, including petty offenses, misdemeanors, and felonies. However, the CRU prioritizes cases where the applicant remains incarcerated with a significant amount of their sentence remaining.

I. Independence & CRU Team

The CRU is a non-prosecution unit that directly reports to the District Attorney. The CRU consists of a director, investigator, and intern assistance. The CRU as a unit is of equal importance to any other unit in the Denver District Attorney's Office. While there is not a chief position, the director of the CRU should be regarded as having a leadership role in the office.

All files will be stored on a drive that is only accessible to members of the CRU team. Case investigations will generally not be shared among prosecutors outside of the team until a case staffing occurs or unless additional support is needed.

II. Conflicts of Interest Policy

Conflicts of interest are likely to arise in the course of case review and investigations. There are two types of conflicts: (1) conflicts that involve personal bias or have the appearance of impropriety; or (2) legal or ethical conflicts.

To avoid personal bias or the appearance of impropriety, prior and current prosecutors will not work on CRU cases. Similarly, if the case involves a prior client of any member of the CRU, another independent prosecutor will take over the investigation.

Legal and ethical conflicts may be identified during the investigation of cases. If the CRU uncovers information demonstrating credible claims of prosecutorial misconduct at any level, the CRU will provide information about that misconduct directly to the District Attorney. The Denver District Attorney may consult outside ethics counsel or refer to the Office of Attorney Regulation if there was a violation of the applicable Rules of Professional Responsibility.

In the same vein, prior prosecutors may be interviewed regarding a case during the investigation stage. The prosecutors may be asked to review the case files to ensure all of the information once present is still in the file. Once the law enforcement file has been obtained,



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prior prosecutors can be consulted to see whether there are materials that had not previously been discovered. If so, prior prosecutors may be asked what steps they took to secure the entire file and what representations were made to them by law enforcement agencies about the completeness of discovery. These interviews will be memorialized and made part of the CRU file. If misconduct is revealed, the prosecutor will be advised of that determination and advised if the Denver District Attorney intends to take further action.

III. Intake

Applicants must submit a CRU application to the Denver District Attorney by mail or email. If the CRU receives a request for review in letter or email form, the CRU will send the applicant an application and request that it be completed. In limited circumstances, letters with enough information for a preliminary review may be accepted as well.

Upon receipt of an application, the CRU will determine if jurisdictional criteria is met.

1. If the application is for a Denver County case, the case will be entered in a database, the application scanned, the file opened for screening.
2. If jurisdictional criteria is not met, the CRU will respond with a formal declination letter.

Once a file is opened, the CRU will begin an informal preliminary review to determine if there is a substantial basis to believe that credible evidence of actual innocence exists.

1. If the preliminary review reveals a potentially credible claim, initial analysis and review is performed by reviewing the court case records, appellate opinions, appellate briefs, review of the prosecutor's file, and/or conversations with the applicant or attorney.
2. If the preliminary review reveals that more information is needed to determine if there is a potentially credible claim, the CRU will respond with a formal request for additional information to the applicant or the attorney.³
3. If the preliminary review does not reveal a potentially credible claim, the CRU will respond with a formal declination letter.

If the preliminary review reveals that there is a potentially credible claim, the case will be opened for further review and 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 CRU may choose to take no further action on the claim or continue the review at the sole discretion of the CRU. The applicant will be notified if the CRU decides to take no further action on their claim.

Victims Services from the Denver District Attorney's office, along with the CRU Director and the District Attorney, will provide Victim Rights Act notification in accordance with statutory requirements.

³ Any request for information will be accompanied by a limited request for waiver of the attorney-client privilege and limited only to information the CRU cannot get on its own



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The Denver District Attorney retains final decision-making authority on accepted and rejected claims for review, but under no circumstance shall any applicant be advised they may appeal to the District Attorney directly.

IV. Case Investigation

When a case meets initial criteria, the CRU will move the application forward to investigation. The CRU team will develop an investigation and litigation plan in coordination with the applicant's counsel if the applicant is represented. The following steps will be taken in each case:

1. If not already available, the Denver District Attorney's Office records are ordered from storage and inventoried. Any available law enforcement records are obtained from the relevant agency, scanned, and processed for review.
 - a. After review of the file and at the discretion of the CRU, both the District Attorney's Office and law enforcement files may be shared with defense counsel, subject to a Discovery and Cooperation Agreement. Law enforcement may be consulted regarding this decision.
2. The Denver District Attorney's Office and Denver law enforcement files are reviewed for evidence such as potential *Brady* material and evidence of other law enforcement or prosecutorial misconduct.
 - a. If Rule 16 or *Brady* material is located and was not previously provided to defense, the CRU will discover the material to the applicant or counsel without regard to the outcome of the investigation.
3. If an applicant is requesting CRU review based on new evidence such as recantations or DNA testing that was not previously available, the CRU will make every effort to locate relevant witnesses and physical evidence. The applicant's counsel will be informed when witnesses and/or evidence is located, or if either cannot be located.
4. The CRU will conduct a holistic investigation in cooperation with the applicant's counsel to determine if the investigation and evidence supports relief. The cooperative investigation will be governed by a Discovery and Cooperation Agreement signed by all parties. This investigation will include consideration of a variety of factors including but not limited to:
 - a. Information from a cooperating defendant, or the defendant's counsel,



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- b. Information from cooperating witnesses, and/or confidential informants;
- c. Any recantation evidence;
- d. Transcripts of proceedings;
- e. The defense attorney's file, where consent is given in writing;
- f. The results of interviews of any witness who testified or is outlined in the discovery;
- g. The results of new forensic testing; and
- h. Any other relevant information.

5. Decisions regarding forensic testing will be made during the investigation phase according to the DNA protocol.⁴ Applicant's counsel will be included in the testing procedure and allowed to respond to preliminary testing results. The Denver District Attorney will not discourage the applicant from consulting with their own expert.

V. Case Review Process

If, after careful investigation, it is determined that there is a claim of actual innocence under a clear and convincing standard or the results of the investigation undermine the CRU's faith in the integrity of the conviction, the CRU will initiate the case review process as follows:

1. A preliminary presentation of the case will be made to the Denver District Attorney.
2. If, after a preliminary presentation is made, it is determined that the case is meritorious, the CRU will notify the victim of the results of their investigation and request a meeting to discuss the case development in compliance with the VRA and best practices.⁵ The CRU will notify the relevant law enforcement agency of the results of the investigation and request a meeting to discuss the case developments.

⁴ The VRA is triggered at the time of the "decision...to conduct postconviction DNA testing to establish the actual innocence of the person...."

⁵ The CRU will collaborate with Victim Services personnel to outline best practices and be responsive to the victim's needs.



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3. The Denver District Attorney will make the final decision as whether to support an applicant's effort to seek relief. The elected District Attorney is the final decisionmaker and must approve all agreements for relief before filing. The victim will be notified of this decision.
4. The Denver District Attorney may grant relief where the results of the investigation undermine the office's faith in the integrity of the conviction, even if the claim for actual innocence cannot be proven by a clear and convincing standard.

VI. Litigation

If the Denver District Attorney determines that relief is warranted, the CRU will take swift action to present the case to the court. If the applicant is *pro se*, the CRU will request the court appoint counsel. A motion seeking relief may be filed by defense counsel. The CRU may submit a detailed brief with stipulated facts outlining the investigation and conclusions or may join any motion filed by defense counsel.

If there is a pending appeal or other post-conviction motion, a motion to stay the proceedings will be filed with the consent of the applicant.

If the Denver District Attorney does not believe relief is appropriate, the CRU will take no further action. The matter may then proceed through the Appeals Division.

VII. Case Closure

If a *pro se* case is declined following review or the CRU has exercised its discretion to decline the case, the CRU will send the applicant a formal declination, stating that the request for review has been declined and that a CRU declination should have no bearing on any other litigation related to the case. The case is then marked as "Declined Following Review" in the case management database.

If a counseled case is declined, either due to a lack of follow-up contact from an attorney or based on the CRU's determination that the CRU cannot support a request for relief at this time, a declination letter is sent to the applicant and applicant's attorney. The case will be marked as "Declined" in the case management database.

VIII. Victim Input & VRA



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The needs and well-being of victims are of utmost concern and addressing them must be a collective effort within the Denver District Attorney's Office throughout the entire post-conviction process. The CRU will ensure that victims are treated with fairness, respect, and dignity.

As applicable to cases of actual innocence, the CRU and Victim Services will work together to confer with victims so that they are informed of case developments. Contact will be made early in the process but only after an applicant meets the eligibility criteria, the CRU has conducted a significant investigation, and a preliminary review has occurred. This process reduces unnecessary contact in the early stages of the review process and avoids unnecessary re-traumatization. Best practices outlined by national exoneration victim organizations will be followed.

Per the Victims Rights Amendment, the victim has the right to be heard at all critical stages. As defined by CRS § 24-4.1-302(2), the relevant critical stages include but are not limited to:

(t) A hearing held pursuant to section 18-1-414(2)(b), C.R.S. (hearing on preservation of evidence) (u) The decision, whether by court order, stipulation of the parties, or otherwise, to conduct postconviction DNA testing to establish the actual innocence of the person convicted of a crime against the victim; the results of any such postconviction DNA testing; and court proceedings initiated based on the result of the postconviction DNA testing. An inmate's written or oral request for such testing is not a "critical stage".

IX. Transparency & Community Engagement

Because the decision to reverse a conviction carries significant weight and emotional consequences, the public should be kept informed about the CRU's operations and decision-making process. While mindful of work product, public safety, and privacy concerns, the extent to which the CRU can make publicly available its process for deciding which cases to review, how cases are reviewed, and how decisions are made helps criminal justice stakeholders and members of the affected communities support the ultimate decision. This will be achieved by: (1) tracking and publishing relevant data with the Denver District Attorney's annual report; and (2) promoting the CRU's work, with the assistance of the communications team, which will determine the best interface with the public, i.e. news media, office website, or townhalls. An exoneree's identification will not be publicized in reports without their consent.

The CRU will track and record data regarding all cases that are reviewed and the outcome of the review. The Denver District Attorney's annual report will include data from the previous year, including the number of applications reviewed, the number of applications that met the



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screening criteria, how many applications were declined, and how many applications were accepted for preliminary review, investigation, and litigation.

Finally, the CRU will track the length and timing of applications, review, and investigation to determine if the CRU is functionally efficiently.

X. Root Cause Analysis

The outcome of CRU investigations provides a critical opportunity to identify systemic gaps that go beyond a single error. As such, in addition to the review and investigation of claims, the CRU may engage in a “root cause” analysis of past injustices with other key stakeholders and propose policies to prevent future wrongful convictions and miscarriages of justice. After identifying the factors that led to the wrongful conviction, the CRU will outline the relevant issues, conduct research on best practices, and make policy recommendations to the Denver District Attorney and their leadership team.