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of Pennsylvania Carey Law School. Mr. Hollway is a national leader in the use of Root Cause Analysis (RCA) to evaluate the criminal-justice system. He frequently consults with criminal-justice agencies and corporations to improve the quality of their systems.

RCA focuses on the how and why an error occurred, rather than on who is at fault. Once the causes are identified, they can be addressed directly to prevent similar errors in the future – as opposed to merely correcting symptoms, like individual improper convictions. Mr. Hollway emphasizes that many errors occur in the criminal-justice system, but there are not nearly enough bad actors to account for them. So instead of rooting out individual fault, he recommends the quality-driven approach that other complex systems use to prevent error: review and address *every* potential cause. This is how the National Transportation Safety Board addresses plane crashes and how hospitals address “never events,” such as leaving a sponge in a patient or operating on the wrong limb.

Unlike the NTSB and the healthcare system, the criminal-justice system does not typically research and analyze its errors from a root-cause perspective. Instead, when errors are discovered (within the relevant time constraints), they are fixed individually through the appellate process. There are few mechanisms in place to prevent future errors. Yet society has a vested interest in avoiding wrongful convictions – such a conviction not only wrongfully incarcerates an innocent person but also leaves a guilty person unaccountable and possibly free.

Mr. Hollway illustrated the likelihood of these errors in Ohio. The National Registry of Exonerations had 2,768 exonerations on record – 84 of them in Ohio. Of the total, 85% were in cases that went to trial and 15% were in cases that involved a plea bargain. Statistical analysis of exonerations suggests that 4% of all capital cases involve wrongful convictions. Measured against Ohio’s conviction numbers, it is likely that five Ohio defendants currently sentenced to death are wrongfully convicted. From a conviction-review perspective, Mr. Hollway had some misgivings about terms like *conviction integrity*, preferring instead for prosecutors to establish *conviction-review* units. But he acknowledged that he’s losing this battle. He informed the Task Force that conviction-review units are established within prosecutor’s offices to evaluate claims of actual innocence. Most states’ postconviction procedures typically do not provide for litigating actual-innocence claims. He observed that there is something of a national trend in creating conviction-review units. They are typically, however, found in urban jurisdictions, since urban jurisdictions usually have higher caseloads and more prosecuting attorneys who can staff the units (Mr. Hollway reported that 75% of prosecutors’ offices across the country have three or fewer attorneys). He also discussed the unique model that North Carolina has established – an innocence inquiry commission with subpoena power to investigate actual-innocence claims.

In terms of best practices for establishing a conviction-review unit, Mr. Hollway emphasized several points:

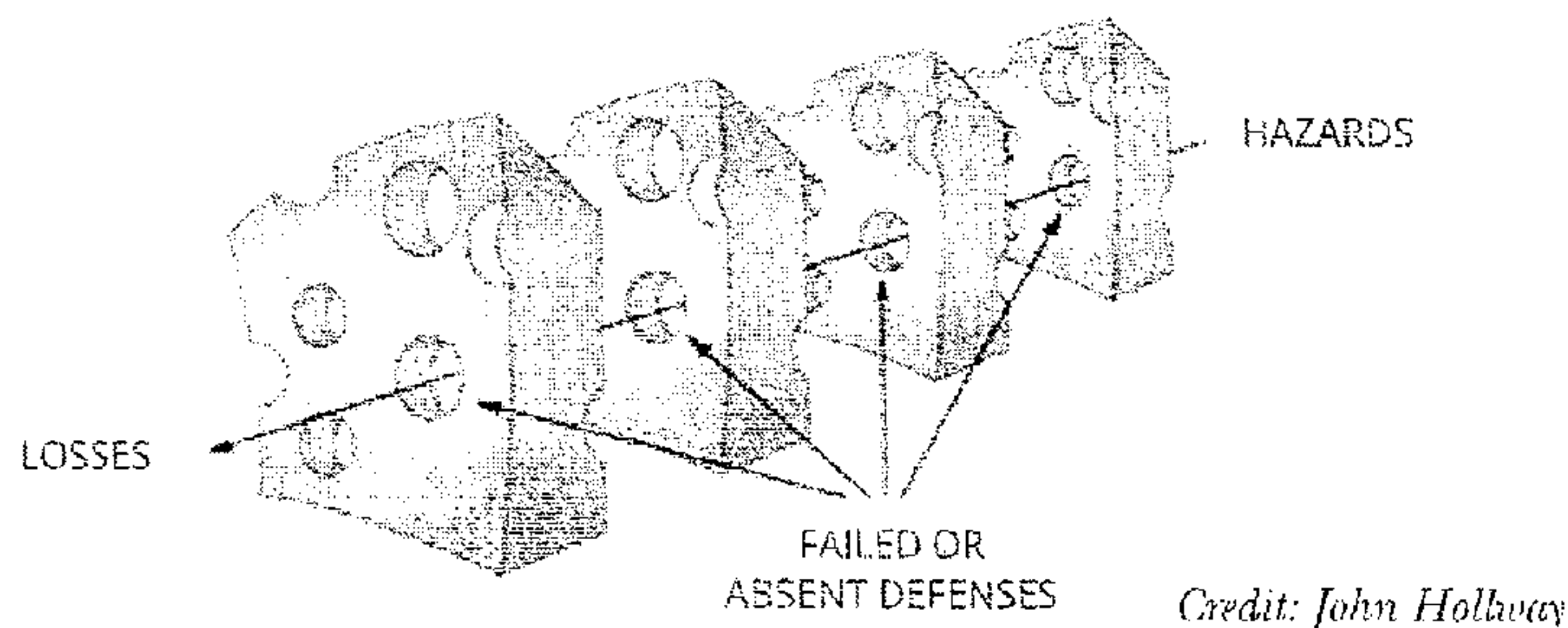
- structural independence.
- procedural flexibility.
- procedural transparency.

An independent conviction-review unit should report only to the elected prosecutor/district attorney to avoid procedural, bureaucratic, or internal political barriers. It must be run by respected prosecutors. And it needs external-stakeholder participation to avoid the perception of the fox guarding the henhouse.

Procedural flexibility should allow the unit to accept cases from multiple sources, focus on plausible claims of innocence (but not bar claims involving guilty pleas or raise other procedural barriers), and should focus on actual facts rather than procedural issues.

From a procedural-transparency standpoint, he recommended that units work with the petitioner and petitioner's counsel during investigations, that units not address *Brady* claims and the like to avoid unnecessary intraoffice friction, and that the unit not be involved in independent disciplinary review of potential *Brady* violations. Separately, he recommended that appellate units not be involved due to their daily emphasis on and bias toward preserving convictions.

The Task Force's discussion after Mr. Hollway's presentation ranged across several issues, but it also stuck on a point that came to define the Task Force's approach to its recommendations. Like errors in other complex systems, wrongful convictions have multiple contributing factors. Using Swiss cheese slices as a metaphor, Mr. Hollway discussed how each step has some defenses, *e.g.*, solid cheese, and some failed or absent defenses, *e.g.*, the holes in the cheese.



When those holes line up, the defenses fail and a wrongful conviction occurs.

The Task Force would later recommend improvements to the criminal-justice system that would minimize the holes, particularly in the postconviction-review process.



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**Larry Krasner, Philadelphia District Attorney and Patricia Cummings,  
Philadelphia District Attorney's Conviction-Integrity-Unit Leader  
(Nov. 19, 2020)**

The next outside experts to address the Task Force were Philadelphia District Attorney Larry Krasner and Assistant District Attorney Patricia Cummings, leader of the Philadelphia District Attorney's Conviction-Integrity Unit. Before joining the Philadelphia DA's office, she led the Dallas County, Texas District Attorney's Conviction-Integrity Unit.

District Attorney Krasner began by highlighting the changing politics of prosecution, noting that 24 progressive prosecutors were elected across the country in the most recent election cycle. Voters are seeking modern approaches to prosecution, including conviction-integrity units. Yet he found himself at odds with, and withdrew his office from, the Pennsylvania District Attorneys Association due to conflicts with the Association's political and policy lobbying.

Next, DA Krasner shared his view on prosecutorial duties, stating that conviction integrity should be important to all prosecutors. Preferring finality over accuracy is at odds with a prosecutor's oath to uphold justice when there are wrongful convictions – which, as a corollary, are also unsolved crimes.

ADA Cummings noted that, per the National Registry of Exonerations, Ohio has had 85 exonerations since 1989. Under the National Registry's definition, an exoneration occurs when newly discovered evidence of innocence has led to the vacatur, reversal, and ultimate dismissal of criminal charges against a convicted person. That is, it's not necessarily synonymous with actual innocence.

She also identified the leading causes of wrongful convictions (more than one is often present in an individual case):

- Official Misconduct: 54%
- Eyewitness Misidentification: 28%
- False Confessions: 12%
- False or Misleading Forensic Evidence: 25%
- Perjury or False Accusation: 59%

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Noting the prevalence of false confessions, ADA Cummings emphasized that conviction-review units should include cases involving pleas.

In addition to pleas, statutes and rules can impede remedying wrongful convictions. For instance, Ohio does not allow postconviction discovery except in death-penalty cases. In contrast, Texas allows the appointment of counsel in postconviction proceedings and New York gives prosecutors significant discretion to vacate and dismiss convictions in the interest of justice. Contrary to popular perception, Texas has enacted numerous other helpful statutes, such as those allowing relief based on scientific advances.

From an ethics standpoint, ADA Cummings recommends the adoption of American Bar Association Model Rule 3.8, which addresses prosecutors' special duties. She directly addressed the Ohio Prosecuting Attorneys Association and its suggestion that adopting ABA Model 3.8 is the only appropriate step, saying, "It's just one tool in the toolkit that you need to address the problem."

She advocates for Ohio to create a toolkit that extends beyond ethics, including extending *Brady* obligations through postconviction proceedings; increasing education and training; modifying rules and statutes, e.g., open-file discovery, procedures for seeking new trials, postconviction statutes, actual-innocence writs, right to postconviction counsel, dismissal in the interest of justice; and allowing for the application of scientific advances to earlier convictions.

DA Krasner and ADA Cummings also have suggestions for structuring and operating a conviction-integrity unit. For starters, ADA Cummings is skeptical of the effectiveness of the North Carolina Innocence Inquiry Commission. This skepticism stems from the small number of exonerations – an average of one per year. She was somewhat less skeptical of conviction-integrity units operated by state attorneys general. She points out that they often have limited jurisdiction, require a county's permission to investigate a case, or require a referral from a county. Contrary to the practice of most conviction-integrity units and North Carolina's Commission, which examine only actual-innocence claims, she advocates for examining the widest possible funnel: actual innocence, other causes of wrongful convictions, and sentencing inequities. Also, DA Krasner and ADA Cummings think it important to maintain the conviction-integrity unit's independence, particularly from appellate prosecutors who specialize in preserving convictions. ADA Cummings also observed that there are multiple schools of thought on assigning blame during the conviction-review process. She acknowledged John Hollway's preference for avoiding blame, but she noted that other experts, like Barry Scheck, believe blame is necessary to hold responsible individuals accountable.



### **Maurice Possley, Senior Researcher of the National Registry of Exonerations (Dec. 10, 2020)**

The next preliminary outside expert to address the Task Force was Maurice Possley, Senior Researcher at the National Registry of Exonerations and a Pulitzer Prize-winning journalist who spent 25 years with the Chicago Tribune. While at the Tribune, he investigated wrongful-conviction and wrongful-execution cases, along with other systemic problems in the criminal-justice system. Further, he has authored five nonfiction books. In 2009, he began working with the Northern California Innocence Project and coauthored a report on prosecutorial misconduct in California. Three years later, he joined the National Registry. There, he researches and writes about the exonerations added to the Registry.

The Registry was founded in 2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law. It is now a joint project of the Newkirk Center for Science & Society at the University of California, Irvine; the University of Michigan Law School; and Michigan State University College of Law. Its database began with 800 cases and as of May 26, 2022, had 3,133 exonerations, representing more than 27,080 years lost.

To qualify for the Registry, a defendant must be exonerated. That is, a government entity with the authority to make such a declaration must declare them factually innocent. This includes pardons, acquittals, and other legal processes, so long as they are based on new evidence. Mr. Possley shared the following comparison of national exoneration data versus Ohio data:

#### *National Cases vs. Ohio Cases*

	NATIONAL	OHIO
CASES	2,383	85
PLED GUILTY	544 (20%)	3 (4%)
NO CRIME CASES	994 (37%)	23 (27%)
CIU CASES	457 (17%)	6 (7%)
INNOCENCE PROJECT CASES	659 (24%)	24 (28%)

#### *National Cases vs. Ohio Cases*

*(Number of exoneration cases based on the crime for which they were originally convicted.)*

	NATIONAL	OHIO
MURDER/MANSLAUGHTER	1,093 (40%)	36 (42%)
DRUG POSSESSION/SALE	359 (13%)	4 (5%)
SEXUAL ASSAULT	339 (12%)	10 (12%)
CHILD SEXUAL ABUSE	293 (11%)	14 (16%)
ROBBERY	134 (5%)	7 (8%)
ATTEMPTED MURDER/ASSAULT	165 (6%)	3 (4%)

*National Cases v. Ohio Cases (Demographics)*

	NATIONAL	OHIO
BLACK	1,336 (49%)	49 (58%)
WHITE	987 (37%)	35 (41%)
HISPANIC	312 (12%)	1 (1%)
MALE	2,460 (92%)	78 (92%)
FEMALE	239 (8%)	7 (8%)

*National Cases vs. Ohio Cases (Contributing Factors)*

	NATIONAL	OHIO
MISTAKEN WITNESS ID	767 (28%)	30 (35%)
FALSE CONFESSION	330 (12%)	2 (2%)
PERJURY/FALSE ACCUSATION	1,606 (60%)	43 (51%)
FALSE/MISLEADING FORENSICS	661 (25%)	20 (24%)
OFFICIAL MISCONDUCT	1,469 (55%)	46 (54%)
INADEQUATE LEGAL DEFENSE	740 (28%)	13 (15%)

Ohio also has two group exonerations in the Registry:

- In 2007, 19 convictions were vacated and the charges dismissed because of misconduct by a DEA agent and informant in Mansfield.
- In 2016, 43 convictions were vacated and the charges dismissed due to police misconduct in East Cleveland, Ohio.

Mr. Possley also shared that the Registry tracks conviction-integrity units nationwide and divides them into two categories: active units that have exonerated at least one defendant and active units that have no exonerations. The Registry is aware of 72 units; 33 had at least one exoneration, while 39 had no exonerations.

Finally, Mr. Possley believes Ohio prosecutors fight very hard to preserve convictions and file appeal after appeal. He thinks that they do this because there is very little in the way of consequences, even for misconduct. He gave the example of Carmen Marino, formerly a prosecutor in Cuyahoga County. A defendant spent multiple additional years on death row as Cuyahoga County fought to preserve his convictions. A codefendant relented and pleaded to lesser charges just to exit prison. A few years later, long after Marino had retired, several more defendants from the same case were exonerated after a trove of exculpatory evidence was discovered, which Marino had intentionally withheld. [According to the Supreme Court of Ohio's attorney directory, Marino has no disciplinary history to this day. (Accessed Dec. 7, 2021.)]



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**Niki Hotchkiss, Assistant Director, and Todd Ives, Researcher, Ohio Criminal Sentencing Commission (Aug. 13, 2021)**

The Ohio Criminal Sentencing Commission staff researchers, Niki Hotchkiss and Todd Ives, submitted a written report to the Task Force addressing current data-collection requirements and practices, along with suggestions for improvements. The appendix to that report is a memorandum recommending best practices for conviction-integrity units written by Lydia Shafik, a Spring 2021 intern with the Commission. Along with the report, Ms. Hotchkiss and Mr. Ives presented the Commission's current practices and enabling statutes. As part of this presentation, they recommended changes to R.C. 181.25(A)(5).

A brief history helps explain the Commission's recommendation. When the General Assembly passed S.B. 2 in 1997, creating a formal sentencing-appeals mechanism, the consensus was that an increase in criminal appellate filings would follow. The legislature tasked the Commission with tracking county expenses related to an expected correlated increase in appellate costs. But no sustained increase in those appeals followed. Instead, criminal-appeal numbers have remained steady, while civil-appeal numbers have fallen. As a result, criminal appeals now make up a larger percentage of overall appellate cases but not a larger absolute number.

Plus, the Commission has found that collecting accurate and meaningful data on the cost of appeals is unnecessarily difficult and of importance primarily to local interests, like county commissioners.

**Beth Tanner, Associate Director, North Carolina Innocence Inquiry Commission (Aug. 13, 2021)**

The final presenter, Beth Tanner, administers the North Carolina Innocence Inquiry Commission, which was created by North Carolina's legislature in 2006. It is the first and only statewide innocence commission in the nation. Ms. Tanner presented a comprehensive picture of the Commission, including its composition, structure, process, budget, and useful statistics.

At its inception, the Commission received several hundred applications. Now, it receives an average of 208 applications per year. Most of these applications come directly from prison inmates, but judges, district attorneys, defense attorneys, and others can refer cases. The Commission's screening process eliminates cases that don't qualify under the statutory criteria, and it exercises its discretion to prioritize older cases and incarcerated defendants.

Its current budget is \$620,697, though it has requested an additional \$700,000 for its upcoming budget, and it currently receives grants totaling over \$1 million.

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The Commission carries an average of 50 open cases. It has held 17 hearings since it began; about 1–3 hearings per year. Of those 17 hearings, 15 resulted in exonerations (less than 1% of the applications).

Ms. Tanner also emphasized that the Commission has several unique qualities: its independence; its confidential nature; its investigatory authority; and its focus on factual innocence. These unique aspects of the Commission were perhaps its most compelling features for the Task Force members.

Contrary to a standard conviction-integrity unit, which is run by a prosecutor's or district attorney's office, the Commission is independent. It has no prosecution-, defense-, political-, or policy-related affiliation. And while it is nominally housed in the judicial branch, the courts have no influence on it (beyond individual judicial appointees' participation). It is beholden to no one and nothing but the underlying truth.

The Commission's work – at least initially – is confidential. The ability to conduct confidential investigations incentivizes those with relevant information to participate without fear of retribution or ignominy. This confidentiality breaks only under a few circumstances: evidence of other crimes develops; evidence favorable to the claimant develops; the Commission moves forward with a hearing (hearings are public); or when a three-judge panel orders that the entire case file be turned over.

The entire case files are extensive, in part because of the Commission's broad investigatory powers. Those broad investigatory powers rival law enforcement's. The Commission can:

- Issue process to compel attendance of witnesses and production of evidence.
- Take depositions.
- Administer oaths.
- Serve subpoenas and other process.
- Access, inspect, examine, and take custody of physical evidence, including consumptive testing of biological materials like DNA – even at private labs.

Ms. Tanner reported that the Commission has authority to seek out lost and misplaced evidence. In the cases in which it discovered such evidence, Ms. Tanner identified a theme of insufficient evidence policies and procedures, such as failing to consistently catalogue and organize evidence or failing to maintain proper destruction records.



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The final and – to some Task Force participants – most compelling feature of the Commission is its strict focus on factual innocence. The Commission has no power to remedy, and thus no interest in, *Brady* violations, lesser-included offenses, etc. Consistent with the Commission's independence, its staff and leadership are state employees, not elected or appointed officials. It has six state-funded and four grant-funded positions:

Executive Director	Administrative Secretary
Associate Director	Two Staff Attorneys (grant funded)
Two Staff Attorneys (state funded)	Legal Investigator (grant funded)
Case Coordinator	Victim-Services Coordinator (grant funded)

The Commission's most recent budget request would add two state-funded positions and convert the Victim-Services Coordinator into a state-funded position.

The Commission itself comprises 16 members serving 8 distinct roles. Each Commissioner role has an alternate. The chief justice of the Supreme Court of North Carolina and the chief judge of the North Carolina Court of Appeals alternate in making appointments. The Commissioners serve three-year terms and are drawn from a broad cross-section of the criminal-justice system, including:

- Superior court judge/commission chair (analogous to common pleas court in Ohio)
- Prosecuting attorney
- Criminal-defense attorney
- Victim advocate
- Public member
- Sheriff
- (2) Discretionary members

The review process begins with an application. To qualify for Commission review, an applicant must be living, must have been convicted of a felony in a North Carolina state court, must claim complete factual innocence of any responsibility for the crime, must allege that there is new evidence that the jury did not hear or that was not reasonably available before a guilty plea.

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Commission review consists of eight potential steps:

1. Innocence claim initiated.
2. Staff screens and investigates claim.
3. Initial review.
4. Further review.
5. Investigation.
6. Formal inquiry – Reserved for cases likely to reach a hearing. At this point, statutes require victim notification and updates to the district attorney, defense counsel, and any codefendants.
7. Commission hearing – The Executive Director determines whether a case goes before the eight commissioners in a nonadversarial hearing. All such hearings are held in Raleigh. And the Executive Director presents all the evidence, while other staff serve as witnesses. The commissioners decide whether sufficient evidence exists to warrant a three-judge panel.
8. Three-judge panel – If warranted, a three-judge panel convenes in the county of conviction. The chief justice of the Supreme Court appoints three superior-court judges from other counties. Applicants are represented before the panel by defense counsel and the state is represented by the district attorney (or attorney general when a conflict exists). The Commission's Executive Director and staff serve only as witnesses.

Exonerees are compensated by the state under the North Carolina Tort Claims Act.<sup>2</sup> Under the Act, exonerees' claims are reviewed and paid by the North Carolina Industrial Commission. For each year of imprisonment, exonerees can receive \$50,000. The total payout, however, is limited to \$750,000 (equivalent to 15 years of wrongful imprisonment).

Finally, the Commission's enabling statutes and practices take into account victims' rights. As noted, the Commission has a victim-services-coordinator position.

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<sup>2</sup> Task Force discussions occasionally touched on financial issues – the most common being the amount of money that must be paid to a *wrongfully imprisoned individual* under R.C. 2743.48. This issue also arose early on, but it received the most discussion during the innocence-commission debates. For instance, Justice Donnelly shared an Excel spreadsheet of the compensation paid to wrongfully imprisoned individuals since 1976. (Appendix F.) This spreadsheet demonstrates the magnitude of Ohio's wrongful-conviction problem. Under R.C. 2743.48(E)(2), a wrongfully imprisoned individual is, roughly speaking, entitled to \$43,330 per year of imprisonment, plus any wages or salary lost directly due to the person's arrest, prosecution, conviction, and wrongful imprisonment. That adds up when a wrongful conviction languishes without remedy. To obtain the full compensation, the wrongfully imprisoned individual must file an action in the Court of Claims.