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## The Prosecutor in the Mirror: Conviction Integrity Units and Brady Claims

Lissa Griffin

Daisy Mason

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# THE PROSECUTOR IN THE MIRROR: CONVICTION INTEGRITY UNITS AND *BRADY* CLAIMS

*Lissa Griffin\* & Daisy Mason\*\**

*In Brady v. Maryland, the Supreme Court held that a prosecutor has a due process obligation to disclose exculpatory evidence that is material to guilt or punishment. The failure to fulfill this duty is particularly insidious because it bears directly on both whether an innocent defendant may have been convicted as well as on whether the adjudicatory process was fair. The failure to disclose exculpatory evidence has been characterized as “epidemic” and has been documented to have made a major, outsized contribution in cases that resulted in exonerations. It is not surprising, then, that conviction integrity units in prosecutor’s offices (CIUs)—departments or bureaus created to entertain claims of wrongful conviction—often must confront allegations of such wrongdoing by trial prosecutors who work or have worked in their own offices. This Article analyzes the CIU investigation and review processes and the complications they present and explores the ethical obligations of a CIU that concludes that a Brady violation has occurred.*

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\* Professor of Law, Ian J. Yankwitt Faculty Scholar, Haub School of Law at Pace University, White Plains, NY

\*\* L.L.M. Professional Law Student, Birmingham City University (2021); B.A. Philosophy, University of Bristol (2020).

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## I. INTRODUCTION

Philadelphia, Pennsylvania 1993: twenty-one-year-old Chester Hollman III is convicted of second-degree murder and sentenced to life without parole for the shooting death of Tae Jung Ho.<sup>1</sup> Twenty-five years later, in 2018, Hollman's attorney and the Pennsylvania Innocence Project request a meeting with Philadelphia District Attorney Larry Krasner's newly appointed Conviction Integrity Unit (CIU) to persuade the Unit to reinvestigate Hollman's case.<sup>2</sup> The CIU accepts and, as a result of providing Hollman his case files, Hollman's attorney discovers that the trial prosecutor had suppressed exculpatory evidence.<sup>3</sup> Based on the exculpatory evidence, the CIU joined Hollman's request to vacate the conviction.<sup>4</sup>

What the CIU had discovered was that the trial prosecutor, Roger King, had not revealed to the defense that he had evidence that linked three other suspects to the crime.<sup>5</sup> One of these alternative suspects, Denise Combs, had been identified by an anonymous caller as a suspect within 24 hours of the murder.<sup>6</sup> She was investigated by police but only in an attempt to link her to their initial suspect—Hollman.<sup>7</sup> Once that effort failed, they abandoned Combs as a suspect.<sup>8</sup> The CIU conceded that the prosecutor had enough evidence to allow their office to successfully prosecute the real perpetrators.<sup>9</sup> Ultimately, on July 30, 2019, after serving twenty-eight years in prison for a crime he did not commit, Hollman was exonerated.<sup>10</sup> Meanwhile, despite his

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1. *Chester Hollman III*, PA. INNOCENCE PROJECT, <https://painnocence.org/chesterhollman> [<https://perma.cc/D63R-PP6G>].

2. *Philadelphia Exoneree Chester Hollman Featured in Netflix Series "The Innocence Files,"* INNOCENCE PROJECT (Apr. 1, 2020), <https://innocenceproject.org/chester-hollman-facing-life-in-prison-exonerated-of-murder-to-be-featured-in-the-innocence-files/> [<https://perma.cc/YE7S-Y2MT>] [hereinafter *The Innocence Project Hollman Article*].

3. PHILA. DIST. ATT'Y'S OFF., OVERTURNING CONVICTIONS—AND AN ERA: CONVICTION INTEGRITY UNIT REPORT JANUARY 2018–JUNE 2021, at 21 (2021), <https://github.com/phillydao/phillydao-public-data/blob/master/docs/reports/Philadelphia%20CIU%20Report%202018%20-%202021.pdf> [<https://perma.cc/L87Q-KRFR>].

4. Answer at 1, *Commonwealth v. Hollman*, No. CP-51-CR0933111-1991 (Ct. Com. Pl. Crim. Trial Div., June 24, 2019).

5. *Id.* at 2–3.

6. *Id.* at 4.

7. PHILA. DIST. ATT'Y'S OFF., *supra* note 3, at 21.

8. *Id.*

9. Answer at 2, *Hollman*, No. CP-51-CR0933111-1991.

10. PHILA. DIST. ATT'Y'S OFF., *supra* note 3, at 21.

suppression of exculpatory evidence, no disciplinary action was taken against Roger King.<sup>11</sup>

Chester Hollman's story, while shocking, is sadly representative of many other exoneration stories.<sup>12</sup> Between 1989 and 2021, 914 exonerations involved prosecutorial misconduct, the overwhelming number of which involved *Brady* violations.<sup>13</sup> Indeed, prosecutorial violation of due process by withholding material exculpatory evidence has been characterized as an "epidemic."<sup>14</sup> The withholding of exculpatory evidence has been documented in approximately 26 percent of exoneration cases since 1989,<sup>15</sup> making it a notable factor in wrongful convictions. *Brady* violations are particularly insidious because the suppression of exculpatory evidence bears directly on both whether an innocent defendant may have been convicted and on whether the process used to convict him or her was fair. At the same time, Conviction Integrity Units, which have full access to the prosecution's case files, are in a unique position to locate exculpatory evidence and to find evidence as to whether it had been disclosed. They are in a unique position to both remedy violations and to prevent future ones.

This Article undertakes to explore the issues presented to CIUs in identifying, rectifying, and preventing serious prosecutorial misconduct, with a specific focus on *Brady* violations. CIUs are in a unique position to address the problem of prosecutorial misconduct, and efforts have been made to create best practices for how to navigate the complexities of CIU investigations of these issues.<sup>16</sup> To be sure, The

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11. See *id.* at 36–38. The authors were unable to find any evidence showing that Mr. King was disciplined.

12. E.g., Maurice Possley, *Dennis Allen*, NAT'L REGISTRY OF EXONERATIONS (May 13, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5559> [<https://perma.cc/B57Y-YF6Q>]; see also NATIONAL REGISTRY OF EXONERATIONS, 25,000 YEARS LOST TO WRONGFUL CONVICTIONS 3 (2021), <https://www.law.umich.edu/special/exoneration/Documents/25000%20Years.pdf> [<https://perma.cc/6S8W-VZG4>] (as of June 2021, the amount of time collectively served by wrongfully convicted individuals surpassed 25,000 years).

13. *Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> [<https://perma.cc/SBS5-HETP>].

14. *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) ("There is an epidemic of *Brady* violations abroad in the land.").

15. This percentage is based on cases logged at the time of writing by the National Registry of Exonerations with both the labels for 'prosecutorial misconduct' and 'withheld exculpatory evidence' containing instances of prosecutors failing to disclose evidence. See NAT'L REGISTRY OF EXONERATIONS, *supra* note 13.

16. The Quattrone Center released a report in 2021 detailing recommendations on how to deal with prosecutorial misconduct claims in Pennsylvania. QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., HIDDEN HAZARDS: PROSECUTORIAL MISCONDUCT CLAIMS IN PENNSYLVANIA, 2000–2016 (2021), <https://www.law.upenn.edu/live/files/11857-hidden-hazards-prosecutorial-misconduct-claims-in> [<https://perma.cc/J6YF-8553>] [hereinafter Hidden Hazard Report]. In particular, it

Quattrone Center at the University of Pennsylvania has provided advice and guidance about how to do so,<sup>17</sup> but there has been a dearth of scholarship on the issue. This Article aims to encourage discussion of the difficult questions about how such investigations should proceed, e.g., how should wrongful conviction cases involving *Brady* claims be investigated—how should they start, what standard of proof should be required? If *Brady* violations are discovered, should CIUs inform the original prosecutor, interview the prosecutor, call the prosecutor as a hearing witness, or proceed without the trial prosecutor's input entirely? If the court finds a *Brady* violation to have led to a wrongful conviction, what is the appropriate remedy aside from dismissing the conviction? What steps should be taken in the office, if any? When, if ever, should a CIU go outside the office and refer the prosecutor to a disciplinary body? Should there be a systematic review of other cases handled by a prosecutor whose misconduct, including *Brady* violations, surfaced in a review or actually resulted in post-conviction dismissal?

To address these questions we draw on both the Quattrone Center's work and the published reports and other public information about how CIUs investigate such claims. Based on four cases in which *Brady* violations played center stage, this Article will illustrate the different ways in which CIUs approach these cases and attempt to shed light on how these questions can be answered.<sup>18</sup>

Part II of this Article describes the history of CIUs, how they emerged, how they currently operate, and what best practices are employed to ensure wrongful conviction claims involving prosecutorial misconduct are being reviewed rigorously. Based largely on the

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looked at the emerging role of CIUs in identifying prosecutorial misconduct and recommended CIUs continue to promote transparency through providing defense counsel/applicants full access to all prosecutorial files. *Id.* at 49–50. Whilst guidance was not given directly as to how CIUs should be navigating these cases, recommendations surrounding automatic reporting of prosecutorial misconduct, enhancing and expanding prosecutorial self-regulation and reporting, and formally reviewing cases of prosecutorial misconduct are certainly instructive to the present discussion. *See id.* at 6.

17. *Id.* at 6.; see also Patricia Cummings, Webinar, *The Trials and Tribulations of Discovering Brady Violations During a CIU Review*, <https://register.gotowebinar.com/register/1364022652459193102> [<https://perma.cc/4UQT-B724>] [hereinafter Cummings Webinar].

18. The misconduct focused on in this Article is predominantly *Brady* violations and, therefore, is not exhaustive of how CIUs handle claims of prosecutorial misconduct that arise in their own offices. However, *Brady* violations appear to be a major category of CIU applications, are often resolvable based on the prosecution's own files, and represent a majority of the cases reported in those annual reports that currently exist. In many ways, though, the discussion here should apply to other types of prosecutorial misconduct claims as well.

reported work of the CIUs in Brooklyn, New York; Philadelphia, Pennsylvania; Massachusetts; Suffolk County, New York; and Dallas County, Texas, Part III will look at examples of cases CIUs have handled, cases that involve suppression of exculpatory evidence, and analyze how each CIU investigated and resolved those claims. Part IV will analyze what the differences between these cases tell us about the implementation of existing best practices in the process by which CIUs review claims of *Brady* violations and about the kinds of remedies available. Part V concludes that current best practices should more clearly articulate the CIUs' relationship with the trial prosecutor in investigating *Brady* claims and attempts to identify the factors that should be considered in determining whether to refer a trial prosecutor to a disciplinary committee and conduct a further review where a prosecutor's misconduct is identified or results in a post-conviction dismissal.

## II. CONVICTION INTEGRITY UNITS

### A. History

A Conviction Integrity Unit (CIU), sometimes called a Conviction Review Unit (CRU),<sup>19</sup> is a designated unit of a prosecutor's office that engages in post-conviction, fact-based investigation and review of claims of wrongful convictions.<sup>20</sup> These units are commonly located within a local District Attorney's ("DA") office.<sup>21</sup>

CIUs first emerged in the early 2000s.<sup>22</sup> Dallas County is credited with having the longest continuously operating CIU,<sup>23</sup> having been

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19. Some offices choose to name their CIU slightly different names, all of which refer to the internal unit within a prosecutorial office that re-investigates possible miscarriages of justice. The term "CIU" will be used synonymously to describe these units.

20. *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [https://perma.cc/C6SD-4PR2]. The term "wrongful conviction" refers to when a convicted individual is found factually innocent of the crime of which they were convicted.

21. There are a small number of statewide CIUs such as the CIU in Michigan run by the Michigan Attorney General's office. *See id.* However, given the greater number of and history behind DAO CIUs, these units will be the focus when using the term CIU.

22. *Id.*

23. The North Carolina Innocence Inquiry Commission was created in 2006; however, it functions as an independent government entity and so is not categorized as a CIU. *See* Warren D. Hynson, *North Carolina Innocence Inquiry Commission: An Institutional Remedy for Actual Innocence and Wrongful Convictions*, 38 N.C. CENT. L. REV. 142, 149 (2016).

created in 2007.<sup>24</sup> The birth of CIUs was the beginning of an evolution originating from the “innocence movement”<sup>25</sup> that was initially sparked in the late 1980s/early 1990s following the introduction of DNA testing.<sup>26</sup> In 1989, the nation’s first two DNA exonerations took place: Gary Dotson and David Vasquez.<sup>27</sup> In 1992, Barry Scheck and Peter Neufeld started the Innocence Project.<sup>28</sup> The Innocence Project focused solely on wrongful conviction claims in which DNA was available.<sup>29</sup> In 2007, Craig Watkins, the newly elected DA in Dallas County, Texas, opened one of the nation’s first CIUs.<sup>30</sup>

Perhaps as a result of the growing awareness of the reality of wrongful convictions and of the prosecutor’s unique role in identifying, preventing, and correcting them, in 2008, the American Bar Association (ABA) amended the Model Rules (MR) by adopting MR 3.8(g) and (h), which, for the first time, enumerated a prosecutor’s ethical duties in the face of evidence of a possible wrongful conviction.<sup>31</sup> This development further cemented the duty of prosecutors to seek justice and not merely convict.<sup>32</sup> In time, the emergence of the

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24. See John Hollway, *Conviction Review Units: A National Perspective* 10 n.5 (U. Pa. L. Sch., Pub. L. Legal Theory Rsch. Paper No. 15-41, 2016), <http://ssrn.com/abstract=2707809> [<https://perma.cc/54FU-F35G>] (“Two offices, Santa Clara (CA) and Dallas (TX) typically vie for the title of ‘First CRU.’ Santa Clara set up a nascent CRU in 2004, but it took a one-term hiatus under a new DA before being reinstated in 2008. Craig Watkins became the DA in Dallas County (TX) in 2007 and started the longest continuously operating CRU at that time; it is the publicity this office garnered that gets most of the credit for leading the wave of CRUs that has followed.”).

25. “Innocence movement” refers to when Innocence Organizations first began emerging and growing in numbers.

26. ROBERT J. NORRIS, *EXONERATED: A HISTORY OF THE INNOCENCE MOVEMENT* 33 (2017) (documenting how DNA testing was offered to the United States by a company in the United Kingdom in 1987).

27. Dolores Kennedy, *Gary Dotson*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3186> [<https://perma.cc/7FQT-UCVZ>] (story of Gary Dotson); *First DNA Exoneration: Gary Dotson*, BLUHM LEGAL CLINIC CTR. ON WRONGFUL CONVICTIONS, <https://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> [<https://perma.cc/Y35J-8MMG>] (story of Gary Dotson); *David Vasquez*, INNOCENCE PROJECT, <https://innocenceproject.org/cases/david-vasquez/> [<https://perma.cc/7R6Y-K4QL>] (story of David Vasquez).

28. NORRIS, *supra* note 26, at 55.

29. *Id.* at 56.

30. Craig Watkins, *The Dallas DA’s Conviction Integrity Unit*, D MAG. (Jan. 13, 2010, 1:13 PM), <https://www.dmagazine.com/publications/d-magazine/2010/january/the-dallas-das-conviction-integrity-unit/> [<https://perma.cc/AP46-MX5S>].

31. MODEL RULES OF PRO. CONDUCT r. 3.8(g)–(h) (AM. BAR ASS’N 2020).

32. Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 459 n.156 (2009) (“The provisions build upon the ABA’s historic commitment to developing policies and standards designed to give concrete meaning to the ‘duty of prosecutors to seek justice, not merely to convict.’” (quoting AM. BAR. ASS’N, CRIMINAL JUSTICE SECTION, Report 105B to the House of Delegates at 5 (Feb. 2008))).



progressive prosecutor movement led to the election of more reform-minded prosecutors,<sup>33</sup> and the number of CIUs has steadily increased.<sup>34</sup>

Currently there are ninety-three CIUs in the United States,<sup>35</sup> an increase of thirty-four CIUs in the last three years alone.<sup>36</sup> Twenty-eight states have at least one CIU, with California and New York having the most as of early 2022, at seventeen and fifteen, respectively.<sup>37</sup> There is considerable variation among how these units are staffed, the procedures they use, how they investigate, and how and to whom they report. This is to be expected given the differences in statutes and procedures across states and in DA offices. However, there are certain recognized best practices that all CIUs aim to implement to maximize their effectiveness.

### B. Best Practices

In 2002, Innocence Project founders Barry Scheck and Peter Neufeld first articulated the need for “innocence commissions” that would investigate wrongful conviction cases to identify causes of wrongful convictions and remedies for future prevention.<sup>38</sup>

To date, the only such commission in the United States is the North Carolina Innocence Inquiry Commission (NCIIC), established in 2006.<sup>39</sup> The NCIIC is an independent government entity that

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33. See Sophie Tatum, *Progressive Civil Rights Lawyer to Be the Next Philadelphia District Attorney*, CNN (Nov. 8, 2017, 9:59 PM), <https://edition.cnn.com/2017/11/08/politics/larry-krasner-philadelphia-district-attorney/index.html> [<https://perma.cc/J9A3-8XM6>]; Steve Schmadeke, *Kim Foxx Promises “New Path” of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016, 6:34 PM), <https://web.archive.org/web/20210701054730/https://www.chicagotribune.com/news/breaking/ct-kim-foxx-states-attorney-met-20161201-story.html>. For an in-depth exploration of progressive DA elections see David A. Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017).

34. See *Conviction Integrity Units*, *supra* note 20.

35. *Id.* (calculation includes statewide CIUs and statistics are correct as of February 2022).

36. For 2019 figures, see NAT’L REGISTRY OF EXONERATIONS, ANNUAL REPORT 9 (Mar. 31, 2020), [https://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2019.pdf](https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2019.pdf)

[<https://perma.cc/RF58-2JG6>]. For 2021 figures, see *Conviction Integrity Units*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/C6SD-4PR2>].

37. See *Conviction Integrity Units*, *supra* note 20, for a full list of CIUs.

38. Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 99 (2002).

39. See Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 492 (2009).

focuses solely on reviewing claims of factual innocence.<sup>40</sup> Consisting of eight commission members, the NCIIC has the power to investigate innocence claims through subpoena powers.<sup>41</sup> To this end the NCIIC requires applicants to assert “complete innocence of any criminal responsibility for the felony for which the [applicant] was convicted,” alongside providing “credible, verifiable evidence of innocence.”<sup>42</sup> In this sense, the NCIIC meets a substantial part of the criteria for an “innocence commission” purported by Scheck and Neufeld.<sup>43</sup>

The NCIIC is the only one of its kind in the United States.<sup>44</sup> The lack of further development of this type of commission could be due to the narrow focus of cases eligible for review. The NCIIC’s sole review of factual innocence claims results in a lack of consideration and pursual of constitutional problems such as *Brady* violations and prosecutorial misconduct.<sup>45</sup> This is an issue given evidence that such constitutional problems contribute to wrongful convictions and have resulted in the dismissal of convictions.<sup>46</sup> As such, the current approach by the NCIIC greatly limits the number of viable cases for review and, as a result, the number of applicants who have their cases reviewed.<sup>47</sup>

Given the large role of CIUs in exonerations,<sup>48</sup> it appears that CIUs have become the favored model for correcting wrongful convictions.<sup>49</sup>

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40. Sarah L. Cooper, *Innocence Commissions in America: Ten Years After*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 197, 200 (Sarah L. Cooper ed., 2014).

41. *Id.*

42. Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345, 1359 (2007) (citing N.C. GEN. STAT. § 15A-1460(1) (Supp. 2006)).

43. Scheck & Neufeld, *supra* note 38, at 100 (“[T]he key, necessary features of an innocence commission will be subpoena power, access to first-rate investigative resources, and political independence.”).

44. *E.g.*, Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability* 2.0, 92 NOTRE DAME L. REV. 51, 76 n.142 (2016) (“North Carolina was the first and only state in the country to establish such an Innocence Inquiry Commission.”); Hynson, *supra* note 23, at 158 (“As an error correction innocence commission, the NCIIC is the first and only one of its kind in the United States.”).

45. Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 712 (2017).

46. *See supra* Part I; *infra* Part III.

47. This small number of claims reviewed is reflected in the NCIIC’s statistics. Since 2006 the NCIIC has reviewed 2,500 cases. Of those cases only 20 have resulted in exonerations. *Cases*, N.C. INNOCENCE INQUIRY COMM’N, <https://innocencecommission-nc.gov/cases/> [<https://perma.cc/D7CT-887A>].

48. *See infra* Part III.

49. Whilst the original term “innocence commissions” centered around the creation of statewide and federal organizations, such as the North Carolina Innocence Inquiry Commission,

In 2014 Barry Scheck delivered a lecture in which he articulated a list of best practices for CIUs<sup>50</sup> that has shaped subsequent CIU-best-practice literature.<sup>51</sup> In 2017, Scheck produced an expanded working document containing this list, which provides best practices for each area of CIU operation, including CIU's review of claims of prosecutorial misconduct within their own offices.<sup>52</sup> At about the same time, in 2016, John Hollway of the Quattrone Center at the University of Pennsylvania, released a report based on interviews with CIU staff that generated a list of best practices that distinguished operative CIUs from those that could be said to exist in name only.<sup>53</sup> These best practices echo those presented by Scheck, and the two works can be viewed in tandem as presenting the best practices that all CIUs should aim to follow.<sup>54</sup> They address every step of investigating and analyzing a claim of wrongful conviction, i.e., (1) who can submit an application to the CIU, (2) what criterion CIUs should use for selecting cases for review, and (3) how the investigation should take place in regard to information sharing between the CIU and the parties seeking relief.<sup>55</sup>

One area addressed by both of the best practices documents is how to handle claims of prosecutorial misconduct.<sup>56</sup> Scheck suggests a CIU should recuse itself from investigating a claim of prosecutorial

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the literature has since expanded to include organizations such as CIUs. *See* Cooper, *supra* note 40, at 206.

50. Scheck, *supra* note 45, at 705 n.\* (“The following is a greatly expanded written version of the 2014 David H. Bodiker Lecture on Criminal Justice I delivered at The Ohio State University Moritz College of Law on October 7, 2014.”). The best practices were first published in 2015. Barry Scheck, *Conviction Integrity Unit Best Practices*, INNOCENCE PROJECT (Oct. 15, 2015), <https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf> [https://perma.cc/45AH-C4HE].

51. *See* Hollway, *supra* note 24; MASS. CONVICTION INTEGRITY WORKING GRP., CONVICTION INTEGRITY PROGRAMS: A GUIDE TO BEST PRACTICES FOR PROSECUTORIAL OFFICES (Mar. 2021), <https://www.massbar.org/docs/default-source/mba-reports/mciwg-guide-to-best-practices.pdf> [https://perma.cc/T4D4-86XX] [hereinafter MASSACHUSETTS REPORT]. Similar best practices were also identified in a report by a task force on wrongful convictions undertaken for the New York State Bar Association. N.Y. STATE BAR ASS'N, REPORT OF TASK FORCE ON WRONGFUL CONVICTIONS 6–10 (Feb. 8, 2019), <https://nysba.org/report-on-the-task-force-on-wrongful-convictions/> [https://perma.cc/8MST-BWG7].

52. Scheck, *supra* note 50.

53. Hollway, *supra* note 24, at 5–7.

54. Scheck, *supra* note 45, at 707.

55. Scheck, *supra* note 50. Not every best practice is listed here as this section is meant to provide only a brief outline of the general best practices CIUs should be implementing. For an extensive discussion of all best practices, see Scheck, *supra* note 45, at 720–46 and Hollway, *supra* note 24.

56. Scheck, *supra* note 45, at 731–32.

misconduct involving current or former members of its office that is based on “substantial, fact-based allegations.”<sup>57</sup> If such allegations are made, such claims “should be referred to an independent authority for investigation and review.”<sup>58</sup> CIUs have not generally followed this practice and continue to review these claims themselves based on the more general best practices covering a CIU’s investigation of wrongful conviction claims.<sup>59</sup>

Under those practices, once an application for review is received, best practices suggest CIUs follow a standard procedure.<sup>60</sup> The first step is intake: determining whether the application meets the CIU’s baseline criteria.<sup>61</sup> The criterion used for selecting cases might include any of the following: facts suggesting a plausible claim of innocence;<sup>62</sup> evidence of a constitutional violation;<sup>63</sup> or the “interests of justice.”<sup>64</sup> Maintaining a broad scope of review for acceptance of an application maximizes case intake and thus the potential for identification of prosecutorial misconduct and correction of wrongful convictions.<sup>65</sup>

The next stage is the screening stage. Generally, the screening stage involves review by an individual in the CIU to establish a minimum level of credibility.<sup>66</sup> The standard for review at the screening stage should also be clear and should not be so high that it will exclude substantial and potentially meritorious claims from further investigation. The level of flexibility employed at the screening stage is not without its problems. The more cases eligible for review by the CIU, the greater the number of resources needed to meet the demand.<sup>67</sup> If more cases are being accepted for review, more individuals will need to be staffed in the CIU to review those cases. Not every CIU will have

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57. *Id.* at 731.

58. *Id.*

59. Scheck, *supra* note 50; Hollway, *supra* note 24, at 56–57.

60. See Hollway, *supra* note 24, at 36–37.

61. *Id.*

62. Scheck, *supra* note 50 (“That a defense lawyer could have found [newly discovered] facts with the exercise of due diligence should not be a bar [to reviewing the case].”).

63. *Id.* This could include *Brady* “violations, ineffective assistance of counsel, unfair . . . plea agreements, [etc.,] which might lead to the vacatur[] of a conviction.” *Id.*

64. “Interests of justice” is a term used by Scheck to widen the scope of cases that can be reviewed from the outset by CIUs. This allows CIUs to take on cases where there may be limited information making it hard to distinguish whether the case is purely an actual innocence case, or whether there exists a constitutional claim. The CIU can instead look to see if there is any kind of plausible claim of innocence and proceed with investigation without needing to categorize all new evidence immediately as “*Brady*” or proof that defense counsel was ineffective. *Id.*

65. Hollway, *supra* note 24, at 35–36.

66. *Id.* at 37.

67. Hollway, *supra* note 24, at 35.

the means to employ a greater number of people and hence may have to decide between the minimum level of their screening process and the resources available.<sup>68</sup>

Once the application passes this stage, the investigation begins.<sup>69</sup> The aim of this stage will be to reach a conclusion about the case that will result in the final or recommendation stage, when the CIU will present its findings to the DA and put forward its suggested action.<sup>70</sup> From there the DA will decide what action should be taken: either applying to a judge to dismiss the charges and release the applicant if they are incarcerated, conducting a new trial, or simply closing the investigation.<sup>71</sup> An additional consideration is how to address claims of prosecutorial misconduct internally, for example, to modify training, promotion, and salary practices, particularly when they lead to dismissal of the charges. A final consideration is whether to refer the responsible trial prosecutor to a disciplinary committee.

### C. Best Practices for Reviewing Brady Claims

#### 1. Investigation: Communication with the Trial Prosecutor

As noted above, the initial standard for reviewing prosecutorial misconduct claims is a finding of “substantial, fact-based allegations.”<sup>72</sup> The misconduct being substantial “denotes a material matter of clear and weighty importance.”<sup>73</sup> It may be possible to resolve the *Brady* claim by examining the trial prosecutor’s files, to which the CIU has complete access, of course.<sup>74</sup> If exculpatory evidence is found there and the defense claims it had not been turned over (and there is no proof that it had been turned over), that is some reliable proof of non-disclosure. But one basic question that a CIU must address in reviewing a *Brady* claim is whether, and if so, how and when, to speak to the trial prosecutor. The best practice for communicating with the original trial prosecutor in the case suggests that initial communication should be limited to (1) professional courtesy and (2) historical

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68. *Id.* (“[A]ttorneys we spoke to struggle with finding an optimal balance between the need for flexibility in case acceptance and the need to prioritize limited resources.”).

69. *Id.* at 36–37.

70. Hollway, *supra* note 24, at 37.

71. *Id.* at 37.

72. Scheck, *supra* note 45, at 731.

73. MODEL RULES OF PRO. CONDUCT r. 1.0(l) (AM. BAR ASS’N 2020).

74. Scheck, *supra* note 50.

information.<sup>75</sup> In addition, however, there have been several cases where courts have demanded more than a report that the trial prosecutor had been contacted.<sup>76</sup> Some courts have refused to dismiss charges until the trial prosecutor's "side of the story" is provided either by the CIU or by calling the trial prosecutor as a witness.<sup>77</sup>

Patricia Cummings, from the Philadelphia CIU, participated in two cases in which the decision had been made not to have the trial prosecutor testify, and in both cases the courts refused to decide the case until the trial prosecutor was given that opportunity.<sup>78</sup> One of the cases involved Antonio Martinez, who was convicted in 1990 of a double homicide and sentenced to life imprisonment.<sup>79</sup> He applied to the Philadelphia CIU, which, on the basis of its review of the file found substantial evidence in the trial records pointing to an alternative suspect that had not been disclosed to the defense.<sup>80</sup> The CIU felt confident in agreeing with the applicant that the prosecutor intentionally withheld this evidence from the defense.<sup>81</sup> The CIU did communicate with the trial prosecutor.<sup>82</sup> However, having done so, it believed he would lie if questioned in court, and the CIU did not call the prosecutor to testify.<sup>83</sup>

When the CIU brought the case in federal court, waiving all exhaustion claims, Judge Mitchell S. Goldberg found fault in the CIU's decision not to call the trial prosecutor as a witness.<sup>84</sup> Judge Goldberg believed that the trial prosecutor's testimony was essential and that he should have the opportunity to meet the allegations.<sup>85</sup> Even though the case was litigated in state court and Martinez was exonerated in that separate state proceeding,<sup>86</sup> the federal court issued a written decision admonishing Cummings for not calling the trial prosecutor to testify

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75. Hollway, *supra* note 24, at 31; MASSACHUSETTS REPORT, *supra* note 51, at 24.

76. Cummings Webinar, *supra* note 17.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *See id.*

84. Martinez v. Delbalso, No. 19-5606, at 2 (E.D. Pa. Feb. 11, 2021), [https://images.law.com/contrib/content/uploads/documents/402/77513/Martinez\\_Memorandum-Opinion-on-Candor.pdf](https://images.law.com/contrib/content/uploads/documents/402/77513/Martinez_Memorandum-Opinion-on-Candor.pdf) [<https://perma.cc/R7BX-M4Z6>].

85. *Id.*

86. *Id.* at 2–3.

and for bringing the case in federal court but ultimately litigating it in state court.<sup>87</sup>

Another example of the controversial decision over whether to allow the trial prosecutor to testify involves Dennis Allen and Stanley Mozee, who were convicted in 2000 of murder and both sentenced to life in prison.<sup>88</sup> Their case was investigated by the Dallas CIU, which found the trial prosecutor had withheld the existence of favorable deals given to witnesses facing convictions in other crimes in exchange for their testimonies.<sup>89</sup> The CIU believed this evidenced a clear *Brady* violation, and given difficulties faced in contacting the trial prosecutor, did not interview the prosecutor or call him to testify.<sup>90</sup> Whilst the trial court exonerated Allen and Mozee, the case was sent to the Court of Criminal Appeals, where it was then remanded with an order that the trial prosecutor be given the opportunity to testify about the *Brady* allegations in an evidentiary hearing.<sup>91</sup>

As far as can be determined, then, courts and CIUs may have different approaches to communications with the trial prosecutor. Best practices would seem to indicate that a CIU should reach out to a trial prosecutor if possible, even when a *Brady* violation is established by the trial files. In addition, CIUs should realize that the courts may be reluctant to dismiss a case without hearing what the prosecutor has to say, either from the CIU's own investigation or the prosecutor's testimony.<sup>92</sup> And it makes good sense in terms of credibility for a CIU to engage the trial prosecutors, when possible, to maximize office buy-in. A CIU that is seen as actively seeking the trial prosecutor's account of events, rather than focusing solely on what they believe the trial

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87. *Id.* at 22.

88. *Stanley Mozee and Dennis Allen Declared "Actually Innocent" After 15 Years in Prison*, INNOCENCE PROJECT (May 10, 2019), <https://innocenceproject.org/stanley-mozee-and-dennis-allen-declared-actually-innocent-after-15-years-in-prison/> [<https://perma.cc/6R9G-BUUH>].

89. Agreed Findings of Fact and Conclusions of Law on Applicants' Amended Writs of Habeas Corpus at 2, 6, *Ex parte Allen*, No. WR-56,666-03, *Ex parte Mozee*, No. WR-82,467-01 (Tex. Ct. Crim. App. Mar. 3, 2017), [https://www.innocenceproject.org/wp-content/uploads/2018/01/1087\\_Mozee-and-Allen-Agreed-Findings-2017-1.pdf](https://www.innocenceproject.org/wp-content/uploads/2018/01/1087_Mozee-and-Allen-Agreed-Findings-2017-1.pdf) [<https://perma.cc/27Y5-XTP3>] [hereinafter *Allen and Mozee Findings*].

90. Cummings Webinar, *supra* note 17.

91. *Id.* at 7.

92. The present discussion centers around courts requiring the trial prosecutor to testify. However, a decision CIUs may need to consider before taking the case to court is whether they wish to call the trial prosecutor as a witness. This decision may influence how a CIU communicates with a prosecutor, as they will need to ascertain the level of information the prosecutor can offer, to what extent the prosecutor can be trusted to tell the truth, and how their testimony may impact the case. This decision is important given the possible preference of some courts to have the testimony of the trial prosecutor or some indication of what the prosecutor says occurred.

documents indicate, is likely to result in greater credibility for the CIU as a fact-finding unit focused on discovering the truth, rather than a unit set out to discredit former and current prosecutors in the office.

Common sense would appear to indicate that an office of ADAs would have little respect for a dismissal based on *Brady* where the prosecutor responsible was not consulted by the CIU. Thus, deterrence would likely be weak and the ability of the CIU to prevent wrongful convictions will suffer. Giving the trial prosecutor an opportunity to consult would generate less resentment and pushback and greater credibility for the CIU as a fact-finding unit focused on discovering the truth, rather than a unit set out to discredit former and current prosecutors in the office. Finally, where the misconduct is severe or repeated, it would appear prudent to contact the trial prosecutor if referring them to a disciplinary committee or taking other steps is even contemplated.

## 2. The Significance of Mens Rea

There is currently a debate about what role, if any, the mens rea of the trial prosecutor should play in addressing a claimed *Brady* violation: whilst not necessary to establish a constitutional *Brady* violation, should it be considered on the merits or in determining any institutional consequences?

*Brady v. Maryland*,<sup>93</sup> of course, does not itself require a showing of mens rea to establish a due process violation based on withheld exculpatory evidence.<sup>94</sup> Nor do the ABA's Model Rules require a mens rea to establish a violation of MR 3.8. Nevertheless, Scheck argues that a CIU should distinguish between due process violations that result from innocent mistake and intentionally committed misconduct.<sup>95</sup> Hollway disagrees and argues that issues of blame should remain separate from the investigation of a wrongful conviction.<sup>96</sup> Thus, for

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93. 373 U.S. 83 (1963).

94. *Id.* at 87 ("We now hold 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 the good faith or bad faith of the prosecution.").

95. *Innocence Project Research Illustrates Lack of Accountability for Prosecutors Who Commit Misconduct*, INNOCENCE PROJECT (Feb. 6, 2012), <https://innocenceproject.org/innocence-project-research-illustrates-lack-of-accountability-for-prosecutors-who-commit-misconduct/> [<https://perma.cc/TW4B-ZVB9>] ("What's most important is to develop internal and external systems to distinguish between error and misconduct so that prosecutors who make honest mistakes can avoid them in the future and those few who engage in serious misconduct can be appropriately sanctioned.").

96. Hollway, *supra* note 24, at 57.



Hollway, the focus of the CIU should remain on deciding if the facts support a claim of innocence, not on whether the prosecutor's misconduct was intentional.<sup>97</sup> He concludes that "the ability to administer discipline for [misconduct] does not rest within the CRU."<sup>98</sup> In effect, he would limit the CIU's investigation to the constitutional merits. As such, CIUs should remain focused on their primary function as wrongful conviction review units, rather than taking time in their investigations to determine the culpable mental state of the trial prosecutor. It may be that there is a concern that attention paid to the trial prosecutor's mens rea will result in adoption of that criteria in addressing the merits of future claims.

But the intentional or knowing failure to disclose exculpatory information is certainly important to a CIU's other concerns. In terms of deterrence or buy-in, other prosecutors in the office are more likely to accept dismissal of a charge, internal sanctioning of a staff lawyer, or changes in training or procedures that arise from instances of knowing or intentional prosecutorial misconduct. And they are definitely less likely to feel threatened by actions taken in a case of intentional misconduct than in one of arguably excusable misconduct. If the CIU is in an office where the culture is focused solely or primarily on "winning," a focus on the most serious and intentional misconduct might create or strengthen trust in its work.

### 3. Ethical Issues for the CIUs

With respect to ethical concerns, the first topic that should be addressed is whether any member of the CIU has a conflict of interest that would warrant their recusal. Such a conflict could arise because they were involved in the original prosecution or a related one, had a relationship with the prosecutor who handled the original prosecution, or were involved in the case or a related case as a defense lawyer.<sup>99</sup> As it is in any legal practice, this is a threshold question that must be resolved before any work is undertaken on the application.

If a violation of the jurisdiction's ethical rules is found, the decision whether to refer a prosecutor to the disciplinary authorities would raise the question of whether the CIU has a duty to report under the jurisdiction's version of MR 8.3. That duty requires reporting to a

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97. Hollway, *supra* note 24, at 56–57.

98. *Id.* at 56.

99. MODEL RULES OF PRO. CONDUCT *rr.* 1.7, 1.9, 1.10 (AM. BAR ASS'N 2021); *see infra* Section III.D (discussing the Suffolk County case).

disciplinary committee where the potential reporter “knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>100</sup> The underlying conduct would generally have to be at least knowing.<sup>101</sup> And certainly, the gravity of non-disclosure is enhanced by its repetition throughout the case or in other cases. Inadvertent or negligent failure to disclose would not seem to satisfy that standard.

#### 4. Remedies

A final question CIUs may need to address is what remedies can be employed following the finding of a *Brady* violation in a wrongful conviction case. Specifically, whether the CIU should refer the trial prosecutor to a disciplinary body or undertake a systematic review of the cases handled by a prosecutor whose suppression of exculpatory evidence emerged on review or led to dismissal. There currently are no best practices concerning these issues.<sup>102</sup>

##### *i. Referral for Discipline*

The suppression of exculpatory evidence violates MR 3.8, a substantial equivalent of which has been adopted in every state.<sup>103</sup> MR 3.8 provides:

The prosecutor in a criminal case shall . . .

(d) 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 known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.<sup>104</sup>

In addition, prosecutorial misconduct, and in particular, *Brady* violations, can violate MR 8.4(d), which prohibits “conduct that is

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100. *Id.* r. 8.3(a) (AM. BAR ASS’N 2020).

101. *Id.* rr. 3.3, 3.8, 8.4 (AM. BAR ASS’N 2021).

102. See Hollway, *supra* note 24, at 56–57.

103. *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N (Mar. 28, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/).

104. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS’N 2021).

prejudicial to the administration of justice.”<sup>105</sup> Conduct that violates MR 8.4(d) can also violate state rules such as rule 8.4(h) of the New York Codes Rules and Regulations, which prohibits “other conduct that adversely reflects on a lawyer’s fitness as a lawyer.”<sup>106</sup> Finally, knowingly making false representations to the court would violate MR 3.3(a)(1).<sup>107</sup> The same misrepresentations to opposing counsel would violate MR 4.1(a),<sup>108</sup> and both would violate MR 8.4(c).<sup>109</sup>

A lawyer has an ethical duty to report another lawyer’s violation of the rules of ethics. MR 8.3(a) sets forth a lawyer’s professional duty to report professional misconduct:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.<sup>110</sup>

A controversial and complicated question, therefore, is if, and if so under what circumstances, a CIU has a duty to report prosecutorial misconduct it discovers in the course of its work.

As noted above, there exists no explicit best practice for lawyers in a CIU to make this decision. While Hollway takes the position that “the ability to administer discipline for [misconduct] does not rest within the CRU,”<sup>111</sup> that does not mean that a CIU faced with manifestly unethical conduct should not refer a prosecutor for discipline or recommend changes in protocol that would prevent future intentional non-disclosure. Whether the elected district attorney decides to fire or otherwise sanction a prosecutor found to have committed a serious *Brady* violation is a separate decision for the district attorney to make. That decision-making process could certainly include consultation with the CIU, which will have a unique perspective on the kinds of non-disclosure that stand out as serious.

Reporting serious misconduct to a disciplinary committee may be an appropriate course, but it also may be required by the Rules

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105. *Id.* r. 8.4(d).

106. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2022) (“A lawyer or law firm shall not . . . engage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.”); *see also In re Kurtzrock*, 138 N.Y.S.3d 649, 665 (App. Div. 2020) [hereinafter *Matter of Kurtzrock*].

107. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1) (AM. BAR ASS’N 2020).

108. *Id.* r. 4.1(a).

109. *Id.* r. 8.4(c).

110. *Id.* r. 8.3(a) (AM. BAR ASS’N 2021).

111. Hollway, *supra* note 24.

themselves. Guidance comes from the ethical obligations set out in the ethical rules. MR 8.3 requires lawyers who gain knowledge of unethical conduct “that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects [to] inform the appropriate professional authority.”<sup>112</sup> Knowledge of misconduct is defined as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.”<sup>113</sup> The information gained from a CIU investigation would appear to establish knowledge. As with other reporting duties, the question would be whether the unethical conduct “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer.”

Arguably, the ability to fulfill this criterion would be enhanced through the CIU engaging in greater communication with the trial prosecutor. While unethical conduct undertaken knowingly may violate the ethics rules, in the absence of recklessness or intentionality, the existence of a *Brady* violation may not indicate that the conduct was knowing or intentional. Demonstrating sufficient gravity to require reporting is unlikely where a non-disclosure, even if material, may have been a good faith error of judgment.

## ii. *Conducting a Systematic Review*

Whether or not the decision is made to refer, a CIU faced with an application that raises questions about whether a prosecutor’s disregard of their *Brady* obligations could have infected other cases handled by that prosecutor should consider whether to undertake some sort of review of the prosecutor’s other cases. Doing so would be consistent with the CIU’s role in correcting wrongful convictions—in this case, the wrongful convictions of other defendants who have not applied for relief. It would also be consistent with the CIU’s obligation to prevent wrongful convictions. A report such as that in the Kurtzrock case,<sup>114</sup> which was released publicly and distributed internally, is likely to be a more powerful and respected educational tool for impacting what can sometimes be an incorrect institutional approach to *Brady* obligations. Interestingly, other institutions whose purpose is to correct and prevent wrongful convictions have engaged in similar systematic reviews, and in some cases even broader ones. Thus, for

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112. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS’N 2020).

113. *Id.* r. 1.0(f).

114. See discussion *infra* Section III.D.2.ii (discussing “The Broader Review”).

example, the Criminal Cases Review Commission in the UK has several times conducted a systematic review of cases where a particular practice led it to refer a case to the court of appeal, which then quashed (dismissed) the conviction.<sup>115</sup> It responded systematically to scientific developments related to infant death (shaken baby) syndrome and sexual abuse cases,<sup>116</sup> and played a significant institutional role in quashing more than thirty convictions that arose from misconduct by the notorious West Midlands Serious Offense Squad and the Rigg Approach Flying Squad, which ultimately led to those departments being closed down.<sup>117</sup>

Among the factors to consider in determining whether to audit other cases are the seriousness of the misconduct, whether the misconduct was isolated or repeated, the reasons for non-disclosure (to the extent they reveal a general practice or reflect a misunderstanding of the law), and the mens rea of the prosecutor.

### III. CIU CASES INVOLVING *BRADY* VIOLATIONS

As demonstrated above, many questions need to be considered in investigating *Brady* claims in a wrongful conviction case. This section analyzes four exoneration cases from four different jurisdictions: the Dallas CIU, the Brooklyn CRU, the Philadelphia CIU, and the NY Suffolk County Conviction Integrity Bureau (CIB). These cases were selected as these CIUs provided significant publicly available information on their cases and processes. All the cases involved the suppression of exculpatory evidence by the trial prosecutor in violation of *Brady*, and all resulted in exonerations and dismissal of charges. In one of the cases, the CIU referred the trial prosecutor for discipline; in a second, the trial prosecutor was the subject of disciplinary proceedings.<sup>118</sup> In the second instance, we analyze those disciplinary proceedings and the CIB's decision to conduct a systematic review of that trial prosecutor's other cases based on prosecutorial misconduct in disclosure.

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115. Lissa Griffin, *Forensic Evidence and the Court of Appeal for England and Wales*, 4 BR. J. AM. LEG. STUDIES 619, 634 (2015).

116. *Id.* at 631–36.

117. Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOLEDO L.R. 107, 126 (2009).

118. It is not clear who referred the prosecutor to the disciplinary committee, and committee records are confidential. N.Y. COMP. CODES R. & REGS. tit. 22, § 1240.18(a) (2018).

A. *Dallas CIU: Dennis Allen and Stanley Mozee*

In 2000, Dennis Allen and Stanley Mozee were sentenced to life in prison for the murder of Reverend Jesse Borns, Jr.<sup>119</sup> The defendants were tried separately, but Richard E. Jackson (“Jackson”), was the trial prosecutor in both cases.<sup>120</sup> DNA testing did not link either defendant to the crime and the prosecution relied on witness testimony.<sup>121</sup> Importantly, every witness stated that they were given nothing in exchange for testifying.<sup>122</sup> Despite Allen and Mozee maintaining their innocence,<sup>123</sup> both were convicted and both convictions were upheld on appeal.<sup>124</sup>

In 2009, the Dallas CIU, together with the New York and Texas Innocence Projects began investigating the case.<sup>125</sup> As part of the investigation, the CIU reviewed Jackson’s trial file and discovered a vast number of documents, including letters and police reports, that were never disclosed to the defense lawyers.<sup>126</sup> The *Brady* violation was clear from the trial files. The CIU did not interview Jackson, who had left the office and was difficult to reach, and because it believed there was clear documentary evidence of a *Brady* violation.<sup>127</sup> In 2014, both applicants filed new applications for writs of habeas corpus.<sup>128</sup> Judge Mark Stoltz heard the applications and found that the state had suppressed exculpatory evidence regarding two jailhouse informants, in violation of *Brady*, by failing to reveal and to correct their false testimony denying any deals had been made in exchange for their testimony.<sup>129</sup> Judge Stoltz recommended that their convictions be vacated.<sup>130</sup> In line with Texas’s criminal procedure, the cases were forwarded to the Court of Criminal Appeals to determine whether that

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119. INNOCENCE PROJECT, *supra* note 95.

120. *Id.*

121. *Id.*

122. *Allen and Mozee Findings*, *supra* note 89, at 4.

123. *Id.* at 5.

124. *See Mozee v. State*, No. 05-00-01260, 2001 WL 1590524, at \*1, \*6 (Tex. App. Dec. 14, 2001); *Allen v. State*, No. 08-00-00442, 2002 WL 1481294, at \*1, \*12 (Tex. App. July 11, 2002).

125. Possley, *supra* note 12.

126. *Id.*

127. Cummings Webinar, *supra* note 17.

128. Possley, *supra* note 12. On November 21, 2003, Allen’s first and only prior application for a writ of habeas corpus was denied. *Allen and Mozee Findings*, *supra* note 89, at 5. Mozee had not filed a prior application for writ. *Id.*

129. *Allen and Mozee Findings*, *supra* note 89, at 6. This violates MR 3.3(a)(3) and 3.8(d).

130. Cummings Webinar, *supra* note 17.

decision was correct.<sup>131</sup> The Court of Criminal Appeals did not rule on the merits but instead remanded, directing the trial court to provide Jackson the opportunity to respond to the applicants' *Brady* claim.<sup>132</sup> The CIU then spoke with Jackson, who denied having suppressed any evidence and insisted he wanted to testify.<sup>133</sup> When he testified at the hearing, Jackson recounted his interactions with witnesses.<sup>134</sup>

One of the witnesses Jackson dealt with was Zane Smith, a jailhouse informant.<sup>135</sup> In what has become a standard claim by jailhouse informants, Smith claimed that Mozee admitted to participating in the murder with Allen.<sup>136</sup> Smith testified, asserting that he had no deal, agreement, or understanding with Jackson about any criminal charges.<sup>137</sup> However, on examination of Jackson's trial file, the CIU found two letters that had been written from Smith to Jackson.<sup>138</sup> The first was written while Smith was in jail awaiting trial on pending felony theft cases, in which he stated he was "willing to testify" against Mozee.<sup>139</sup> Three weeks before Smith later testified at Mozee's trial, Smith received a favorable plea and sentence for a third-degree theft charge that resulted in him spending just 365 days in prison—staggeringly less than the possible twenty years he could have faced.<sup>140</sup> The day after he testified against Mozee, Smith sent a second letter to Jackson seeking confirmation that Jackson would deliver on personally interceding in Smith's case to reduce his sentence further.<sup>141</sup> After both trials were over, Jackson personally moved to reopen Smith's case.<sup>142</sup> The motion was granted, and Jackson succeeded in reducing Smith's sentence even further, from 365 days to 244 days, a sentence he had already served.<sup>143</sup> As a result, Smith was released.<sup>144</sup>

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131. TEX. CODE CRIM. PROC. ANN. art. 11.07 (West 2021); Cummings Webinar, *supra* note 17, at 34:40–34:50.

132. *Allen and Mozee Findings*, *supra* note 89, at 7.

133. *See generally* Possley, *supra* note 12.

134. Discussion of the two jailhouse informants will be focused on here; however, numerous other witnesses were called, and exculpatory evidence suppressed in relation to deals given in exchange for testimony. *See Allen and Mozee Findings*, *supra* note 89, at 27.

135. *Id.* at 36.

136. *Id.* at 36–37.

137. *Id.* at 40.

138. *Id.* at 38.

139. *Id.*

140. *Id.* at 38–39.

141. *Id.* at 39.

142. *Id.* at 42.

143. *Id.* at 42–43.

144. *Id.* at 43.

When presented with this evidence at the hearing, Jackson conceded that he did not turn over either of Smith's letters to either defendant's counsel.<sup>145</sup> Jackson agreed that the second letter was *Brady* material, and that he violated his duty to make a timely post-trial disclosure.<sup>146</sup>

Jackson had similar dealings with a second jailhouse informant. In Allen's trial, Lonel Hardeman, a jailhouse informant, testified that Allen made admissions to him about the murder while both men were in county jail.<sup>147</sup> Like Smith, he insisted numerous times that he neither sought, wanted, nor expected any benefits or assistance from the State.<sup>148</sup> However, during the hearing, Jackson conceded that he knew of letters Hardeman had sent pleading for the State to dismiss his own pending robbery cases outright in exchange for his testimony.<sup>149</sup> In fact, transcripts from Hardeman's robbery cases reveal that Jackson personally intervened on Hardeman's behalf in prosecutions being handled by another colleague.<sup>150</sup> As a result, instead of receiving the mandatory twenty-five years to life on each robbery count, Hardeman was offered, and accepted, a guilty plea of just three years' imprisonment on each of his two felony robbery charges.<sup>151</sup> This was the same kind of intercession Jackson undertook for Smith, none of which he revealed to the defense.

The Court granted the writ of habeas corpus to both applicants,<sup>152</sup> finding as to both of them:

[T]here exists compelling documentary and testimonial evidence that the trial prosecutor (1) knowingly presented and/or failed to correct false testimony at trial, (2) failed to disclose benefits, promises, agreements, and/or understandings between the State and [at] least four informant witnesses who had pending criminal charges . . . in Dallas County for which they sought and received [State] assistance, as well as . . . notes in the prosecutor's own file relating to those pretrial

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145. *Id.* at 43–45.

146. *Id.* at 44. This violates MR 3.3a(3) and 3.8(d).

147. *Allen and Mozee Findings, supra* note 89, at 17.

148. *Id.*

149. *Id.* at 18–19, 31.

150. *Id.* at 35.

151. *Id.* It is not clear from the transcript whether the terms ran concurrently, and Hardeman served only three years for both felony charges, or whether they ran consecutively, and he served six years. Information on his plea hearing was not accessible. The reduction is significant, nevertheless.

152. *Id.* at 66.



discussions and benefits, and (3) failed to disclose favorable eyewitness evidence.<sup>153</sup>

On October 25, 2018, the Dallas CIU and the Innocence Project submitted a grievance complaint against Jackson, requesting the State Bar of Texas to investigate his conduct in the *Allen* and *Mozee* cases.<sup>154</sup> There was no doubt, and the court confirmed it, that the non-disclosure was knowing or intentional.<sup>155</sup> The disciplinary complaint<sup>156</sup> cited Jackson's misconduct as a violation of rule 3.09(d) of the Texas Disciplinary Rules of Professional Conduct,<sup>157</sup> which requires the "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."<sup>158</sup> Historically, state bars routinely dismiss complaints against prosecutors, and prosecutors are almost never disciplined.<sup>159</sup> Here, however, the State Bar of Texas found that there was enough evidence to go forward with the investigation, no doubt impressed by the court's findings.<sup>160</sup> While the investigation was proceeding,<sup>161</sup> Jackson moved to have his resignation from the bar accepted in lieu of discipline while continuing to deny all the allegations in the pending disciplinary action.<sup>162</sup> On April 13, 2021, the Supreme Court of Texas accepted Jackson's motion for resignation in lieu of discipline.<sup>163</sup>

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153. *Id.* at 3–4.

154. Cummings Webinar, *supra* note 17.

155. *Allen* and *Mozee* Findings, *supra* note 89, at 3–4.

156. Memorandum from Kristin V. Brady, Assistant Disciplinary Couns., to Blake Hawthorne, Sup. Ct. of Tex. (Apr. 8, 2021), <https://images.law.com/contrib/content/uploads/documents/401/52688/richard-e-jackson.pdf> [<https://perma.cc/HM34-ZJ3Z>].

157. *Id.* at 1.

158. TEXAS DISCIPLINARY RULES OF PRO. CONDUCT r. 3.09(d) (2022).

159. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U. L. REV. 623, 650 (2017) ("Unfortunately, in practice, the standard mechanism for review—bar discipline—has proven ineffective."); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276–77 (2007) ("Even when referrals occur, state bar authorities seldom hold prosecutors accountable for misconduct.").

160. Cummings Webinar, *supra* note 17, at 37:40–38:37.

161. The existence of a pending allegation with a correlating rule violation demonstrates that the Disciplinary Counsel had begun investigation into Jackson's conduct. *See* COMM'N FOR LAW. DISCIPLINE, STATE BAR OF TEX., ANNUAL REPORT: JUNE 1, 2019–MAY 31, 2020, at 16 (2020), <https://web.archive.org/web/20210201084726/https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=41986>.

162. Memorandum from Kristin V. Brady, *supra* note 156, at 1 ("While Applicant vehemently denies all allegations in the pending disciplinary action, Applicant simply cannot financially afford to continue to defend himself in this action.").

163. *Disciplinary Actions*, 84 TEX. B.J. 544, 545 (2021).

*B. Brooklyn CRU: Gerard Domond*

In 1989, Gerard Domond was convicted of murder and sentenced to twenty-five years to life based on the death of Patrick Hinkson.<sup>164</sup> Hinkson had been shot once in the head and had died of his injuries.<sup>165</sup> Three days after the shooting, one Francois Pierre walked into the 77<sup>th</sup> Precinct police station in Brooklyn and claimed that Domond had shot Hinkson.<sup>166</sup> Shortly thereafter Pierre viewed a photo lineup and identified Domond.<sup>167</sup> No witnesses or DNA evidence could be found to corroborate Pierre's account and none was presented.<sup>168</sup> The State's case rested entirely on Pierre's testimony.<sup>169</sup>

Before trial, Pierre entered into a cooperation agreement with the Kings County DA whereby he would testify against Domond in exchange for a guilty plea to his pending narcotics charges with a promised sentence of six months' jail and five years' probation instead of a potential five to fifteen year term of imprisonment.<sup>170</sup> Pierre testified about this deal at trial.<sup>171</sup>

On May 30, 1989, despite the jury's knowledge of Pierre's deal and the defense calling numerous alibi witnesses, Domond was found guilty and sentenced to twenty-five years to life.<sup>172</sup>

Domond's direct appeal<sup>173</sup> and petition for a writ of habeas corpus were both denied.<sup>174</sup> Throughout all the proceedings, Domond

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164. *Id.*

165. Maurice Possley, *Gerard Domond*, NAT'L REGISTRY EXONERATIONS (July 1, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5859> [https://perma.cc/Z9W6-RNXG].

166. *Id.*

167. *Id.*

168. *Id.*

169. *Brooklyn District Attorney Moves to Vacate Conviction in 1987 Murder After Finding That Sole Eyewitness' Mental Condition Wasn't Disclosed*, DIST. ATT'Y KINGS CNTY. (Oct. 30, 2020), <http://www.brooklynnda.org/2020/10/30/brooklyn-district-attorney-moves-to-vacate-conviction-in-1987-murder-after-finding-that-sole-eyewitness-mental-condition-wasnt-disclosed/> [https://perma.cc/6749-CUC3].

170. Possley, *supra* note 165. In the 1980s, the "Rockefeller drug laws" imposed mandatory indeterminate sentences for drug offenses. *See also* N.Y. PENAL LAW § 70.00 (McKinney 2019); Peter A. Mancuso, Comment, *Resentencing After the "Fall" of Rockefeller: The Failure of the Drug Law Reform Acts of 2004 and 2005 to Remedy the Injustices of New York's Rockefeller Drug Laws and the Compromise of 2009*, 73 ALB. L. REV. 1535, 1535–36 (2010).

171. CONVICTION REV. UNIT, DIST. ATT'Y KINGS CNTY., REPORT ON THE CONVICTION OF GERARD DOMOND 10, <http://www.brooklynnda.org/wp-content/uploads/2020/10/Domond-memo-CRU-Case.pdf> [https://perma.cc/G5KC-A5NV] [hereinafter *Domond Memo*].

172. *Id.* at 14.

173. In 1993, the Appellate Division unanimously upheld the conviction. *See People v. Domond*, 598 N.Y.S.2d 974 (App. Div. 1993).

174. *Domond Memo*, *supra* note 171, at 14–15.

maintained his innocence.<sup>175</sup> In 2016, Domond's attorney sent two letters to the Brooklyn CRU asking that Domond's case be reviewed.<sup>176</sup>

The CRU began investigating the case and discovered that before trial Pierre had been in custody in the Department of Corrections Psychiatric Forensic Unit at Kings County Hospital (KCH) G Building.<sup>177</sup> A takeout order, signed by the trial prosecutor, Paul Maggiotto, was found in the trial file, alongside an undated and unsigned handwritten note that contained the phrase "psychological" connected to the G Building of KCH.<sup>178</sup> Following this discovery, the CRU learned that the G Building exclusively housed psychiatric patients and that the fact of his psychological treatment was *Brady* impeachment information that had never been disclosed to the defense.<sup>179</sup> It also found that Maggiotto actually misled the jury about the reasons for the witness's hospitalization, preventing them from evaluating the credibility of the only witness against the defendant.<sup>180</sup>

The CRU interviewed Maggiotto by telephone on three occasions.<sup>181</sup> In those conversations, he told the CRU that he knew at the time of trial that the KCH G Building was a psychiatric ward but claimed he thought Pierre had been suffering from AIDS and surmised that he was in G Building because he may have attempted suicide.<sup>182</sup> There is no indication why Maggiotto assumed the psychiatric commitment was related to any suicidal issue. Moreover, Pierre spent a full four months in the G Building, and he was not simply placed on suicide watch or some other suicide prevention program.<sup>183</sup> The CRU interviewed two medical experts who stated that a four-month stay indicated a "very serious mental health condition."<sup>184</sup> The experts stated that if Pierre had tried to commit suicide, he would not have been committed to the G Building for so long.<sup>185</sup>

The Brooklyn CRU concluded that Maggiotto had misled the jury and denied the defense the opportunity to impeach Pierre, regardless of whether he actually knew why Pierre was in a psychiatric ward or

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175. *Id.* at 15.

176. *Id.*

177. *Id.* at 15–16.

178. *Id.* at 15.

179. *Id.* at 16.

180. *Id.* at 21–22.

181. *Id.* at 18.

182. *Id.* at 18.

183. *Id.* at 17, 20.

184. *Id.* at 17.

185. *Id.*

not.<sup>186</sup> Since Pierre provided “the only evidence of the defendant’s guilt,”<sup>187</sup> it recommended dismissal.<sup>188</sup> On October 30, 2020, Domond was exonerated.<sup>189</sup>

There is no public record of any disciplinary action having been taken against Maggiotto in New York,<sup>190</sup> and no other indication can be found that he was ever referred for disciplinary proceedings regarding this case.<sup>191</sup>

### C. Philadelphia CIU: Walter Ograd

On October 8, 1996, Walter Ograd was convicted and sentenced to death for the murder of four-year-old Barbara Jean Horn.<sup>192</sup> The prosecution contended that Ograd had beaten her over the head after trying to sexually assault her.<sup>193</sup> Her body was discovered inside a cardboard television box.<sup>194</sup> At least five eyewitnesses told police they had seen a man carrying or dragging a cardboard box through the neighborhood on the afternoon Horn was murdered.<sup>195</sup> Ograd lived in the neighborhood and none of the descriptions of the man with the box matched Ograd.<sup>196</sup> In a confession that was later claimed to be false and coerced, Ograd confessed, but he immediately recanted the confession.<sup>197</sup> His confession was placed in evidence.<sup>198</sup> The first trial resulted in a mistrial after a juror said in open court that they did not agree with the majority’s decision to acquit.<sup>199</sup> A new prosecutor was

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186. *Id.* at 22, 24. This violates MR 3.3(a)(3) and 3.8(d),

187. *Domond Memo*, *supra* note 171, at 23.

188. *Id.* at 23–24.

189. Possley, *supra* note 165.

190. *Attorney Online Services—Search*, N.Y. STATE UNIFIED CT. SYS., <https://iapps.courts.state.ny.us/attorneyservices/search?2> [<https://perma.cc/CHE7-4PAT>].

191. Reissued Public Censure at 7, *In re Maggiotto*, No. 09-039 (N.H. Sup. Ct., Sept. 21, 2010), <https://www.nhattyreg.org/assets/1286368628.pdf> [<https://perma.cc/F5TM-NJCU>] (Maggiotto moved to practice law in Concord New Hampshire in 1990; he received a Public Censure sanction from the New Hampshire Supreme Court Professional Conduct Committee in 2010 after engaging in a relationship with a client he was representing in divorce proceedings).

192. Maurice Possley, *Walter Ograd*, NAT’L REGISTRY OF EXONERATIONS (Aug. 13, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5752> [<https://perma.cc/9RSC-63DG>].

193. *Id.*

194. *Id.*

195. *Id.*

196. Philadelphia DA’s Report, *supra* note 4, at 22.

197. *Id.*

198. Possley, *supra* note 192.

199. Commonwealth’s Answer to Petition for Postconviction Relief at 7, *Commonwealth v. Ograd*, No. CP-51-CR-0532781-1992 (Ct. Com. Pl. Crim. Trial Div., Feb. 28, 2020) [<https://perma.cc/AQN5-DBHV>] [hereinafter *Ograd Answer*].

then appointed to take over the case for the second trial, Judith Rubino.<sup>200</sup> During the second trial, the prosecution presented testimony from a new witness, Jay Wolchansky, a jailhouse informant, who testified for the first time that Ogrod had confessed to him.<sup>201</sup> Rubino claimed there had been no arrangement between the Commonwealth and Wolchansky in exchange for his testimony.<sup>202</sup> At this second trial, Ogrod was found guilty and sentenced to death.<sup>203</sup>

In 2018, an investigation by the Philadelphia CIU revealed an extensive record of exculpatory evidence that neither the original trial prosecutor nor Rubino had disclosed to the defense.<sup>204</sup> The first category of exculpatory evidence included exculpatory and impeaching information that indicated the victim had died from asphyxia and not from head wounds and that this was known to the ADAs.<sup>205</sup> The file contained handwritten notes that indicated “asphyxiation . . . probably smothered her.”<sup>206</sup> The second included information that corroborated the defendant’s claim that the detective had testified to a false and unreliable confession.<sup>207</sup> The file contained a report of an investigation into Ogrod’s history that clearly demonstrated he was easily manipulated and would have supported his claim that his confession was coerced.<sup>208</sup> This also had not been disclosed to the defense.<sup>209</sup> The third category of exculpatory evidence included information about two jailhouse informants, Hall and Wolchansky. This information—found in the prosecutor’s files—also demonstrated the confessions were fabricated and established collusion between the two informants.<sup>210</sup> It also revealed Wolchansky’s extensive mental health records, which had not been disclosed, and the DA’s own belief that he was malingering in order to avoid prosecution.<sup>211</sup> Wolchansky had been cross-examined about his mental health and had denied having any mental health issues.<sup>212</sup> However, Rubino had undisclosed file documents that

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200. *Id.* at 9.

201. *Id.*

202. Philadelphia DA’s Report, *supra* note 4, at 22.

203. *Id.*

204. *Id.*

205. *Id.* at 23.

206. *Id.*

207. Ogrod Answer, *supra* note 199, at 2–3.

208. *Id.* at 24.

209. *Id.* at 25.

210. *Id.* at 11–12.

211. *Id.*

212. *Id.* at 30.

demonstrated that Wolchansky suffered from mental health problems that were persistent, severe, and at times psychosis-inducing.<sup>213</sup> This information was not turned over to the defense and Rubino made no attempt to correct Wolchansky's testimony that he had no mental health problems.<sup>214</sup>

As part of its investigation, the CIU sent a letter to Rubino informing her of its current investigation. It also forwarded items from the file and asked her to contact the CIU if she had any relevant information or if she wanted to discuss the case.<sup>215</sup> Following the letter, Rubino had several phone call discussions with the CIU.<sup>216</sup> She acknowledged that the handwritten note "asphyxiation . . . probably smothered her" was hers, that it contradicted the prosecution's claim that the victim was beaten following a sexual assault, and that it was likely made while preparing Rubino's expert to testify.<sup>217</sup> She indicated that based on her knowledge of the case and the conversations with the CIU she believed that Ogrod should be granted a new trial.<sup>218</sup>

On June 10, 2020, the Common Pleas Court granted the CIU's motion to dismiss the case.<sup>219</sup> It appears that the CIU took no action against either the original trial prosecutor or Rubino, as there is no public record of any disciplinary action having been taken against either of them and no other indication that either was referred.<sup>220</sup>

#### *D. N.Y. Suffolk County CIB: Messiah Booker*

By an order dated December 30, 2020, Glenn Kurtzrock, an assistant district attorney in the N.Y. Suffolk County DA's office, was suspended from practice for two years.<sup>221</sup> Three allegations of professional misconduct had been made against him, and each of which was upheld following an extensive hearing in a Special Referee's eighty-

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213. *Id.*

214. *Id.* at 11. This violates MR 3.3(a)(3) and 3.8(d).

215. Ogrod Answer, *supra* note 199, at 21 n.11.

216. *Id.*

217. *Id.* at 21.

218. *Id.* at 21 n.11.

219. Possley, *supra* note 192.

220. *Judith Frankel Rubino*, DISCIPLINARY BD., PA. SUP. CT., <https://www.padisiplinaryboard.org/for-the-public/find-attorney/attorney-detail/14203> [<https://perma.cc/VK67-7R7F>].

221. *In re Kurtzrock*, 138 N.Y.S.3d 649, 666 (App. Div. 2020). Unlike our discussion of the other three cases, we analyze the *Booker* case in retrospect, based on the Appellate Division's opinion affirming the findings of the disciplinary committee, where most of the facts surrounding the underlying wrongful conviction claim are found. We also rely on the report of the Suffolk County CIB, which undertook a systematic review of Kurtzrock's cases following the court's decision.

eight-page report.<sup>222</sup> The charges were based on Kurtzrock's failure to disclose *Brady/Giglio* and *Rosario* materials<sup>223</sup> in the homicide case of *People v. Messiah Booker*.<sup>224</sup> In the underlying *Booker* case, defense counsel had properly made a series of *Brady/Giglio* requests to which Kurtzrock had responded by representing to the court and counsel either that all materials had been turned over or that the People had complied with their disclosure obligations.<sup>225</sup> After extended requests and motions, followed by orders from the court to turn over additional materials, defense counsel moved to dismiss in the interests of justice based on Kurtzrock's *Brady/Giglio* and *Rosario* misconduct.<sup>226</sup>

On May 9, 2017, the court held a hearing on the issue.<sup>227</sup> The hearing was never completed, because as evidence of *Brady/Giglio* and *Rosario* violations was adduced, the prosecution, in the person of Kurtzrock's bureau chief, moved to dismiss the felony murder charge "based upon the events" at the hearing.<sup>228</sup> The prosecution explained that, in light of the non-disclosures, the People would not be able to prove guilt beyond a reasonable doubt.<sup>229</sup> The court recognized the prosecution's problem and referred to section 210.40(e) of the New York Criminal Procedure Law, noting that it "speaks to serious misconduct in the prosecution of the defendant" and that "the record speaks for itself in that regard."<sup>230</sup> No decision was made on the motion to dismiss, and Booker pleaded guilty to attempted burglary in the second degree and received the agreed-on five-year sentence.<sup>231</sup> Kurtzrock resigned from the district attorney's office that day.<sup>232</sup>

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222. *Id.* at 651.

223. *Id.* at 652. In addition to *Brady* obligations, *Giglio v. United States*, 405 U.S. 150 (1972), requires disclosure to the defense of material impeachment information concerning prosecution witnesses; *People v. Rosario*, 173 N.E.2d 881 (N.Y. 1961), requires disclosure before hearing or trial of all written or recorded statements made by prosecution witnesses that relate to the subject matter of their testimony.

224. *People v. Booker*, Indictment No. 2325A-2015 (N.Y. Sup. Ct.).

225. *In re Kurtzrock*, 138 N.Y.S.3d at 652.

226. *See id.* at 656.

227. *Id.* at 657.

228. *Id.* at 653–54.

229. *Id.*

230. *Id.* at 658.

231. *Id.* at 654.

232. *Id.* at 658.

Charge one of the petition alleged violation of rule 3.8(b) of the New York Rules of Professional Conduct.<sup>233</sup> The Special Referee found that Kurtzrock

1. failed to turn over and misleadingly redacted memo book entries, written reports, and interview notes that identified “John Doe No. 1,” an alternative suspect, as the perpetrator of the crime;<sup>234</sup>
2. failed to turn over notes of an interview of a key prosecution witness—the only witness to identify Booker—reflecting that she was taking strong medication for depression and ADHD at the time of the crime and interview notes of another person who stated that this same witness had kept changing her story why the subject premises had been targeted, several versions of which had nothing to do with Booker;<sup>235</sup>
3. failed to turn over records of out of state police activity concerning Booker’s former girlfriend, who testified as an accomplice.<sup>236</sup>

Interestingly, the special referee made additional factual findings of misconduct. In brief, the special referee also found that Kurtzrock

1. had been fully aware of the full contents of the police file, had done nothing in response to defense counsel’s requests, but simply followed his practice of relying on the police detectives to alert him to “exculpatory material or something that would be important for [him] to know” including whether another suspect “is or is not *Brady*”;<sup>237</sup>
2. as to *Rosario*, had reviewed the files concerning the prosecution’s witnesses and identified materials that were not turned over because

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233. *Id.* at 658–59; MODEL RULES OF PRO. CONDUCT r. 3.8(b) (AM. BAR ASS’N 2020); (N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2017) (“A prosecutor . . . in criminal litigation shall make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.”)).

234. *In re Kurtzrock*, 138 N.Y.S.3d at 659. Kurtzrock redacted two years of the detective’s memo book that included references to the other suspect and in a way that did not reveal the extent of the redactions. *Id.* at 656.

235. *Id.* at 660.

236. *Id.*

237. *Id.* at 657.



of Kurtzrock's belief that he would not be questioning the witness about them on direct examination, an erroneously narrow reading of *Rosario* requirements;<sup>238</sup>

3. had made false sworn representations to defense counsel and the trial court that he had complied with his obligations, because he had not conducted a *Brady* review.<sup>239</sup>

Charge two was based on the same conduct and alleged a violation of rule 8.4(d) (conduct that is "prejudicial to the administration of justice").<sup>240</sup> Charge three was also based on the same conduct and alleged a violation of rule 8.4(h) (conduct that "adversely reflects on his fitness to practice law").<sup>241</sup>

Kurtzrock did not controvert the findings of the special referee and stated that he took "full responsibility for his failure to properly perform the duty imposed upon him as a prosecutor."<sup>242</sup>

#### 1. The Court's Decision

All three charges were upheld by the Appellate Division, which imposed a two-year suspension.<sup>243</sup> Noting the case presented "grave violations of professional standards," the Appellate Division observed nonetheless that it was unlikely the misconduct would be repeated since Kurtzrock had resigned.<sup>244</sup> It observed that there was no finding of "intentional malicious or venal conduct," recognized Kurtzrock's community service and "credible evidence of his reputation and good character," and acknowledged that a member of Kurtzrock's family had "had a medical issue."<sup>245</sup> Significantly, the court also noted that "there was no showing that he engaged in any similar conduct in any other cases notwithstanding the respondent's assertion to the effect that he customarily delegated responsibility for compliance with

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238. *Id.* at 656.

239. *Id.* at 657.

240. *Id.* at 654; *see also* RULES OF PRO. CONDUCT r. 8.4(d) (N.Y. STATE BAR ASS'N 2017). ("A lawyer or firm shall not . . . (d) engage in conduct that is prejudicial to the administration of justice.").

241. *In re Kurtzrock*, 138 N.Y.S.3d at 654; *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200 (2017).

242. *In re Kurtzrock*, 138 N.Y.S.3d at 651.

243. *Id.* at 666.

244. *Id.*

245. *Id.*

*Brady* to the police.”<sup>246</sup> Giving weight to what it characterized as “extensive evidence in mitigation,” it imposed a two-year suspension from practice.<sup>247</sup>

## 2. The Systematic Review

### *i. The First Review*

In 2017, after Kurtzrock resigned, prosecutors who had not been involved in the cases examined the files in eight other homicides in which Kurtzrock had been lead trial counsel.<sup>248</sup> In several of these cases, documents were identified that the reviewing prosecutor thought should have been turned over. Pursuant to *Brady* and *Rosario*, several hundred pages of documents were turned over to the relevant defense attorneys.<sup>249</sup>

### *ii. The Broader Review*

In 2020, after the Appellate Division’s suspension, and after he had created the first Conviction Integrity Bureau in the office, DA Timothy Sini directed the CIB to investigate other cases that had been handled by Kurtzrock. This decision appears to have been motivated in part by:

1. The concern, given the evidence in *Booker*, that Kurtzrock’s *Brady* misconduct extended beyond that one case;
2. A concern about the reputation of the DA’s office, since the prior DA had been convicted of obstruction of justice;

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246. *Id.*

247. *Id.*

248. SUFFOLK CNTY. DIST. ATT’Y’S OFF: CONVICTION INTEGRITY BUREAU, A REVIEW OF THE DISCLOSURE PRACTICES OF FORMER ASSISTANT DISTRICT ATTORNEY GLENN KURTZROCK 3 (Nov. 23, 2021) [hereinafter Kurtzrock Report], <https://suffolkcountyny.gov/Portals/6/DA/PDFs/SCDAO%20Kurtzrock%20Report%20Final.pdf> [https://perma.cc/K3KD-VV57]. The CIB had not yet been created. DA Sini, who was elected as the DA and took office in 2018, created the CIB. See Press Release, Suffolk Cnty. Dist. Att’y’s Off., DA Sini Announces Appointments to Conviction Integrity Bureau and Independent Review Panel (Mar. 12, 2021), <https://www.suffolkcountyny.gov/da/News-and-Public-Information/Press-Releases/da-sini-announces-appointments-to-conviction-integrity-bureau-and-independent-review-panel> [https://perma.cc/M5NK-DDBR] (“[The CIB was] [l]aunched by District Attorney Sini immediately upon his taking office in 2018 . . .”).

249. University of Pennsylvania Carey Law School, *Conducting Audits: Suffolk County CIU and NY Law School Innocence Clinic*, YOUTUBE (Feb. 14, 2022) [hereinafter *Conducting Case Audits*], <https://www.youtube.com/watch?v=d6xq2YPil3s> [https://perma.cc/M5DQ-FRYT].

3. The Appellate Division's statement that, in imposing a sanction, it had relied in part on the fact that there had been no evidence of similar misconduct in other cases.<sup>250</sup>

Sini directed the CIB to address two questions: (1) were any other defendants' fair trial rights affected by Kurtzrock's misconduct, and (2) if similar misconduct were identified, did the Grievance Committee require additional information given that it had relied on the fact that "there was 'no showing that he engaged in any similar conduct in any other cases'?"<sup>251</sup>

The CIB's audit built on the earlier review of Kurtzrock's cases from 2017-18, described above. For this more systematic review, the CIB reexamined each of those cases, but also all cases that Kurtzrock had tried as an ADA, both as a homicide prosecutor and as part of the bureau handling non-fatal violent crimes and other felony offenses.<sup>252</sup> The fact that the DA's office had a system for identifying those cases was obviously an advantage.<sup>253</sup> It also examined other cases that Kurtzrock did not try but in which his pre-trial conduct raised *Brady/Giglio* or *Rosario* concerns.<sup>254</sup> The review covered twenty-two cases.<sup>255</sup>

As to the cases that had already been reviewed in 2017-18, where additional materials were identified that should have or might have been required to be disclosed, discussions were had with DA personnel and defense counsel to ensure that all material had been produced.<sup>256</sup> In one of those cases, *People v. Shawn Lawrence*,<sup>257</sup> the CIB found "dozens" of documents that had not been produced.<sup>258</sup> These disclosures and other serious issues that came to light resulted in a

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250. *Id.*

251. Kurtzrock Report, *supra* note 248 (quoting the opinion of the court).

252. *Id.*

253. *Conducting Case Audits*, *supra* note 249.

254. *See* Kurtzrock Report, *supra* note 248, at 4.

255. *Conducting Case Audits*, *supra* note 249. It is worth noting that in one of those cases, a CIB attorney had to recuse himself because he had been defense counsel in the case. *Id.*; *see also* Kurtzrock Report, *supra* note 248, at 9 n.6. Each of these cases is discussed in detail in the CIB report, which was released in November 2021. Kurtzrock Report, *supra* note 248.

256. Kurtzrock Report, *supra* note 248, at 3.

257. *People v. Lawrence*, Indictment No. 1095-12b (N.Y. Sup. Ct.).

258. Kurtzrock Report, *supra* note 248, at 3.

joint motion with defense counsel to dismiss the indictment against Lawrence.<sup>259</sup>

The Suffolk County CIB is part of a partnership with the New York Law School Post-Conviction Innocence Clinic.<sup>260</sup> That partnership is partly supported by the U.S. Department of Justice's Bureau of Justice Assistance Upholding the Rule of Law and Preventing Wrongful Convictions Program "to review certain applications for relief submitted to the CIB and investigate systemic issues identified by the CIB or Post-Conviction Innocence Clinic (PCIC)."<sup>261</sup> As part of that partnership, the PCIC reviewed the CIB's report as well as the additional materials that had been identified as appropriate for further disclosure.<sup>262</sup> The PCIC concurred in the disclosure decisions; according to Craig McElwee, head of the CIB, the partnership was an extremely helpful collaboration in which the CIB and PCIC agreed on "90 percent of everything."<sup>263</sup> He reported being amazed at the student enthusiasm, thoroughness, and quality of work and appreciated the debate and discussion.<sup>264</sup> The partnership and input from the PCIC also added legitimacy to the CIB's work, for example, when it was concluded that an application presented no grounds for dismissal.<sup>265</sup>

In addition to reviewing the report, the PCIC also suggested a broader institutional review to determine if office-wide practices might have allowed for Kurtzrock's actions and will be working with the CIB on ongoing reviews.<sup>266</sup>

### 3. Results

"Despite . . . confidence in the verdicts of conviction and negotiated dispositions," in most cases the CIB disclosed "all non-produced potential *Rosario*, *Brady*, and/or *Giglio* material" to defense counsel.<sup>267</sup> It also included additional material that it deemed might not

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259. *Id.* at 11.

260. *Id.*

261. *Id.* at 4.

262. *Id.*

263. *Conducting Case Audits*, *supra* note 249.

264. *Id.*

265. *Id.*

266. *Id.* Professor Adele Bernhard runs the New York Law School PCIC. *Id.* She shared her enthusiasm for the CIB/PCIC partnership as an educational tool and an effective way to identify and correct potential wrongful convictions. *Id.* Among other things, in its work on applications to the CIB, the relationship enables the PCIC to access documents and other information that would be difficult to find. *Id.*

267. Kurtzrock Report, *supra* note 248, at 6.

have been required to be disclosed to ensure that the defendants could effectively evaluate the disclosure issues that the new disclosure might have raised.<sup>268</sup> Disclosures were made in 100 percent of the homicide cases and 76 percent of all the cases reviewed.<sup>269</sup> In one case, this process resulted in the filing of an application for relief under section 440.20(e) of the New York Criminal Procedure Law.<sup>270</sup> Other defendants applied to the CIB for relief from their convictions.<sup>271</sup> Those cases are being reviewed, in partnership, in due course.<sup>272</sup>

Anecdotally, the CIB reports that there has not been a lot of pushback or hostility to the audit and report from the DA's office, although there has perhaps been a bit more from the police department.<sup>273</sup>

Whether due to the *Booker/Kurtzrock* disclosures or simply part of the same reform effort, it bears noting that DA Sini undertook other reforms at about the same time as the events surrounding *Booker* and *Kurtzrock* were taking place:

1. The CIB was created as the first such bureau in the office.
2. Upon assuming office in 2018, the DA adopted a new voluntary disclosure policy. Under that policy *Rosario* material is disclosed as part of the initial discovery (rather than, as required, on the eve of trial), unless there is a compelling reason requiring delayed disclosure, and *Brady/Giglio* compliance is required.<sup>274</sup>
3. In light of the discovery law reforms in January 2020, the DA invested substantial resources to ensure compliance and created a new intake bureau and a new disclosure team to ensure compliance.<sup>275</sup>
4. A new training regimen was created that involved regular training on the new law and on *Rosario*, *Brady* and *Giglio* obligations for both newly hired and experienced ADAs. Since 2018

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268. *Id.*

269. *Id.*

270. *Id.*

271. *Conducting Case Audits*, *supra* note 249.

272. *Id.*

273. *Id.*

274. Kurtzrock Report, *supra* note 248, at 7.

275. *Id.*

there have been twelve trainings on discovery obligations as well as a multi-day training for new hires.<sup>276</sup>

5. The office now regularly issues bulletins on decisions and updates so ADAs are kept informed of developments.<sup>277</sup>

6. The CIB's report was published publicly and distributed internally.<sup>278</sup>

7. The CIB has undertaken to examine future applications for similar misconduct and to ensure that those practices do not impact the convictions. In addition, "if any systemic injustices are identified as a result of the CIB's and PCIC's ongoing work, they will be brought to the attention of the appropriate authorities and the public."<sup>279</sup>

#### IV. ANALYSIS

In this section we analyze what these cases tell us about how *Brady* claims are handled by CIUs and make suggestions for what best practices should be adopted. We focus largely on the four main issues discussed above, i.e., (1) whether to communicate with the trial prosecutor, and if so, when and how; (2) whether mens rea need or should be investigated or proven, and whether and when a CIU should undertake to prove it; (3) whether a CIU should refer a trial prosecutor to the disciplinary authorities; and (4) whether a CIU should conduct a review or systematic audit of other cases handled by a prosecutor whose *Brady* violations led to dismissal.

##### A. Communication with the Trial Prosecutor

In *Allen* and *Mozee*, the Dallas CIU did not end up communicating with the trial prosecutor during the course of its investigation; in the *Ogrod* and *Domond* cases, the Brooklyn and Philadelphia CIUs, respectively, did communicate with the trial prosecutors.

The Dallas CIU did attempt to reach out to Richard Jackson, the trial prosecutor in the *Allen* and *Mozee* cases, during its investigation:

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<sup>276</sup>. *Id.*

<sup>277</sup>. *Id.*

<sup>278</sup>. *Id.* at 7–8.

<sup>279</sup>. *Id.* at 8.

Jackson had since left the office and this made reaching him difficult.<sup>280</sup> Moreover, the CIU concluded that it had established a clear *Brady* violation and did not need to interview Jackson both because of the strength of the evidence and the fact that the prosecutor's mens rea is irrelevant to *Brady*.<sup>281</sup> However, the court disagreed and refused to dismiss; instead, it remanded so that Jackson could testify and ordered the CIU to subpoena him.<sup>282</sup> This could have been an idiosyncratic reaction by the court, but it could also signal the court's desire to hear both "sides" explain where constitutionally deficient non-disclosure is indeed found. If the latter, there may be dangers in allowing the court to make the decision whether to call the trial prosecutor. First, of course, human nature being what it is, the prosecutor is unlikely to confess to unconstitutional and unethical conduct. If called at the insistence of the court, the court could well refuse to vacate the conviction. The hearing court sits as a factfinder and could accept the prosecutor's version. Moreover, given the momentum to uphold criminal convictions, and the disinclination of the courts to find prosecutorial misconduct or even to name an offending prosecutor, allowing the court to decide whether, and if so how, to make the prosecutor a witness without CIU preparation could seriously backfire.

Conversely, in *Domond*, Maggiotto was contacted three times over the phone during which he admitted he knew the building Pierre, the eye witness upon which the State's case entirely rested, was staying in was a psychiatric ward.<sup>283</sup> Similarly, in *Ogrod*, Rubino, the trial prosecutor, was informed of the CIU investigation and after several phone calls with the CIU asserted her belief that Ogrod should be granted a new trial.<sup>284</sup> Sometimes cooperation between the CIU and the trial prosecutor can help. And in neither case did a trial court issue any findings about the non-disclosure and in neither case was the prosecutor referred to disciplinary authorities.

From these cases it seems that best practices would suggest that a CIU should communicate with the trial prosecutor, even if just as a matter of professional courtesy, after the CIU's investigation reveals that a *Brady* violation may have occurred. In doing so, the trial prosecutor should be treated as a fact witness. As with any other witness,

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280. *Id.*

281. *Id.*

282. Cummings Webinar, *supra* note 17.

283. *Domond* Memo, *supra* note 171, at 18.

284. *Ogrod* Answer, *supra* note 199, at 21 n.11.

the CIU should review all available materials before interviewing the trial prosecutor and share relevant materials with the witness. At least anecdotally, courts may require that the trial prosecutor testify at a hearing before deciding a motion to dismiss.

It is also good practice to speak with the trial prosecutor at some point in order to assess the deterrent value of a dismissal based on non-disclosure as well as to determine whether reporting is required under MR 8.3. A prosecutor's explanation for or reflection on prior *Brady* violations may well be relevant to whether the prior misconduct raises a substantial question about the prosecutor's ability to practice law and will certainly impact the deterrent impact of a disciplinary complaint. There appears to be no uniform approach to communication with the trial prosecutor. Given the above, there need to be clearer guidelines relating to what a CIU's role entails in relation to the level of communication with a prosecutor in a case alleging prosecutorial misconduct. Such guidelines would also legitimate the CIU's purpose in the eyes of the existing ADA staff.

Interestingly, in *Allen* and *Mozee* the prosecutor testified at the hearing after the court insisted on him being produced.<sup>285</sup> At least in that case, requiring the trial prosecutor to testify appears to have made denial of misconduct more difficult and led to a judicial finding about that prosecutor's conduct. In fact, rather damningly in Jackson's case, he had to concede on multiple occasions that based on what was found in his trial file by the CIU's investigation he had failed to disclose exculpatory evidence. For example, when Jackson was shown the various letters between himself and two informants (Zane Smith and Lonel Hardeman) that were in his trial file, he agreed that each constituted *Brady* material that he was required to disclose in a timely fashion.<sup>286</sup> He also agreed that given that the letters were in his trial file, he must have known about them.<sup>287</sup> In *Booker*, a hearing was held on the defendant's motion to dismiss based on prosecutorial misconduct, which was abruptly halted to permit a reduced guilty plea and after which the prosecutor resigned.<sup>288</sup> While each case needs to be considered on its own facts and merits, it is important to consider the role that the trial prosecutor plays in the investigation, analysis, and proceedings that lead up to a motion to dismiss.

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285. See *supra* note 88 and accompanying text.

286. *Allen* and *Mozee* Findings *supra* note 89, at 27.

287. *Id.*

288. *In re Kurtzrock*, 138 N.Y.S.3d 649, 657–58 (App. Div. 2020).



*B. Considering and Determining Mens Rea*

It is clear that a prosecutor's mens rea is not a necessary part of establishing a due process *Brady* violation. For that reason, a prosecutor's mens rea is not a necessary prerequisite to a CIU's determination that a probably innocent defendant was deprived of a fair trial and that the charge should be dismissed.

But, as noted above, a conclusion that a trial prosecutor knowingly or intentionally withheld exculpatory information or did so on more than one occasion, is important to the work of the CIU in other ways. Dismissals based on particularly extreme or egregious misconduct are more likely to be respected by the office and are thus more likely to lead to deterrence. Most prosecutors do not intentionally withhold exculpatory information and most prosecutors do not think they do that. Thus, to the extent a trial prosecutor observes the consequences of intentional non-disclosure, they are more likely to respect any institutional sanctions or changes in training or protocols that result. Moreover, as far as discipline is concerned, in *Allen* and *Mozee*, the hearing court explicitly found that the trial prosecutor, Jackson, knowingly withheld a multitude of exculpatory evidence.<sup>289</sup> And in *Kurtzrock*, where the prosecutor was actually suspended, the special referee found "a deliberate pattern of avoidance, or willful blindness" and "deliberate, volitional, and extraordinary actions to attempt to avoid learning" of *Brady* material.<sup>290</sup> And as far as the CIU lawyers' duty to report, when deciding when a case demonstrates dishonesty or unfitness to practice law, the mens rea of the prosecutor becomes pertinent.<sup>291</sup>

The prosecutors in the *Domond* and *Ogrod* cases both failed to disclose exculpatory evidence, but their mens rea is less clear. They both violated *Brady* and the ethical rules.<sup>292</sup> Maggiotto failed to determine the real cause for Pierre's hospitalization and then failed to disclose the fact of the hospitalization itself.<sup>293</sup> Rubino's case is more disturbing because she replaced a prosecutor who had not disclosed exculpatory evidence and had a second chance to disclose what was wrongly withheld.<sup>294</sup> Instead she continued to withhold the evidence,

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289. *Allen* and *Mozee* Findings, *supra* note 89, at 3–4.

290. *In re Kurtzrock*, 138 N.Y.S.3d 649, 666 (App. Div. 2020).

291. See discussion *infra* Section II.A.2.

292. MODEL RULES OF PRO. CONDUCT *rr.* 3.3(a)(3), 3.8(d) (AM. BAR ASS'N 2020).

293. Possley, *supra* note 165, at 4–5.

294. See *supra* text accompanying note 204.

continued to argue for a cause of death that she knew was inaccurate, and even secured a second jailhouse informant who, it turned out, had colluded with the first informant and had serious credibility and mental health problems.<sup>295</sup> She did not reveal those either, and allowed the witness to testify that he had no serious mental health issues.<sup>296</sup> Despite these facts, there was no finding that her non-disclosure was intentional.<sup>297</sup> Depending on the culture of the DA's office in question, it may be difficult for a CIU to openly find deliberate and intentional misconduct, particularly, as discussed above, since that is not necessary to a finding of a *Brady* violation. Indeed, there was similarly no finding of intentional misconduct by Maggiotto, who chose to assume, apparently without any factual foundation or investigation, that his witness was suicidal rather than mentally compromised. Both of these prosecutors violated *Brady* and the ethical rules.<sup>298</sup> Another difference is that in *Allen* and *Moze*, the trial prosecutor denied any wrongdoing; in contrast, the prosecutor in *Domond* offered an excuse and the prosecutor in *Ogrod*, while apparently not offering an excuse, nevertheless agreed that the conviction should be vacated.

### C. Referral for Discipline

Rubino and Maggiotto were not referred to the disciplinary authorities, while Jackson and Kurtzrock were referred.<sup>299</sup> Several factors will impact the CIU's decision whether to refer a prosecutor. The chief reasons for doing so are to deter and prevent future misconduct and to promote public trust in the bar and in the criminal process. The chief reason not to do so is that to the extent the CIU's investigation needs cooperation from the office itself, referral will create animosity and distrust and will make investigation much more difficult in the future. It will also make staff feel threatened and will prevent respect for the CIU's work. In *Allen* and *Moze*, the prosecutor was called to testify and basically forced to concede his misconduct. This suggests that key factors in the Dallas CIU's decision to refer Jackson for

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295. Possley, *supra* note 192, at 6.

296. *Id.*

297. See *supra* text accompanying note 220.

298. Domond Memo, *supra* note 171.

299. It is unclear how Kurtzrock was referred for discipline, but his case is instructive nevertheless. The record is not clear as to who referred him to the disciplinary committee, but it may have been the court.

discipline arose from the hearing: his false denials of misconduct, his admissions, and the court's explicit finding of misconduct.<sup>300</sup>

A further difference can be seen in the number of *Brady* violations highlighted in each case. The *Allen* and *Mozee* case, which involved the trial prosecutor being referred, involved a series of violations taking place in relation to multiple witnesses and jailhouse informants, which resulted in a large amount of exculpatory evidence being withheld. The same is true of Kurtzrock, the trial prosecutor in *Booker*, where knowing redaction of police documents, suppression of evidence of a third party's possible guilt, and withholding serious impeachment evidence of essential prosecution witnesses led to discipline. On the other hand, *Domond* involved the withholding of important exculpatory evidence, albeit about the sole prosecution witness, where the prosecutor had failed to determine the exculpatory value of the evidence. This difference is significant as the greater the number of *Brady* violations, the more prejudicial it can be and the more deliberate and more unethical the conduct appears. Patterns of non-disclosure rather than isolated failures generally make the misconduct less likely to be a mistake or a matter of judgment.<sup>301</sup> The

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300. This is evidenced further by the infamous case of Ken Anderson. Daniele Selby, *Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction*, INNOCENCE PROJECT (Nov. 11, 2020), <https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-jail/> [https://perma.cc/9BSE-8TD7]. Ken Anderson is the only prosecutor to receive jail time for prosecutorial misconduct that led to a wrongful conviction, and crucially, he testified in court. *Id.* His misconduct led to the wrongful conviction of Michael Morton in 1987 who was exonerated after the Innocence Project found exculpatory evidence had been concealed from Morton's defense team. *Id.* Upon this discovery, the Innocence Project filed a petition urging an investigation into Anderson's misconduct. *Id.* This led to the Texas Supreme Court ordering a rare Court of Inquiry that ruled there to be probable cause that Anderson had violated criminal laws by concealing evidence and charged him with criminal contempt and tampering with evidence. *Id.* Anderson pled guilty to contempt of court, permanently surrendered his law license, and was sentenced to 10 days' jail time. *Id.* Despite not being a CIU case, it does demonstrate how a trial prosecutor testifying about a potential *Brady* violation aided in proving misconduct had occurred and resulted in discipline. This supports the notion that requiring a prosecutor to testify may increase the likelihood of disciplinary action.

301. MODEL RULES OF PRO. CONDUCT r. 8.3 cmt. 1 (AM. BAR ASS'N 2020) ("An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."). This suggests that a known instance of misconduct can be an indicator of further misconduct. This has been evidenced by CIUs who, upon finding misconduct in one case, have reviewed other cases by that prosecutor and discovered further misconduct. *See* Kurtzrock Report, *supra* note 248 (report details a pattern of nondisclosure in multiple cases in which the prosecutor committed misconduct); *see also* Hidden Hazard Report *supra* note 11, at 55 ("Notably, four of those 23 [Philadelphia CIU exoneration cases] were prosecuted by the same prosecutor: Roger King. In addition to those four exonerations, a recent Philadelphia Inquirer report found three additional convictions in which King was the lead prosecutor that were reversed, at least in part, because of prosecutorial misconduct.").

existence of a pattern of misconduct would present a stronger case in relation to MR 8.3 and to MR 8.4 violations as prejudicial to the administration of justice, not to mention New York's rule 8.4(h) (conduct that "adversely reflects on his fitness to practice law").

As noted above, MR 8.3 requires lawyers who gain knowledge of substantial misconduct to report it to the appropriate professional authority.<sup>302</sup> Arguably, a CIU gains 'actual knowledge' of the misconduct through its investigation and certainly through the in-court testimony of the prosecutor and the court's holding, as occurred with Richard Jackson and Ken Anderson. This knowledge will be supplemented by the CIU's having proof of a pattern of *Brady* violations either in the case being reviewed or after an audit of other cases, which demonstrates not an isolated or negligent error of judgment but the intentionality of the misconduct. Thus, through the establishment of a pattern of misconduct, as in *Allen* and *Mozee* and *Booker*, and an official recognition of the seriousness of the misconduct, a CIU has solid footing for reporting a prosecutor's misconduct under MR 8.3.<sup>303</sup>

In this sense CIUs have the ability to become internal regulators of prosecutorial misconduct within DAs' offices. This is especially true if they can establish criteria for referral or systematic review that could be consistently applied. Of course, on the other hand, a CIU's choice to pursue proceedings against a current or former prosecutor can lead to serious problems in effectively performing their core function of correcting wrongful convictions.

*Push-back.* Trial prosecutors may view a CIU as a body determined to find misconduct and to freely second-guess decisions made by the prosecutors at trial. Often prosecutor sensitivity can be a barrier to the effective operation of a CIU.<sup>304</sup> A case involving *Brady* violations may present serious risks in this regard as illustrated by a recent case in Philadelphia. The Philadelphia CIU sought dismissal of a conviction based on a clear *Brady* violation but the reaction from the prosecutors was to insist that nothing was withheld because "the evidence

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302. MODEL RULES OF PRO. CONDUCT r. 8.3(a) (AM. BAR ASS'N 2020) ("A lawyer who knows that another lawyer has committed a violation of the Rules . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer . . . shall inform the appropriate professional authority.").

303. Arguably this occurred in the *Booker* case, where, although no decision was reached on the motion to dismiss based on prosecutorial misconduct, the court noted that the record of serious misconduct "speaks for itself." *In re Kurtzrock*, 138 N.Y.S.3d 649, 658 (App. Div. 2020).

304. Hollway, *supra* note 24, at 31.

overwhelmingly established” the defendant’s guilt.<sup>305</sup> Another prosecutor insisted that the office never reveals prior inconsistent statements of witnesses.<sup>306</sup> In this sense, it behooves a CIU to refer a prosecutor for discipline only when faced with egregious—perhaps systematic and intentional—non-disclosure. It is also important that the CIU not be seen as a disciplinary body in itself—or as a body motivated to punish prosecutors.

*Alienation.* One CIU Chief reported that the CIU staff can end up being viewed as “the guy who killed Superman.”<sup>307</sup> Historically, DA offices promoted a tough-on-crime approach and prosecutors with high conviction rates were celebrated.<sup>308</sup> Therefore, despite the election of a reform-minded DA, the office ethos may value the win-at-most-costs prosecutor and remain skeptical of the CIU.<sup>309</sup> This resentment and suspicion could be further exacerbated if CIU staff do not engage the trial prosecutors in their investigations and almost certainly if CIUs begin to regularly file grievances against prosecutors.

However, the progressive movement, with its election of more progressive prosecutors, may have begun to change the ethos of some prosecutors’ offices toward an awareness that being a prosecutor is about justice, not solely about winning.<sup>310</sup> There is no data to support that though, and some so-called progressive prosecutors have received substantial pushback in attempting cultural change.<sup>311</sup> As a result, CIU

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305. Samantha Melamed, *Philadelphia DA Says Prosecutors Hid Evidence for Years in a 2003 Murder Case*, PHILA. INQUIRER (Nov. 15, 2021), <https://www.inquirer.com/news/philadelphia-da-krasner-lavar-brown-prosecutorial-misconduct-conflict-20211115.html> [<https://perma.cc/K8YK-FEYR>].

306. *Id.*

307. Philadelphia DA’s Report, *supra* note 4, at 14.

308. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICAN’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 13 (2012).

309. Philadelphia DA Report, *supra* note 4, at 14.

310. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2020).

311. Anita Chabria & James Queally, *‘It’s a Showdown’: California District Attorneys Battle Over Criminal Justice Reforms*, L.A. TIMES (Feb. 8, 2021, 8:34 PM), <https://www.latimes.com/california/story/2021-02-08/california-district-attorneys-battle-gascon-policies> [<https://perma.cc/WC4H-Y4DW>] (“[M]any of the state’s old guard of district attorneys are openly sparring with reformer colleagues . . .”); Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019, 2:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [<https://perma.cc/RN93-KD24>] (discussing Pennsylvania’s passage of legislation that allows the state attorney to bring charges where progressive district attorney chooses not to); Linhchi Nguyen & Carlin Ross, *Progressive Prosecutor Series: Boston Progressive DA Faces Pushback in Policies by Opponents*, DAVIS VANGUARD (Jan. 8, 2021), <https://www.davisvanguard.org/2021/01/progressive-prosecutor-series-boston-progressive-da-faces-pushback-in-policies-by-opponents/> [<https://perma.cc/VDH8-GWX6>] (citing pushback on a district attorney’s policy dismissing low-level misdemeanor charges).

staff may not be ostracized, or at least ostracized less, once more prosecutors become comfortable with scrutinizing their work and accepting accountability where egregious misconduct has occurred.

#### *D. Conducting a Systematic Audit*

Reviewing other cases for a prosecutor's *Brady* violations or other misconduct is extremely time consuming and expensive.<sup>312</sup> Not every case in which a dismissal is based on a prosecutor's *Brady* violations will warrant that kind of investment. But when a CIU's review gives reason to believe that the prosecutor in question engaged in a pattern of repeated *Brady* violations that raise a question of whether such violations would appear in other cases, a review of the prosecutor's other cases may be an excellent way to fulfill the CIU's duty to correct and prevent wrongful convictions based on *Brady*.<sup>313</sup>

The *Booker* case is an excellent example. The *Booker* record revealed repeated *Brady* and *Rosario* violations that not only were clearly knowingly made,<sup>314</sup> but also egregious and repeated violations. This evidence raised a question about whether the same misconduct had occurred in the many other cases Kurtzrock had handled either as trial prosecutor or before trial. In addition, the explanations offered to the court by Kurtzrock made the likelihood of repetition of the misconduct clear. First, it was clear that Kurtzrock was aware of material that should have been disclosed but was not.<sup>315</sup> Importantly, he also admitted that his practice was to rely on the police to identify *Brady* materials for him<sup>316</sup> in contradiction to clear Supreme Court authority making the prosecutor responsible for police disclosure, not the other

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312. *Conducting Case Audits*, *supra* note 249.

313. This sort of systematic audit is not new to wrongful conviction bodies. The Kings County, Brooklyn CIU famously audited cases involving disgraced homicide detective Louis Scarcella. This was sparked by reporters reviewing dozens of cases involving Scarcella revealing a pattern of misconduct. *See* Scheck *supra* note 50, at 720–22; Frances Robles & N. R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), <https://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html> [https://perma.cc/WSF9-P6A8]; QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., *Guidelines for Collaboration and Engagement: Prosecutors and Defense Counsel Working Together in Joint Post-Conviction Investigations* (Mar. 2022), <https://www.law.upenn.edu/live/files/12062-guidelines-for-collaboration-and-engagement> [https://perma.cc/857S-G6ZR].

314. *In re Kurtzrock*, 138 N.Y.S.3d 649, 657 (App. Div. 2020). For example, two years of notes that included the identification of a different suspect were redacted, important impeachment evidence—in one case relating to the only identifying witness—was repeatedly withheld. *Id.* All along, Kurtzrock was representing that he had complied with his *Brady* obligations. *Id.*

315. *Id.* at 656.

316. *Id.*

way around.<sup>317</sup> He also testified that he did not disclose prior statements of prosecution witnesses as required by *People v. Rosario*<sup>318</sup> and *Giglio v. United States*,<sup>319</sup> on the basis that they did not relate to the questions he would be asking those witnesses on direct examination.<sup>320</sup> This was a deliberate and erroneously narrow view of his obligations. Thus, to the extent that he engaged in “deliberate, volitional”<sup>321</sup> failure to fulfill his *Brady* obligations that was based on articulated systematic and unconstitutional interpretations of his disclosure obligations, there was good reason to believe it had occurred in other cases.

As noted, an audit or systematic review of other cases by a prosecutor takes time and resources. Once a decision to audit is made, an essential requirement is, as well, that a DA’s office have a systematic way to identify cases by a prosecutor’s name. Suffolk County was able to do that. A first step, then, would be creating such a system if one does not exist. Second, CIU staff must make sure to account for any conflicts of interest arising from their pre-CIB employment and should recuse themselves where necessary. Finally, partnering with an innocence project or law school clinic will not only lighten the workload and speed up the process, but it will also add a perspective that may not otherwise be available and foster greater legitimacy to the outcomes.

Equally important, as it was in Suffolk County, where they also had a newly-elected DA intent on discovery reform, the review and systematic audit resulted in enhanced review of CIB applications with an eye out for “red flags,” signaling possible repeat offenders that can be recorded and considered for audit or review. It also resulted in important internal changes in the DA’s office beyond the correction of the specific wrongful convictions, including enhanced training, information sharing, and greater awareness of discovery obligations.

## V. CONCLUSION

Handling *Brady* claims presents many unique challenges to a CIU. Yet CIUs have a unique opportunity to identify, rectify, and prevent the most serious violations: they have unique access to the

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317. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

318. 173 N.E.2d 881 (N.Y. 1961).

319. *Giglio v. United States*, 405 U.S. 150 (1972).

320. *In re Kurtzrock*, 138 N.Y.S.3d 649, 662 (App. Div. 2020).

321. *Id.* at 662.

prosecutor's files, which often makes the claim relatively simple to prove, and aids the investigative staff in uncovering what occurred, sometimes decades earlier. Current best practices do not clearly address CIU investigations of *Brady* and other misconduct claims. Whilst this Article is not intended to be exhaustive of practices that CIUs should utilize when handling such allegations, by using example cases involving *Brady* violations, this Article may lay the groundwork for newly created CIUs and for articulating best practices that would permit CIUs to more effectively serve their role in correcting and preventing wrongful convictions.



