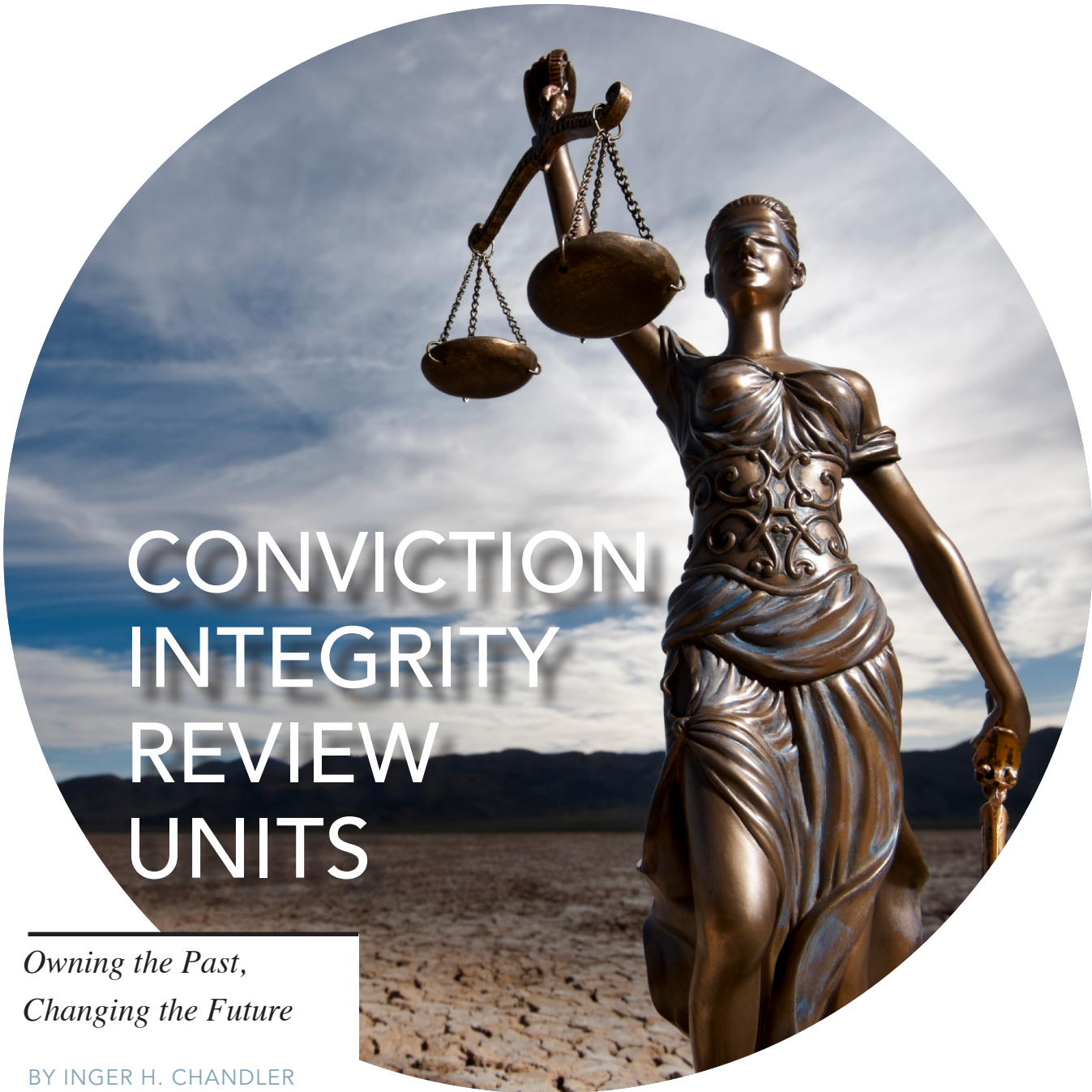




CONVICTION INTEGRITY REVIEW UNITS

*Owning the Past,
Changing the Future*

BY INGER H. CHANDLER

harris County, Texas, is not the only prosecutors' office to have an established Conviction Integrity Unit, nor was it the first. Dallas County (Dallas, Texas) is often credited with creating the nation's first unit in 2007, and perhaps rightfully so. It is certainly the longest running. There is no question that the large number of exonerations that resulted from the formation of the Dallas County unit ignited a spark in the prosecution community and inspired the creation of other units across the country.

The original concept of conviction integrity/review units, however, dates as far back as the year 2000, when San Diego County (San Diego, California) Deputy District Attorney George "Woody" Clarke, then a nationally recognized expert on DNA, created a "DNA Innocence Project" to review claims of actual innocence. Clark began the unit by sending letters to hundreds of convicted persons, offering to test the DNA evidence in their disposed cases. Then, in 2004, Santa Clara County (Santa Clara, California)

established a unit of their own, but as happens in the world of government, it fell victim to budget cuts in the following term. With the first two units no longer in operation, the creation of the Dallas County unit in 2007 represented a new chapter in conviction integrity/review. Harris County followed in 2009, and, according to the National Registry of Exonerations, the number of units across the country had jumped to 24 by the end of 2015, including the reestablishment of Santa Clara County's unit in 2011. And the trend continues. Already in the first quarter of 2016, two more units have come online, including one in honor of the man who started it all, San Diego County's "George 'Woody' Clarke Conviction Review Unit."

THE HARRIS COUNTY EXPERIENCE

The role of a conviction integrity/review unit can vary from office to office, but on a very basic level, most are tasked with conducting investigations involving claims of innocence. In Harris County, cases are screened for claims of *factual* innocence, leaving legal defenses and other constitutional claims to the appellate and writs divisions. Cases typically fall into two major categories: formal requests for postconviction DNA testing and "grassroots" innocence investigations.

In a nutshell, Texas law provides that a convicted person may submit a motion for postconviction DNA testing of evidence that was either (1) not previously subjected to DNA testing, or (2) previously subjected to DNA testing, but can now be subjected to newer testing techniques that may provide more accurate and/or probative results. (*See* TEX. CODE CRIM. PROC. art. 64.01(a).) Though the statute facially requires the convicted person to establish, among other things, that identity was at issue in the case and that he or she would not have been convicted if exculpatory results had been obtained through DNA testing, the Harris County Conviction Integrity Unit tends to take a more relaxed approach. When presented with a request to test a particular piece of evidence, they simply ask, "*could* it make a difference?" If there is a chance that it could, the unit agrees to testing. The philosophy of the unit is simple: doing what's right should trump the technicalities of the statute. The biggest hurdle to Chapter 64 testing in Harris County has been the availability of evidence. In the past, once the statute of limitations and/or the appellate timeline had lapsed, law enforcement property rooms routinely destroyed physical evidence. While not done maliciously, it has created a significant impediment to testing evidence from decades-old cases.

"Grassroots" innocence investigations are initiated in a

variety of ways, most typically in the form of jail letters from convicted defendants. Harris County's unit has also been alerted to cases by family members of defendants, by their trial counsel, and on a few occasions by the very prosecutor who tried the case. A comprehensive review of each case is conducted, including reviewing incident reports, defendant/codefendant case dispositions, appellate/writ history and opinions, trial transcripts, prosecutors' files, and forensic reports (i.e., DNA, fingerprints, ballistics). The goal is to understand the whole tapestry of the case, to conduct an "autopsy" of the conviction so to speak, starting with the underlying facts of the criminal offense and continuing through each stage of the investigation, arrest, conviction, and postconviction litigation. If the unit can investigate the case from a forensic science angle, they certainly will. But they also review cases for well-known recurrent themes in wrongful convictions, such as faulty eyewitness identification, false confessions, incentivized informants (snitches), prosecutorial misconduct (*Brady* violations), and invalidated forensic science. It is not

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uncommon for a case to begin as a Chapter 64 motion and turn into a "grassroots" investigation if the DNA results do not provide conclusive evidence of innocence.

Interestingly, the unit has found that a collaborative approach to cases (prosecutors and defense attorneys working together) results in a more meaningful and comprehensive investigation. The Harris County unit has worked hand-in-hand with defense counsel in reviewing reports, reviewing evidence, locating witnesses, and conducting interviews.

INVESTIGATING INNOCENCE IN TEXAS

The postconviction process in Texas presents unique procedural hurdles to the innocence process. In cases involving final felony convictions, once the time frame for the filing of a motion for new trial has expired (30 days), any postconviction relief must be obtained by way of state habeas, reviewed and ultimately decided by the Texas Court of Criminal Appeals. There is no mechanism in Texas for the trial court to vacate a conviction, and even if the trial court recommends the granting of habeas relief, the Court of Criminal Appeals is not bound by that recommendation. Therefore, it's not enough in Texas to believe justice would be served by overturning a conviction. Nor is it enough to say, "Had I known then what I know now, I would not have prosecuted this case."

INGER H. CHANDLER is an assistant district attorney with the Harris County District Attorney's Office in Houston, Texas. She has been employed as a prosecutor since 2003, and is currently the chief of the Conviction Integrity Unit.

ABA MODEL RULE 3.8, SPECIAL RESPONSIBILITIES OF A PROSECUTOR

(g) When 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.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Rather, to prevail in state habeas in Texas, one must establish a constitutional violation. While Texas law does recognize the conviction of an innocent person as a violation of due process, to prevail on an actual innocence claim, one must not only produce “newly discovered” evidence—defined as evidence that was not known to the defense at the time of trial and could not have been discovered through the exercise of reasonable diligence—but also convince the court that, when considered in light of the evidence presented at trial, no rational juror would have convicted the defendant had the new evidence been available. (*See Ex parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996).) This standard is seemingly easy to meet where postconviction DNA testing exonerates the convicted person, particularly when that testing goes on to identify the true perpetrator. However, in cases involving recantation, false accusations, and other new scientific evidence, it becomes much more complex. The Court of Criminal Appeals itself has stated, “Establishing a bare claim of actual innocence is a Herculean task. We have stated that ‘any person who has once been finally convicted in a fair trial should not be permitted to wage, and we do not permit him to wage, a collateral attack on that conviction without

making an exceedingly persuasive case that he is actually innocent.’” (*Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006).)

AN OUNCE OF PREVENTION

Beyond DNA motions and innocence investigations, conviction integrity/review units can and should serve a proactive purpose. The leaders of these units, with the support of their administrations, have the ability to effect change in their offices. Texas is now home to four conviction integrity/review units. Each of the units, located in Dallas, Houston, San Antonio, and Fort Worth, is staffed by at least two full-time prosecutors. Beyond their “traditional” roles, the unit chiefs are actively involved with the Texas Forensic Science Commission, one of the guiding forces behind forensic science reform in Texas. Through that participation, the Texas units have been on the forefront of case reviews involving DNA mixture interpretation, hair microscopy, and bite marks. Additionally, the unit chiefs are frequently called upon to train attorneys and law enforcement personnel on the topics of wrongful conviction and actual innocence. And perhaps most importantly, when wrongful convictions have occurred or have nearly occurred, the unit chiefs have conducted thorough procedural reviews to determine the root cause(s) of those failures or near misses. These reviews have led to policy changes and the establishment of best practices within their offices.

CHANGE COMES FROM THE TOP

Finally, it cannot be overstated how important the support of the elected district attorney is to the success of the integrity/review unit. In October 2015, Harris County District Attorney Devon Anderson sponsored mandatory actual innocence training for all prosecutors and investigators. The training involved an in-depth look at the recurrent themes in wrongful convictions, an informative session on the neuroscience of memory by Dr. Craig Stark, and a keynote address by Anthony Graves. Graves, also known as Death Row Exoneree 138, spent over 18 years in prison after being convicted of capital murder in Burleson County, Texas. He was sentenced to death and spent 12 years on death row. Graves captivated the crowd with the story of his wrongful conviction and his tireless efforts to clear his name, and surprised some with his belief in and support of the criminal justice system. He reminded the audience members of the enormous power they possess and the need to exercise it responsibly while encouraging them to always strive to do the right thing. District Attorney Anderson's endorsement of the training program spoke volumes about her commitment to establishing a culture and philosophy at the Harris County District Attorney's Office of achieving justice by doing the right thing. It was a message that still resonates throughout the office.

There is no greater failure of the criminal justice system than the conviction of innocent persons. Conviction integrity/review units represent the acknowledgement of those failures by prosecutors' offices across the country, and their commitment to right the wrongs of the past and prevent similar injustices from happening in the future. ■