

Quattrone Center for the  
Fair Administration of Justice  
UNIVERSITY *of* PENNSYLVANIA

**Report of the  
Philadelphia  
Event Review Team**

*on*

**The Wrongful  
Conviction of  
Marshall Hale**

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## Introduction

The Philadelphia Event Review Team (PERT) is a voluntary collaboration among the Philadelphia District Attorney's Office (DAO), the Philadelphia Police Department (PPD), the Court of Common Pleas First Judicial District of Pennsylvania (CCP), and the Defender Association of Philadelphia, coordinated by the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School (Quattrone Center or QC). Each of the agencies participating in the PERT is dedicated to a culture of learning from error, and the PERT comes together to use principles of quality improvement and root cause analysis to evaluate cases in which undesired outcomes have occurred, identify the various factors contributing to their occurrence, and design improvements to the system to prevent their recurrence.

The members of the PERT decided to review the conviction and subsequent exoneration of Marshall Hale, convicted in 1984 of the rape of a teenage girl in Philadelphia. Mr. Hale's conviction rested largely on the eyewitness identification of the rape victim.

Mr. Hale steadfastly proclaimed his innocence, and he submitted many petitions for postconviction review in the years following his conviction. Mr. Hale lacked legal representation during this time and accordingly submitted his petitions pro se. As part of Mr. Hale's postconviction petitions, he submitted multiple requests for scientific information related to his case and physical evidence that could be used to assess his claims of innocence, particularly as DNA testing became an available technology.

In 1998, in response to one of Mr. Hale's requests for all scientific information related to his case, the DAO delivered to Mr. Hale laboratory notes from all testing in his case, including a saliva test conducted by the PPD Forensic Science Bureau (FSB) that had been conducted and analyzed by the FSB on the last day of his trial.

The test results, many of which were never reported and deemed inconclusive, and may indicate that Mr. Hale was not the source of biological material found in a vaginal sample taken from the victim on the day of the rape, had never before been disclosed to Mr. Hale. Indeed, some tests were not performed until the last day of Mr. Hale's trial, shortly before the jury returned its verdict. It is unclear whether the DAO had previously had a copy of these test results in its possession, because sometime between the trial and Mr. Hale's 1998 request for scientific information related to

his case, the DAO lost its file on Mr. Hale's case. Equally troubling is that these analyses appear to have not been reported by the forensic scientist who conducted them. Lacking this file, the DAO requested all scientific information held by the PPD's Forensic Science Bureau (FSB), and provided that information to Mr. Hale, including (for the first time) the test results that would ultimately be the foundation for his exoneration and release from prison.

While the laboratory notes were disclosed by the DAO to Mr. Hale in 1998, it appears that neither the DAO nor Mr. Hale understood the laboratory notes or their relevance to the case. Neither Mr. Hale (who was representing himself in his postconviction petitions and had neither legal nor scientific experts assisting him) nor the DAO had scientific experts review the FSB file prior to its disclosure, and neither side appeared to even be aware that new information had been disclosed. Without the trial file to compare against, the DAO acknowledged to Mr. Hale and the Court the possibility that exculpatory information was being disclosed, and agreed not to object to the use of such information as if it was a new disclosure. Identifying and comprehending the test results was further complicated by the fact that formal laboratory reports of all analyses conducted in the investigation were not issued. Therefore, all subsequent reviews of this information were limited to reading the handwritten notes that were recorded by the analysts who performed the original testing.<sup>1</sup> As a result, Mr. Hale continued his pro se representation in the Pennsylvania and federal post-conviction appellate process by making arguments on procedural grounds, including claims that the Commonwealth had violated his due process rights by destroying a great deal of the physical evidence used to convict him at trial, with the result that the evidence was not available for DNA testing that could have bolstered Mr. Hale's claims of innocence.

In 2009, the newly formed Pennsylvania Innocence Project (PAIP) agreed to review Mr. Hale's case. Convinced of his innocence, the PAIP engaged a scientific expert who reviewed the test results and concluded that the evidence was insufficient to establish that Mr. Hale was a contributor to the biological evidence sample collected from the victim's vagina. Despite this, the expert's scientific analysis was doubted by many in the DAO, and the prosecution continued to argue against Mr. Hale's petitions for the reversal of his conviction. Not until 2017

<sup>1</sup> It is noted that the timeframe in which the tests were conducted predated the creation of standards for recordkeeping and reporting that are now required for the accreditation of forensic laboratories; these reporting requirements are intended in part to assist laypeople in understanding the data included in such test results.



did the DAO agree to withdraw its charges, vacate the conviction, and release Mr. Hale, who by that time had spent thirty-three (33) years in prison, despite the evidence that led to his release being in the possession of the PPD FSB since 1984 and being in his possession since 1998.

After Mr. Hale's civil litigation against various entities related to his wrongful conviction was resolved, the PERT agreed to conduct a thorough review of the case and identify the various factors that:

- Caused an innocent man to be inaccurately identified as the perpetrator of these terrible crimes, charged and prosecuted, and imprisoned
- Allowed the actual perpetrator of the crimes to avoid accountability and potentially commit other crimes while Mr. Hale was incarcerated
- Delayed the disclosure of the key test results for fourteen (14) years
- Delayed the comprehension of the key test results twelve (12) years; and
- Extended his incarceration for seven (7) additional years until his charges were vacated.

The PERT used principles of root cause analysis and a “just culture” standard of organizational accountability<sup>2</sup> to identify contributing factors, and then suggested consensus recommendations to improve the criminal justice system in ways that are intended to prevent the factors that contributed to Mr. Hale's identification, conviction, and extended incarceration from occurring in future cases. The goal was not to punish or find blame with any individual or agency, but to learn from the mistakes, misunderstandings, and miscommunications made in this case and to make changes that will ensure that the criminal justice system operations fairly and justly for all. Through this review, the PERT hopes to shed light on systemic issues that can lead to wrongful convictions, and to promote a culture of accountability and transparency in the criminal justice system. A case timeline and narrative follow, as well as a set of contributing factors that combined to enable the inaccurate conviction, and a list of proposed improvements to the Philadelphia criminal justice system that are designed to reduce opportunities for error in this jurisdiction.

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<sup>2</sup> The PERT defines a “just culture” as “a culture that recognizes that competent professionals make mistakes and acknowledges that even competent professionals will develop unhealthy norms (e.g., shortcuts, ‘routine rule violations’), but has zero tolerance for reckless behavior.” Agency for Healthcare Research & Quality Glossary, available at [http://psnet.ahrq.gov/popup\\_glossary.aspx?name=justculture](http://psnet.ahrq.gov/popup_glossary.aspx?name=justculture).



## Executive Summary

This report provides the results of a Sentinel Event Review (SER) of the wrongful conviction and 33-year incarceration of Marshall Hale, who was convicted in 1984 of rape and released in 2017 after all charges against him were vacated and dismissed.

The SER was conducted by the Philadelphia Event Review Team (PERT), a voluntary collaboration among the Philadelphia District Attorney's Office (DAO), the Philadelphia Police Department (PPD), the Court of Common Pleas First Judicial District Court of Pennsylvania (CCP), and the Defender Association of Philadelphia. It was coordinated by the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Carey Law School (Quattrone Center or QC).

The PERT, and each of its participants, conducted this SER as a quality improvement exercise evaluating a number of undesirable outcomes that occurred in Mr. Hale's case. The group identified various factors that came together to lead to:

- The inaccurate identification of Mr. Hale, leading to his arrest
- The failure to conduct scientific testing prior to the commencement of the trial, and the failure to report all forensic test results to all parties in a timely fashion
- The destruction of physical evidence while Mr. Hale's case was open and on appeal, leading to the inability to perform DNA analyses
- The delayed disclosure of scientific information to Mr. Hale by the PPD's Forensic Science Bureau (FSB) and by the Philadelphia DAO
- The system-wide lack of awareness and comprehension of forensic scientific information conducted in Mr. Hale's case; and
- The delays in reaching an agreed-upon adjudication of the case after the scientific information was identified and understood.

These issues caused an innocent man to be inaccurately identified as the perpetrator of these terrible crimes, allowed the actual perpetrator of the crimes to avoid accountability and potentially commit other crimes while Mr. Hale was incarcerated, delayed the disclosure of the key test results for fourteen (14) years, delayed the comprehension of the key test results

for an additional twelve (12) years; and extended Mr. Hale's incarceration for seven (7) additional years until his charges were vacated.

The PERT used principles of root cause analysis and a "just culture" standard of organizational accountability<sup>3</sup> to identify contributing factors, and suggested consensus recommendations directed to each participating organization designed to improve quality and accuracy of the criminal justice system by preventing the factors that contributed to Mr. Hale's identification, conviction, and extended incarceration from occurring in future cases.

The PERT did not seek to punish or find blame with any individual or agency, but to learn from this wrongful conviction and make changes to avoid such errors again, helping the criminal justice system operate fairly and justly for all.

The PERT identified 46 distinct factors that contributed to his wrongful conviction and his wrongful incarceration for 33 years. The PERT then discussed and agreed upon 29 consensus recommendations for changing the criminal justice system in Philadelphia. These contributing factors and recommendations are interspersed throughout the case analysis below, and collected in a table in Appendix B.

Mr. Hale's wrongful conviction could not have happened without systemic errors occurring at every level of his case. Any wrongful conviction must start with an inaccurate identification and arrest; from there, prosecutors at the DAO must accept the case and move to adjudicate it despite its inaccuracy. Defense attorneys are unable to convince others of their client's innocence, and judges and juries tasked with objective fact-finding are unable to do their job, causing the judge to preside over an incorrect jury assessment of guilt. Thus, Mr. Hale's case (and any wrongful conviction) provided PERT representatives of the PPD, the PPD OFS, the DAO, the Defender Association and the CCP with numerous opportunities for quality improvement.

The recommendations generated in this report focus on improvement to the systems in which law enforcement, forensic scientists, prosecutors, defense attorneys, judges and juries exist, ensuring that they are enabled to do their jobs as effectively and efficiently as possible. The recommendations focus on:

<sup>3</sup> The PERT defines a "just culture" as "a culture that recognizes that competent professionals make mistakes and acknowledges that even competent professionals will develop unhealthy norms (e.g., shortcuts, 'routine rule violations'), but has zero tolerance for reckless behavior." Agency for Healthcare Research & Quality Glossary, available at [http://psnet.ahrq.gov/popup\\_glossary.aspx?name=justculture](http://psnet.ahrq.gov/popup_glossary.aspx?name=justculture).



- Ensuring that best practices are used in the identification of suspects in criminal cases by eyewitnesses
- Improving communication among the CCP, prosecution and defense attorneys, and the PPS Office of Forensic Science (OFS)<sup>4</sup> to ensure complete and timely discovery of scientific information to all parties
- Improving the handling and retention of case files and physical evidence
- Ensuring that lawyers and judges in cases that involve scientific information are knowledgeable and critical consumers of the relevant science
- Ensuring that pro se petitioners (i.e., petitioners representing themselves) and counsel for the indigent have appropriate access to scientific experts and
- Where possible, accelerating post-conviction appellate procedures.

The quality improvements that will occur when these recommendations are implemented should both reduce mistakes and make it harder for any future bad actors to operate in a more precise system for adjudicating criminal cases.

The Sentinel Event Review of Mr. Hale's is deserving of one final note. The crime for which Mr. Hale was convicted occurred in 1983, forty (40) years prior to this review. We believe this makes it the oldest case to date to receive a Sentinel Event Review. Just as the delay between Mr. Hale's conviction and the disclosure of the test that ultimately led to his freedom created challenges for Mr. Hale's quest for innocence, so too the time that has passed between the conviction and this SER created challenges for the Review Team (see Appendix C.). Despite these challenges, the PERT identified a significant number of opportunities to improve that have persisted as challenges since that time, showing that even a 40-year-old review can yield useful quality improvements.

The delay in conducting this SER also allowed the PERT to recognize and appreciate several areas where the organizations had embarked upon quality improvements voluntarily, without being nudged or forced, and typically without fanfare (e.g., PPD's formal policies and procedures for the use of photo arrays with eyewitnesses, improved integration between the OFS Lab Information Management System (LIMS) and the CCP's information system, etc.) between the date of Mr. Hale's conviction and today. We applaud the willingness of each of the participating organizations to learn from Mr. Hale's wrongful conviction and to continuously work to improve the criminal justice system for all.

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4 The FSB became the OFS in 2010.





## Contributing Factors Leading to Mr. Hale's Wrongful Conviction

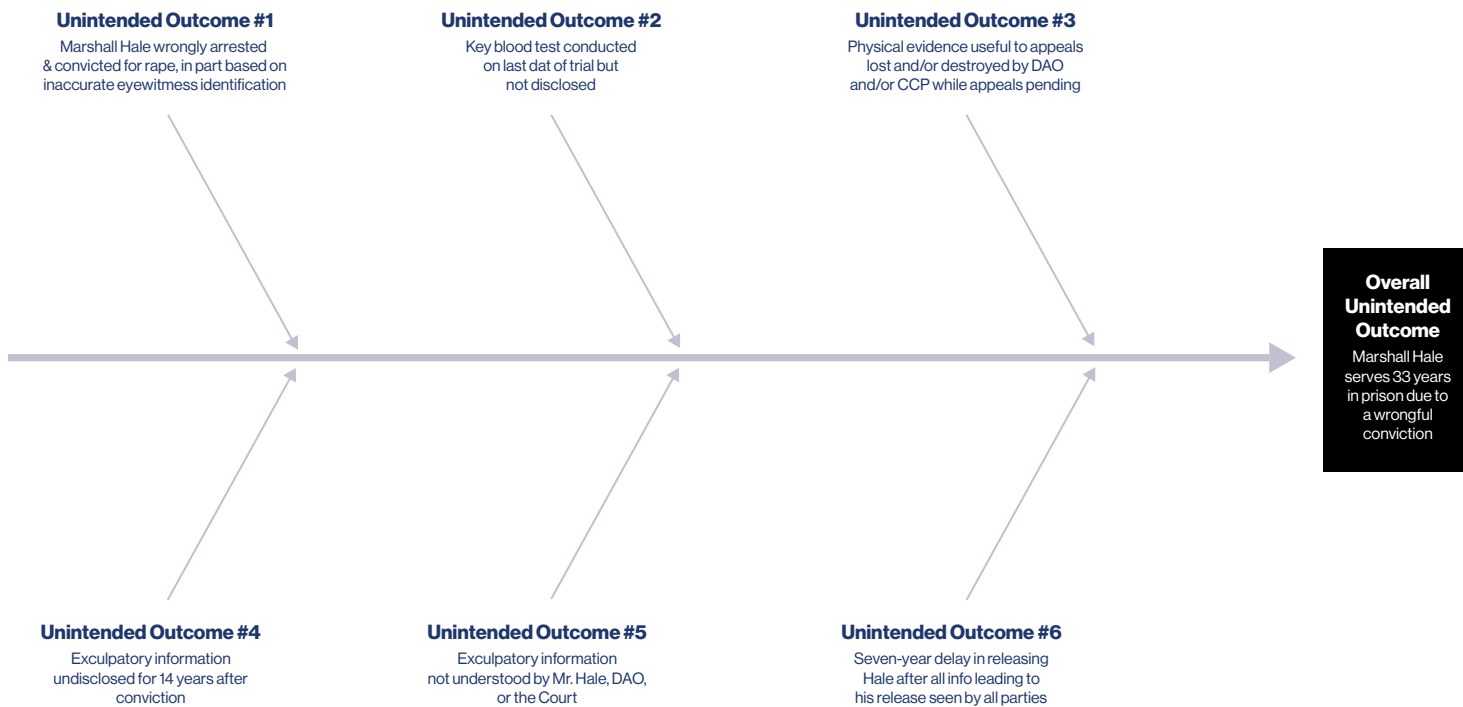


Figure 1. Unintended outcomes contributing to Marshall Hale's wrongful conviction.



## Case Analysis, Contributing Factors and Recommendations

Each participating agency contributed documents in its possession related to the case to the Quattrone Center and representatives of Dechert LLP for review and analysis.<sup>5</sup> They reviewed thousands of pages of court transcripts, appeals, and attachments, and interviewed twelve individuals who participated in the case between 1983 and the present day. This review allowed the PERT to evaluate the case in chronological order of events, identifying factors that combined to cause the various undesired outcomes in Mr. Hale's case, including:

- Mr. Hale's inaccurate identification as the perpetrator of the crimes
- The failure of the PPD and DAO to provide to Mr. Hale and the court prior to the completion of the trial all of the forensic test results, which would have shown inconclusive as well as exclusionary data that Mr. Hale could not have been a contributor to certain biological markers found in the evidence, including the rape kit
- The failure of the PPD and DAO to generate a report of those test results at the time of analysis and to deliver them to Mr. Hale prior to 1998
- The destruction of physical evidence used at trial while Mr. Hale's appeals were pending, eliminating evidence that could subsequently have exonerated Mr. Hale
- The inability of anyone associated with the case to realize the impact and importance of the test results until a defense expert reviewed them in 2010 and
- The seven (7) year delay between the recognition of the importance of the test results and the DAO's willingness to vacate the charges against Mr. Hale in 2017.

Wherever possible, the PERT sought to understand the actual environment and awareness of the participants in the case at the time they were making decisions, so that recommendations for change would help criminal justice professionals in the future avoid the factors that contributed to Mr. Hale's inaccurate identification, conviction, and incarceration.

### Commission of a crime, Philadelphia Police Department investigation, and trial

On November 11, 1983, a 14-year-old Hispanic female was walking to school in North Philadelphia when she was confronted by an unknown man and forced at gunpoint into an abandoned building. The man forced her to remove her clothing and orally and vaginally raped her. When finished, he used her blouse to wipe his penis. He pulled up his pants and left the building, telling her to wait a few minutes.

Following the traumatic attack, the victim was bleeding heavily and was quite upset. She eventually made contact with a police officer, who took her to the hospital. Doctors examined her and administered a rape kit. The police collected several items of evidence, including her underwear, blouse, and knee socks. She also spoke with a police officer, describing her attacker to police as a heavy-set African American male with a light complexion, 30-35 years old, 5'11" tall and weighing approximately 190 pounds, with small ears and a "baby face."

When the victim was released from the hospital, her parents took her to Florida to recover from the attack. It was not until December 30, 1983 that she spoke again with the police. At that time, she again described the attacker to police, stating that he was "in his early twenties," was approximately 5'5" to 5'7" tall, had a dark complexion, and weighed approximately 165 pounds.

On this same day, the police showed the victim eighteen (18) composite photos, and she selected one she said looked like her assailant. They also showed her a slide carousel of photographs for ninety (90) minutes. During this time, the victim made a possible identification of Mr. Hale, saying that she "[f]eels he looks like male who raped her." Three days later, the police came to Victim's residence very late at night and showed her eight (8) photos; this time she selected a photo of Mr. Hale as her assailant. Mr. Hale was arrested and charged with rape and other related offenses.

<sup>5</sup> Dechert LLP provided substantial resources on a pro bono basis to assist in the review of documents and interviews with participants, as well as the discussion of contributing factors and recommendations. The members of the PERT want to warmly acknowledge this important contribution to the PERT's work.





On February 15, 1984, Victim viewed a pre-trial in-person lineup and failed to select Mr. Hale as the man who assaulted her. According to the trial testimony of a police officer, however, immediately after the lineup concluded, Victim said that she recognized Mr. Hale as her attacker but was afraid to identify him because she thought he could see her.

Victim subsequently identified Mr. Hale as her assailant in open court at the March 20, 1984 preliminary hearing, and during her testimony at the September 1984 trial.

In instructions to the jury, the judge instructed the jury on eyewitness identifications as follows: “The Commonwealth witness . . . has identified the defendant as the person who committed the crime. However, a mistake can be made in identifying a person, even by a witness attempting to be truthful. In determining whether or not to accept as accurate the identification testimony of [Victim], you should take into consideration the following matters. Was the testimony of the identification witness generally believable, was her opportunity to observe sufficient to allow her to make an accurate identification, how did she arrive at the identification. You should consider all of the circumstances indicating whether or not the identification

was accurate. Also, consider whether the identification testimony is supported by other evidence.” This instruction was apparently included to ensure that jurors understood some of the imprecision inherent to eyewitness identification, though it lacked any specificity on various factors that might have impacted Victim’s ability to accurately identify her assailant, including system variables (variables caused by the system of investigation, e.g., repeat exposure to photos of suspect, lineups with dramatically different “fillers” vs. the suspect, officer administering the lineup knows which photo in the array is the suspect, etc.) and descriptor or estimator variables (variables inherent to the witness, e.g., nearsightedness, cross-racial bias, weapon focus, etc.). It was also not in agreement with the Court’s standard instructions on identification instructions to jurors, including specifically the so-called Kloiber instructions.<sup>6</sup>

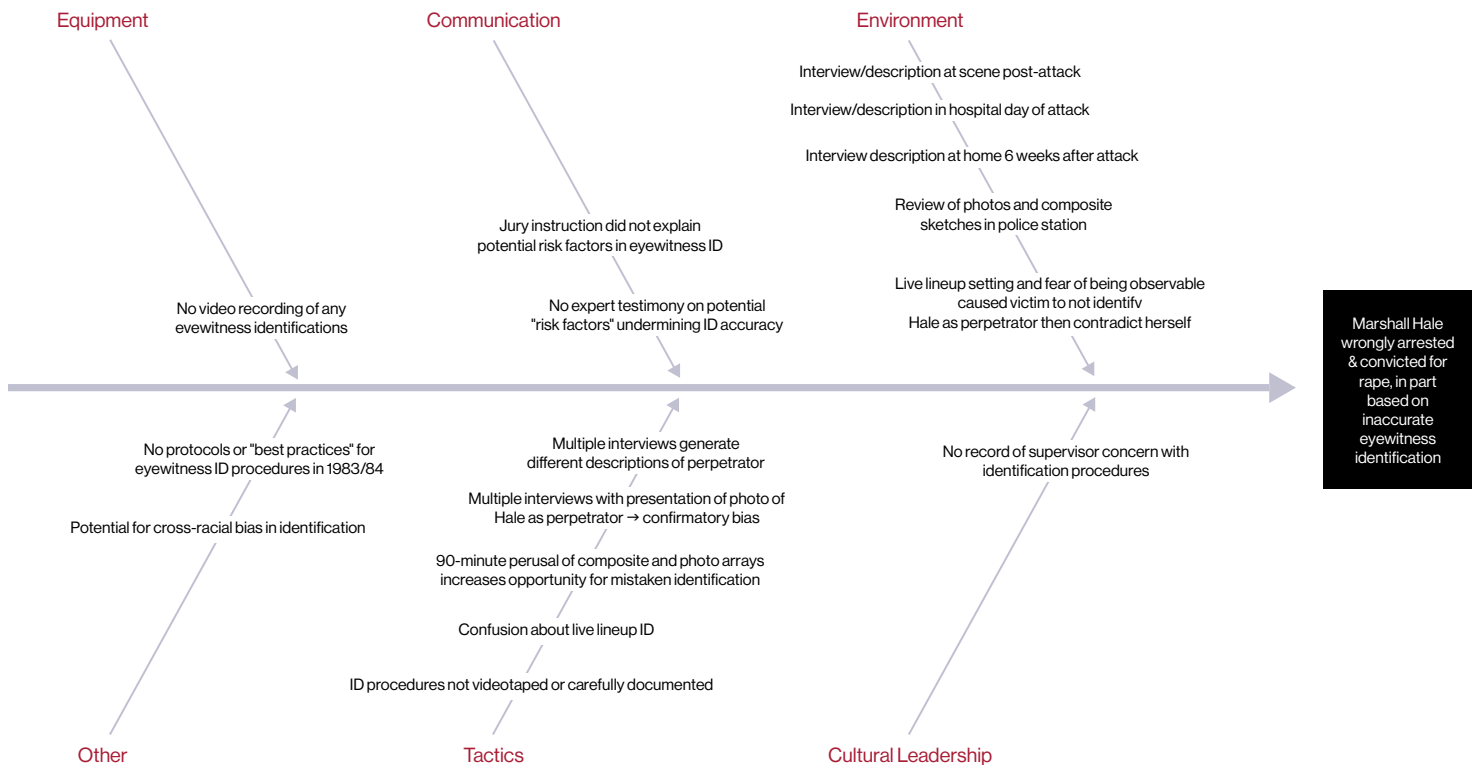
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6 The Kloiber case (Commonwealth v. Kloiber, 387 Pa. 412 (Pa. 1954) held that “where the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution.” It is embodied in Pennsylvania Suggested Standard Jury Instructions at 4.07A, “Identification Testimony” as follows:

1. In [his] [her] testimony, [*name of witness*] has identified the defendant as the person who committed the crime.
2. In evaluating [his] [her] testimony, you should consider the following factors in addition to the other instructions I will have provided to you for judging the testimony of witnesses:  
*[The judge should only discuss those factors that were raised as an issue by the evidence:]*
  - a. Did the witness have a good opportunity and enough time to observe the perpetrator of the offense?
  - b. Was there enough lighting for [him] [her] to make [his] [her] observations?
  - c. Was [he] [she] close enough to the individual to note [his] [her] facial and other physical characteristics, as well as any clothing [he] [she] was wearing?
  - d. Has [he] [she] made a prior identification of the defendant as the perpetrator of these crimes at any other proceeding?
  - e. Was [his] [her] identification positive or was it qualified by any hedging or inconsistencies?
  - f. Did the witness identify anyone else as the perpetrator during the course of this case?
  - g. How attentive was the witness during the incident?
  - h. Was the witness’s focus affected by a visible weapon?
  - i. Was the witness under high levels of stress during the incident? If so, did this affect the witness’s ability to give an accurate identification?
  - j. Was the witness intoxicated at the time of the identification?
  - k. Did the race of the witness and the perpetrator have any bearing on the accuracy of the identification?
3. If you consider the witness’s level of certainty in making the identification, you should recognize that the level of certainty can change between the time of the initial identification and the later identification in court. Consider if the level of certainty was recorded by the police at the time of the initial identification, and if that differs from the level of certainty in the later identification in court. You may consider any reasons for any change in the witness’s level of certainty between the initial identification and the later identification in court.
4. If the police failed to record the initial level of certainty, you may consider any reason given by the police for their failure to record the witness’s level of certainty at the time of the initial identification.
5. Consider also any other evidence on the issue of the level of certainty of the in-court identification.
6. If there was an initial identification by photographic display, you may consider the circumstances surrounding the identification on the question of the reliability of the identification. As previously mentioned, you may consider if the level of certainty was recorded. You may also consider how the photographs were displayed, what instructions were given to the witness, and whether the procedure was conducted by an



Undesired Outcome 1: Marshall Hale was arrested, then convicted, for a crime that he did not commit, in part based on inaccurate eyewitness identification.



**Figure 2. Contributing Factors to inaccurate identification of Marshall Hale.**

officer who did not know which picture was the suspect’s picture.

7. Please consider that a victim or another witness can sometimes make a mistake when trying to identify the criminal. If certain factors are present, the accuracy of identification testimony is so doubtful that you must receive it with caution.

8. Identification testimony must be received with caution:

*[Use only what was raised by the evidence:]*

- [if the witness because of bad position, poor lighting, or other reasons did not have a good opportunity to observe the criminal.]
- [if the witness in [his] [her] testimony is not positive as to identity.]
- [if the witness’s positive testimony as to identity is weakened by qualifications, hedging, or inconsistencies in the rest of [his] [her] testimony.]
- [if [he] [she] did not identify the defendant, or identified someone else, as the criminal [at a lineup] [when shown photographs] *[give specifics]* before the trial.]
- [if, before the trial, the defendant’s request for a [lineup] *[specify request]* to test the ability of the witness to make an identification was denied and the witness subsequently made a less reliable identification.]
- [if, *[give specifics]*.]

*[First Alternative--Court rules as a matter of law that caution is required:]*

9. In this case [there was evidence that *[name of witness]* could not see the criminal clearly] *[give specifics]*. Therefore, you must consider with caution [this testimony identifying the defendant as the person who committed the crime.

*[Second Alternative--When there is a jury issue as to whether caution is required:]*

9. If you believe that [this factor is] [one or more of these factors are] present, then you must consider with caution [name of witness] ‘s testimony identifying the defendant as the person who committed the crime. If, however, you do not believe that [this factor] [at least one of these factors] is present, then you need not receive the testimony with caution; you may treat it like any other testimony.

10. You should consider all evidence relevant to the question of who committed the crime, including the testimony of *[name of victim or witness]*, [and] [any evidence of facts and circumstances from which identity, or non-identity, of the criminal may be inferred] [and] *[give other circumstances]*. You cannot find the defendant guilty unless you are satisfied beyond a reasonable doubt by all the evidence, direct and circumstantial, not only that the crime was committed but that it was the defendant who committed it.



Contributing Factor 1: The Philadelphia Police Department (“PPD”) had no written protocols in 1983 or 1984 describing the preferred methods of conducting an eyewitness identification process. Protocols that would have substantially changed the process used in this case were adopted in 2014.

Contributing Factor 2: PPD detectives conducted multiple interviews and gave the victim no fewer than seven (7) instances to describe and/or identify Mr. Hale as her attacker. The victim’s multiple differing descriptions called the accuracy of her identification of Mr. Hale into question.

- i. The victim of the crime was interviewed immediately after a violent attack. In such circumstances, due to the extreme trauma of the incident, some individuals are not able to provide clear and precise descriptions of their assailant(s).
- ii. The victim of the crime was interviewed again the same day of the attack in the hospital. She gave a different description of the attacker than she had given in the first interview.

- iii. The victim went to Florida for six (6) weeks after her stay in the hospital; upon her return, she was interviewed again, and provided a description that differed from both of her first two identifications.

Contributing Factor 3: PPD detectives provided the victim with repeat exposure to Mr. Hale’s picture during the investigation. This increased the potential for the victim’s eyewitness identification to be impacted by confirmation bias and other cognitive interference that could have reduced its accuracy.<sup>7</sup>

- i. During one interview, PPD detectives showed Mr. Hale’s picture to the victim more than once, enhancing the likelihood that the victim would recall Mr. Hale and associate him with the perpetrator.
- ii. During one interview, PPD detectives showed the victim 18 composite images as well as carousel slides of potential attackers over a period of roughly 90 minutes. This departs dramatically from current PPD policy.<sup>8</sup> The increased number of photos may have increased the likelihood of an inaccurate identification and added to the risk of further confirmation bias by the victim if she had seen Marshall Hale’s photograph before.

<sup>7</sup> While problems with repeat exposure of a suspect to a witness may have been less well known in 1984, subsequent research has shown quite clearly the increased risk of an inaccurate identification that can result. The early research here was summarized by the New Jersey Supreme Court in *State v. Henderson*, 208 N.J. 208, 255-256, 27 A.3d 872, 900-901, 2011 N.J. LEXIS 927, \*80-82: “Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem . . . is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure. . . . Multiple identification procedures that involve more than one viewing of the same suspect . . . can create a risk of “mugshot exposure” and “mugshot commitment.” Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone—who had been depicted in the earlier photos—at a later identification procedure. A meta-analysis of multiple studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot. Kenneth A. Deffenbacher et al., *Mugshot Exposure Effects: Retroactive Interference, Mugshot Commitment, Source Confusion, and Unconscious Transference*, 30 *Law & Hum. Behav.* 287, 299 (2006). Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, “a significant number” then “reaffirm [ ] their false identification” in a later lineup—even if the actual target is present. See Koehnken et al., *supra*, at 219. Thus, both mugshot exposure and mugshot commitment can affect the reliability of the witness’ ultimate identification and create a greater risk of misidentification. As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.” See also Steblay, N. K., & Dysart, J. E. (2016). Repeated eyewitness identification procedures with the same suspect. *Journal of Applied Research in Memory and Cognition*, 5(3), 284-289; (“repeated procedures make certain that the suspect is identified more often, but do not increase the likelihood that the identified suspect is actually guilty[and] . . . identifications made from repeated procedures—beyond the first identification attempt—should not be considered reliable eyewitness evidence);” Report of the Third Circuit Task Force on Eyewitness Identifications (2019), accessible at <https://www.ca3.uscourts.gov/sites/ca3/files/2019%20Report%20of%20Third%20Circuit%20Task%20Force%20on%20Eyewitness%20Identifications.pdf>, at 17 (“[r]epeated identification attempts with the same suspect increase the chance of error and can inflate witness confidence.”); American Psychological Association Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification (2020) Wells, G. L., Kovera, M. B., Douglass, A. B., Brewer, N., Meissner, C. A., & Wixted, J. T. (2020). Policy and procedure recommendations for the collection and preservation of eyewitness identification evidence. *Law and human behavior*, 44(1), 3 at 23, accessible at <https://doi.apa.org/fulltext/2020-06220-002.html> (“[e]yewitness identification evidence has a unique characteristic that makes it unsuitable for what might be called “repeated testing.” Whether the eyewitness is asked to make an identification with a showup or a lineup, there is only one *uncontaminated* opportunity for a given eyewitness to make an identification of a particular suspect. Any subsequent identification test with that same eyewitness and that same suspect is contaminated by the eyewitness’s experience on the initial test.”)

<sup>8</sup> Current PPD policy mandates the presentation of six (6) photos in a specific order. The suspect cannot be the first photo or the last photo in the array (this is not told to or known by the eyewitness). There is no time limit for the eyewitness to review the photo array. If the



- iii. The victim was interviewed by PPD detectives a fourth time, three days after the prior interview, and selected Mr. Hale from an array of eight (8) photos. This procedure is not in compliance with current PPD protocols and created additional risk of confirmation bias on the part of the police and of the victim.
- iv. Approximately six weeks after the last photo array identification, and three months after the crime was committed, the victim failed to select Mr. Hale out of a live lineup, then immediately identified Mr. Hale as the perpetrator immediately after the live lineup and explained that her change of opinion was due to a fear that Mr. Hale could see her while she was selecting him.
- v. Approximately four (4) months after the attack, the victim conclusively and with certainty identified Mr. Hale in open court as her attacker.
- vi. Approximately ten (10) months after the attack, the victim conclusively and with certainty identified Mr. Hale in open court at trial as her attacker.

***Recommendation 1: PPD officers conducting interviews with victims of crime should be aware of the potential for repeated exposures to the same individuals to contaminate victim eyewitness identifications, and during an investigation should make efforts to minimize repeated exposures of potential suspects to eyewitnesses.***

***Recommendation 2: PPD should modify its policy for eyewitness identifications to include the following: if a victim/witness fails to make an identification based on a photo array or physical line-up and then makes a statement positively identifying the suspect, the PPD witnesses to this statement and the victim should be interviewed immediately and the interviews should be contemporaneously documented.***

Contributing Factor 4: None of the eyewitness identifications made by Victim were recorded on video, nor were they carefully documented by officers in real time to indicate the similarities or differences among various descriptions given by the victim. These recordings – in video or in writing – might have allowed others to better evaluate the likelihood that the identifications were accurate.

eyewitness wishes to view the array more than once within the same sitting, the policy states that the entire array should be shown again in the same order and documented in the same fashion as the first presentation. Officers should not conduct multiple presentations of the array, including after a positive identification by the eyewitness.

<sup>9</sup> As a matter of law in Pennsylvania it is illegal for an officer to record an identification against the will of the witness. In addition, witnesses to crimes frequently do not wish to have their identifications recorded on video, and technology limitations may provide additional challenges to recording an eyewitness description or identification of a suspect.

***Recommendation 3: PPD officers should record physical line-ups on video whenever possible.***

***Recommendation 4: PPD should encourage its officers, when permitted by the individual being interviewed, to video eyewitness identifications when permitted by the person being interviewed.<sup>9</sup> If video recording is not possible, officers should carefully document the procedure by which the eyewitness identification is made as well as each statement and action made by the eyewitness during the identification procedure.***

Contributing Factor 5: The rapist was a Black male and Victim was an Hispanic girl; eyewitness identifications in such circumstances may be impacted by “cross-racial bias,” a reduced ability to accurately identify faces of people of races different from that of the eyewitness.

***Recommendation 5: PPD Detectives should receive specific training on cognitive biases that may impact their investigations, including cross-racial bias and its potential to impact the accuracy of eyewitness identification. New detectives should receive this training prior to their promotion.***

Contributing Factor 6: There is no record of any police supervisor, ADA or other participant in the case raising concerns about the number of interviews that were conducted with the victim or the potential impact on the accuracy of her identification of Mr. Hale.

***Recommendation 6: PPD officers should present photo arrays to eyewitnesses of crimes in ways that conform to then-current PPD policies.***

***Recommendation 7: PPD should review its current policy on conducting photo arrays for eyewitness identification and ensure that the policy continues to conform with scientific consensus on methods to enhance accuracy and reduce the risk of bias or other impediments to accuracy.***

***Recommendation 8: Supervisors with Detective Divisions and Units should follow Directive 5.2.3, and review and sign the victim/witness interview log at the beginning of every shift and check on the well-being of any persons being or waiting to be interviewed. They should also review each eyewitness***



***identification with a critical eye for factors that could impact the accuracy of the identification and ensure that Detectives are (a) considering such factors in the prioritization of leads in an investigation and (b) minimizing the risk of additional contamination of witness memory.***

Contributing Factor 7: No expert testimony was solicited or provided to educate the judge or juror on potential “risk factors” related to the eyewitness identification, including system and descriptor/estimator variables that might have impacted the accuracy of the victim’s eyewitness identification.<sup>10</sup>

Contributing Factor 8: At the conclusion of testimony in the trial, the trial judge gave the jury instructions regarding eyewitness identification that did not fully address the descriptor or system variables that may have impacted the accuracy of the identification.

***Recommendation 9: The Criminal Procedural Rules Committee of the Supreme Court of Pennsylvania should consider whether to adopt the recommendations of the United States 3rd Circuit Court of Appeals for jury instructions in cases where an eyewitness identification is included as evidence in a criminal case.<sup>11</sup>***

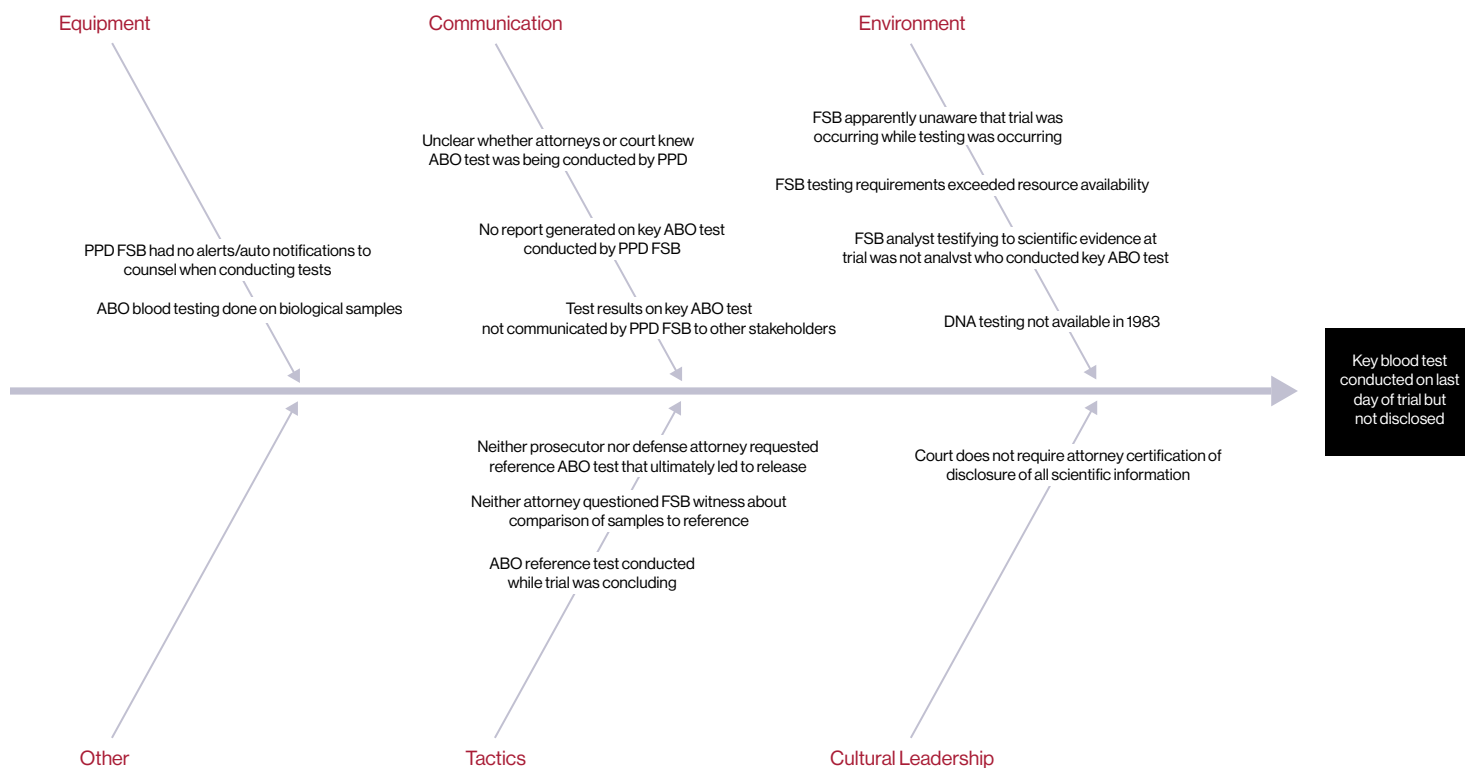
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<sup>10</sup> Expert testimony for eyewitness identification was not a common occurrence nationally in 1984. To the contrary, expert testimony was not permitted in the Commonwealth of Pennsylvania until 2014. *Commonwealth v. Walker*, 92 A.3d 766 (Pa. 2014).

<sup>11</sup> In 2019, the U.S. 3<sup>rd</sup> Circuit Court of Appeals convened a panel of judges, investigators, prosecutors, defenders, and scholars to evaluate the state of the science in eyewitness identification and issued a report with guidance to courts within the 3<sup>rd</sup> Circuit, including Courts of Common Pleas in Pennsylvania, designed to reduce the risk of inaccurate eyewitness identifications being accepted into evidence in Pennsylvania and New Jersey courts. Report of the Third Circuit Task Force on Eyewitness Identifications (2019), accessible at <https://www.ca3.uscourts.gov/sites/ca3/files/2019%20Report%20of%20Third%20Circuit%20Task%20Force%20on%20Eyewitness%20Identifications.pdf>, at 95 – 98. These recommendations have not currently been adopted by the Third Circuit Committee on Model Criminal Justice Instructions but might have provided the jury in Mr. Hale’s case with additional factors to consider when weighing the identification of Mr. Hale by the victim.



Undesired Outcome 2: The Philadelphia Police Department Forensic Science Bureau (FSB) conducted laboratory tests ultimately used to support Mr. Hale’s release. The tests were conducted on the last day of his trial, but a formal laboratory report was not issued and results were not disclosed in a timely fashion.



**Figure 3. Contributing factors to the untimely completion and non-disclosure of ABO blood test**





During Mr. Hale's trial on September 24 – 26, 1984, a Philadelphia Police Department criminalistics technician testified about blood evidence related to the assault that had been tested by the PPD Forensic Science Bureau (FSB). The testifying technician had not conducted all of the testing on evidence gathered at the scene or from the Victim (she had conducted the analysis on physical evidence, but not on reference blood evidence);<sup>12</sup> therefore, her testimony was limited to the tests that she had conducted. (Because this case pre-dates the use of forensic DNA, the only testing possible was ABO blood typing of any biological material recovered.)

While testing of vaginal and vulvar samples containing blood and semen was deemed inconclusive, meaning that a blood type could not be identified, a cervical sample had yielded markers for blood type O. Markers for blood type B had been identified from samples of blood and sperm from Victim's blouse and underwear. In addition, blood markers for A and O had been identified from blood on Victim's socks. Blood markers for A, B and O were identified on the victim's skirt as well as on several items listed as vials of recovered red matter and hairs. Victim was blood type O and Mr. Hale was blood type A; as a result, the technician explained at trial that Mr. Hale could not have contributed to the blood (B blood group) found on the blouse and underwear.

The criminalistics technician did not provide an opinion on whether Mr. Hale could have been the source of the relevant semen samples, nor was she asked to do that by either the prosecutor or defense counsel. That question could not have been answered at that time, as the Philadelphia Police Forensic Science Bureau (FSB) was still conducting testing of samples collected at the scene relevant to that issue. The analyst conducting the tests was a different person than the technician offering testimony. While it is not clear whether anyone at Mr. Hale's trial was aware of the additional tests being conducted by the FSB, it was not a subject of discussion on the record at the trial.

At 3 PM on the last day of trial, September 26, 1984, the FSB completed an inhibition study on a sample of Mr. Hale's saliva and concluded that he was a "secretor," meaning his blood type markers (type A) would appear in all of his bodily fluids, including his semen. There is no record of this information being disclosed by the FSB to attorneys for the Commonwealth or Mr. Hale or to the court at the time. This new information also was not included in any memorandum or report, including the Memorandum sent

from the FSB Laboratory Division to the Philadelphia Police Sex Crimes Unit on October 4, 1984. Mr. Hale's trial concluded without the "secretor" test results being disclosed to either attorney or to the court.

Based on the information provided to the jury, Mr. Hale was convicted of rape and related crimes (involuntary deviate sexual intercourse, indecent assault, corrupting the morals of a minor, aggravated assault, simple assault, possession of an instrument of crime, possessing a concealed weapon, and indecent exposure on September 26, 1984.

Contributing Factor 9: At the time of Mr. Hale's trial, DNA testing was not yet available for use in criminal investigations. As a result, conventional blood testing practices were used. These practices were less conclusive or comprehensive than DNA testing that became widely used during his appeals.

Contributing Factor 10: A blood type reference test known as an inhibition study (here, the "ABO reference test") was conducted by the PPD FSB on the final day of Mr. Hale's trial using samples of Mr. Hale's saliva. Notes of these test results were retained by the FSB but not shared with other agencies and not memorialized into a report.

Contributing Factor 11: No information about the ABO reference test appears to have been sent by the FSB to prosecutorial or defense counsel of record, or to the court.

***Recommendation 10: The OFS should follow its current policies that require every test result to be disclosed in a report to appropriate parties given the stage of the case (e.g., investigators, prosecutors, etc.)***

Contributing Factor 12: Nothing in the record suggests that any counsel or the judge knew that the ABO reference test was being conducted, even though it was one of a predictable panel of tests to be conducted in a rape case. The FSB (now OFS) had no mechanism for automatically alerting counsel in the Hale case that new test results had been generated in their case, and counsel did not actively seek out the new test results as they did not know the test was being conducted.

<sup>12</sup> "Reference blood evidence" refers to samples taken from the individual whose blood is being compared to the sample taken from the victim, in this case Mr. Hale.



***Recommendation 11: OFS should configure its LIMS system to automatically notify the Court, the prosecutor of record, and where possible the defense counsel of record of each new report generated by OFS in each criminal case.<sup>13</sup>***

Contributing Factor 13: The Forensic Science Bureau analyst who testified at trial was not the analyst who conducted the ABO reference test, and the ABO reference test had not been completed as of the time of her testimony at trial.

Contributing Factor 14: Neither DAO nor defense attorneys elicited testimony from FBS representatives about the comparison of samples to reference, which would likely have disclosed the existence of (or need for) the ABO reference test.

Contributing Factor 15: The Court did not require either the DAO or defense counsel to certify that all relevant scientific or other information in the possession of the government had been disclosed to the defense or that the defense had received same.

Contributing Factor 16: The analyst who conducted the reference sample test did not put the test results into a report that could be clearly understood by “downstream stakeholders” (e.g., attorneys, judges, jury members). *Note: between the time of Mr. Hale’s conviction and the convening of this event review, PPD OFS has implemented policies that any test result will be memorialized in a report that will be distributed to appropriate PPD and DAO stakeholders. Any deviation from these policies should generate a corrective action process within OFS that requires documentation, investigation, and reporting of steps to prevent its recurrence.*<sup>14</sup>

***Recommendation 12: In cases in which scientific information will be used, the Court of Common Pleas should ensure that pretrial conferences are held among the parties and include a certification from each counsel and a knowledgeable representative from PPD OFS indicating that all parties are in agreement on the laboratory reports that have been***

***generated to date; what (if any) reports remain to be generated and that all relevant information generated to date has been distributed to all parties. Trials should not be initiated prior to the completion and distribution to all parties of all agreed-upon forensic testing and reporting.***

***Recommendation 13: Judges in the Court of Common Pleas should issue a standing order requiring the disclosure of any and all scientific evidence testing a minimum number of days before trial sufficient to allow all counsel to review the information using a third-party scientific resource. The DAO and defense will provide the court with a list of all scientific testing performed by the OFS or any other third-party laboratory, and all counsel will certify to the court that all such information has been shared among the parties.<sup>15</sup>***

Contributing Factor 17: The volume of forensic testing requested by the criminal justice system of the PPD Office of Forensic Science (OFS), the successor to the FSB, exceeds the current capacity of the OFS, leading to delays in testing. The OFS Laboratory Information Management System (LIMS) is not tied to the Court of Common Pleas scheduling system and requires manual oversight to ensure that tests are completed in a timely fashion in advance of trial dates.

***Recommendation 14: The OFS should receive whatever funding is necessary to ensure that its resources are adequate to meet the volume of forensic testing required by the Philadelphia criminal justice system within reasonable time frames.***

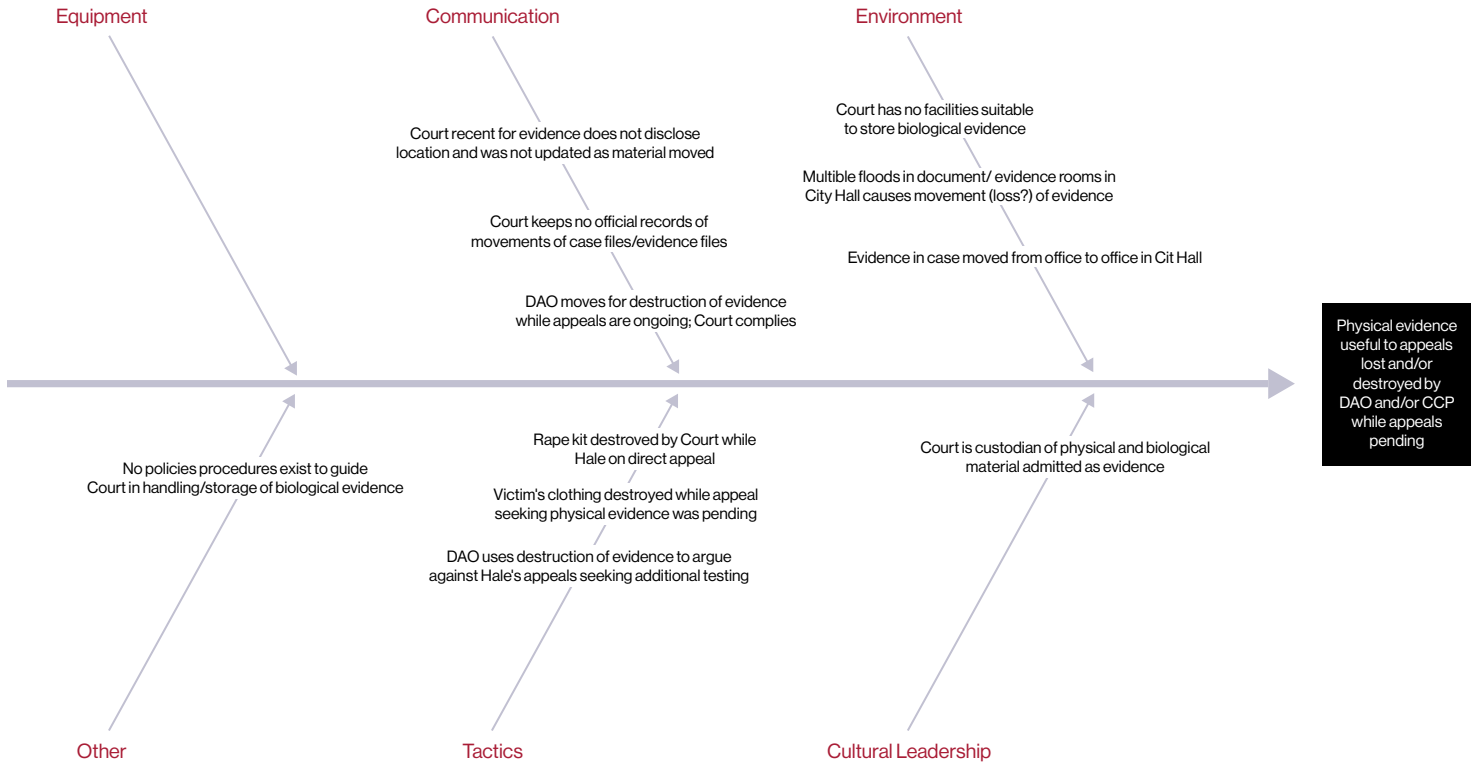
<sup>13</sup> At the present time, OFS is updating its LIMS so that the Record Management System (RMS) will be updated automatically upon the completion and entry to LIMS of a new OFS report. The RMS is accessible by the DAO and used for discovery. OFS has no immediate plans for the LIMS updates to be pushed to the CCP or defense counsel, in part because it is common for multiple individuals to inhabit these roles within a single criminal case. The DAO has been and is expected by the OFS to continue to be responsible for notifications to the court and defense counsel.

<sup>14</sup> Office of Forensic Science, Quality Assurance Manual, Section 12, Case Documentation, and Section 13, Laboratory Reports.; and ISO/IEC 17025 Standard 7.8 Reporting Results.

<sup>15</sup> The PERT reviewers note the current backlog in testing at the PPD OFS and that the ability of PPD OFS to meet their role in this requirement is dependent upon the existence of sufficient resources within OFS to allow for the timely examination and reporting of evidence. The PERT representative from the OFS did not participate in this recommendation.



## Post-conviction appeals; Destruction of physical evidence by Commonwealth



**Figure 4. Contributing factors to the untimely destruction of physical and biological evidence**



After his conviction, Mr. Hale repeatedly sought access to the physical evidence and forensic records related to his case, through *pro se* and counseled filings in the Court of Common Pleas and letters to court officials written by Mr. Hale. Courts denied these petitions for a variety of reasons. Despite the active pendency of Mr. Hale's appeals, much of the physical evidence in his case had been destroyed by the Court of Common Pleas. The court had taken custody of the evidence during trial and had not returned the evidence to either party after the trial. But much of the physical evidence, including the rape kit, was destroyed in 1986, and clothing relevant to the case was destroyed in 1989 and 1993, each time in response to DAO motions characterized as "routine" in handling physical evidence post-trial. Evidence and files related to the case were moved from file room to file room in the courthouse, subjected to flooding multiple times, and ultimately moved to an unmarked miscellaneous file room and kept in poorly marked and disorganized fashion without any notification to the parties in the case.

Adding to the confusion around materials used to prepare for and conduct the trial, the Philadelphia District Attorney's Office (DAO) lost its trial file relating to Mr. Hale's case at some point before 1998.

After exhausting appeals in the Pennsylvania Court of Common Pleas, Superior Court, and Supreme Court, Mr. Hale filed a federal habeas petition in the United States District Court for the Eastern District of Pennsylvania in February of 1998, more than thirteen (13) years after his conviction, asserting among other claims that the Commonwealth had withheld exculpatory evidence and destroyed physical evidence in bad faith. In connection with that petition, Mr. Hale again requested that all physical evidence and laboratory tests in his case be provided to him. The DAO, realizing that its trial file had been lost, sought the records of the Philadelphia Police FSB and provided that file in its entirety to Mr. Hale. In doing so, the Commonwealth conceded that, because its trial file had been lost, it had no way of proving what materials may have been previously disclosed to Mr. Hale and what materials (if any) were newly provided. The DAO acknowledged that its 1998 disclosure might, therefore, include previously undisclosed exculpatory information ("Brady material") and agreed to allow Mr. Hale to evaluate and proceed with any newly discovered information without objection on the timing of his arguments in post-conviction appeals.

On July 8, 1998, the DAO mailed the file maintained by the FSB laboratory, which contained twenty-five pages of notes and reports but no summary or analysis, to Mr. Hale. Among these

materials were the test results and handwritten FSB analyst notes reflecting the result of the inhibition study that showed Mr. Hale was a Type A secretor. The results and notes were dated September 26, 1984 – the final day of Mr. Hale's trial. The PERT could find no evidence that anyone – Mr. Hale's attorney, the ADA representing the DAO, the judge or his clerks, or the FSB analyst who testified that morning at the trial (who was not the analyst conducting the testing) – was aware that additional testing was occurring on that date. In addition, nothing in the record suggests that anything more was done once the test was completed. The FSB did not generate a report that communicated the test results to any other party, and there is no record of it being sent by the FSB to anyone for several years after the test was conducted.

**Undesired Outcome 3: Physical evidence that could have been tested to assist in Mr. Hale's claims of innocence was lost and/or destroyed by the Commonwealth of Pennsylvania and the Court of Common Pleas while Mr. Hale's appeals were pending.**

**Contributing Factor 18:** Physical evidence that could have been used for further testing to evaluate Mr. Hale's claims of innocence was destroyed while Mr. Hale's case was under direct appeal and subsequently, preventing him from the ability to prove his innocence through DNA testing, as it became a preferred method of forensic analysis in sexual assault cases.

- i. The rape kit in the case was destroyed two years after his conviction but while his case was on direct appeal.
- ii. All of the victim's clothing was destroyed three and one-half (3.5) years after the conviction, despite the filing of a petition by Mr. Hale seeking the physical evidence in question.

The DAO consistently claimed that Mr. Hale's requests for testing of physical evidence that could have supported his claims of innocence must be rejected because the evidence has been destroyed. The DAO characterized the destruction of physical evidence as "pursuant to routine court order" (emphasis added) and describe the destruction as "unsurprising."

**Recommendation 15: The Commonwealth of Pennsylvania should consider statewide standards for document retention in criminal and capital cases that would be applicable to the participants in the PERT.**



***Recommendation 16: In the absence of state guidelines, the DAO, the Court of Common Pleas and the PPD, including the OFS should agree on policies for the storage and maintenance and handling of physical evidence that will preserve its utility in criminal cases at least as long, and potentially longer than the case is under post-conviction appeal.***

While there are multiple ways the spirit of this recommendation could be met, the PERT notes that many jurisdictions have moved evidence retention oversight under their forensic laboratory (in this case, PPD OFS) out of concern that what happened to Mr. Hale or others like him could happen in their jurisdiction. While the PERT did not feel the need to draft specific guidelines, any policy or progress made by the DAO, CCP, and PPD on this important issue should refer to the need for the preservation of evidence due to potential future forensic testing and forensic guidelines and standards that have been released on this subject. See NIJ publications, etc. on this topic. Cites can be added.

Contributing Factor 19: The Court was the custodian of physical evidence admitted at trial and did not have an effective chain of custody system.

- i. Physical evidence accepted by the Court in the Hale case was allegedly kept in a 5th floor storage room in the courthouse. This room was flooded, causing the evidence to allegedly be moved to a 6th floor storage room. This room was also flooded, causing the evidence to be moved to a third (unspecified) location. The evidence was not well marked or well organized and no representatives from the prosecution, defense, court, or Forensic Science Bureau were able to locate evidence as needed.
- ii. The Court provided a receipt for its collection of the evidence but not a location for the evidence and did not alert the parties when the evidence in its possession was moved.

Contributing Factor 20: The Court was not equipped to store biological and/or physical evidence safely and preserve its utility in criminal cases, including appeals.

Contributing Factor 21: No policies appear to exist governing the Court's maintenance of evidence archives, including the methodology or environment required for the storage of physical or biological evidence collected in a case.<sup>16</sup>

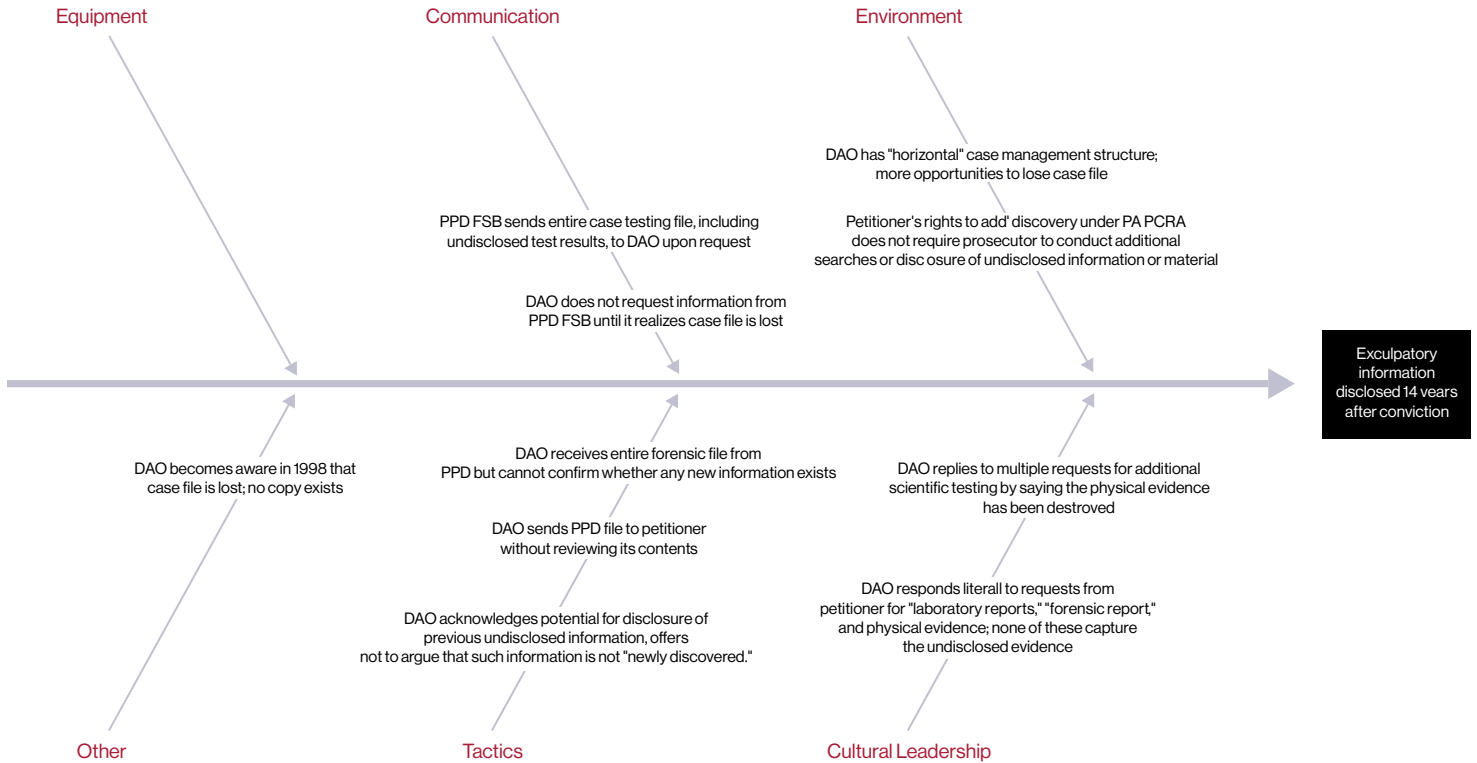
***Recommendation 17: The Court of Common Pleas should only be the custodian of physical or biological evidence while an actual trial is progressing, and only for materials that must be displayed physically at trial. After the conclusion of the trial, the Court should turn all physical or biological evidence over to the OFS for storage, maintenance and archiving. OFS will ensure that physical and biological evidence materials are maintained for the duration of the evidence retention policies mentioned above, and that appropriate identification information has been shared with all counsel and the Court. OFS will also implement and maintain a unified tracking system allowing any participant with appropriate access to locate each specific item of evidence in each case in real time.***<sup>17</sup>

<sup>16</sup> The City of Philadelphia lacks a unified evidence tracking system that would allow the agencies participating in the PERT to locate any piece of information collected at a crime scene or generated related to a specific criminal case is located, and that is accessible to attorneys working on the case or to members of the judicial branch tasked with deciding on or managing criminal cases.

<sup>17</sup> The PERT realizes that this process is not currently the responsibility of the OFS, but of the PPD's evidence custodian, who is in charge of long-term storage and tracking and evidence. Thus, this recommendation would require an organizational shift within the PPD. The Director of OFS did not participate in the drafting of this recommendation.



## Disclosure and lack of comprehension of exculpatory scientific information



**Figure 5. Contributing factors to the untimely disclosure of exculpatory information**





After his conviction, Mr. Hale persisted in maintaining his innocence, though his counseled direct and post-conviction PCRA appeals raised other procedural and constitutional issues. Prior to and following his receipt of the FSB data in 1998, Mr. Hale unsuccessfully sought legal representation for his subsequent PCRA appeals. He wrote to various legal aid organizations, bar associations, and government officials. These groups declined to help Mr. Hale, often citing the destruction of physical evidence from the case and the inability to use (now-common) DNA testing to conclusively prove his innocence as a complicating factor that prevented them from accepting the representation.

#### Undesired Outcome 4: Exculpatory information in Mr. Hale's case was not disclosed to him until 1998, fourteen (14) years after his conviction.

Contributing Factor 22: Mr. Hale filed multiple requests seeking scientific information in his case that had not been previously disclosed.

- i. Mr. Hale filed a post-conviction petition roughly seven and a half (7.5) years after the test was completed seeking "laboratory reports." The ABO blood reference test was not disclosed by the DAO in response to this petition.<sup>18</sup>
- ii. Mr. Hale wrote a letter to the Manager of Court Reporting Services asking for help in obtaining "fornecsic report" [sic] from his case.<sup>19</sup>
- iii. Almost twelve (12) years after his conviction, Mr. Hale filed a request for the production of physical evidence that did not include a request for testing; the ABO reference test results were not disclosed in response to this request.
- iv. In February 1998, roughly sixteen and one-half (16.5) years after his conviction, Mr. Hale filed a federal habeas petition in which he sought the disclosure of all physical and laboratory evidence related to his case.

Contributing Factor 23: A petitioner's right to additional discovery under Pennsylvania's Post-Conviction Review Act (PCRA) is limited to extraordinary circumstances in non-capital cases. 234 Pa. Code § 902. The request from a petitioner does not impose an obligation on the prosecutor to conduct any additional search or disclosure of such information under state or Federal law. This complicated Mr. Hale's ability to obtain the previously undisclosed ABO reference test results.

Contributing Factor 24: The DAO could not respond to Mr. Hale's 1998 habeas petition because it could not locate its case file on the case. The case file has never been located.

Contributing Factor 25: The DAO manages cases "horizontally," meaning that different attorneys within the DAO handle different phases of a case, creating additional risk that a case file could be misplaced.

Contributing Factor 26: The DAO relied upon a single paper file to hold the information in Mr. Hale's case and did not scan or otherwise preserve a copy of the case file that could have prevented or remediated the loss of the case file.

Contributing Factor 27: The DAO responded to Mr. Hale's Feb. 1998 petition with a packet of information received from the FSB, including the first known disclosure of the ABO test results. Because the DAO lacked a complete case file, the DAO stated that it was unaware of whether or not there was new evidence in the file. There is no record of the DAO understanding, highlighting, or otherwise calling attention to the ABO reference test, other than to acknowledge the potential for new information to have been included in the FSB's materials.

***Recommendation 18: All DAO case files should be digitized and maintained in a secure environment that is constantly accessible to appropriate DAO employees. Physical evidence should be archived with the OFS<sup>20</sup> and should be readily accessible to the DAO and other participants in a criminal case should the materials be needed.***

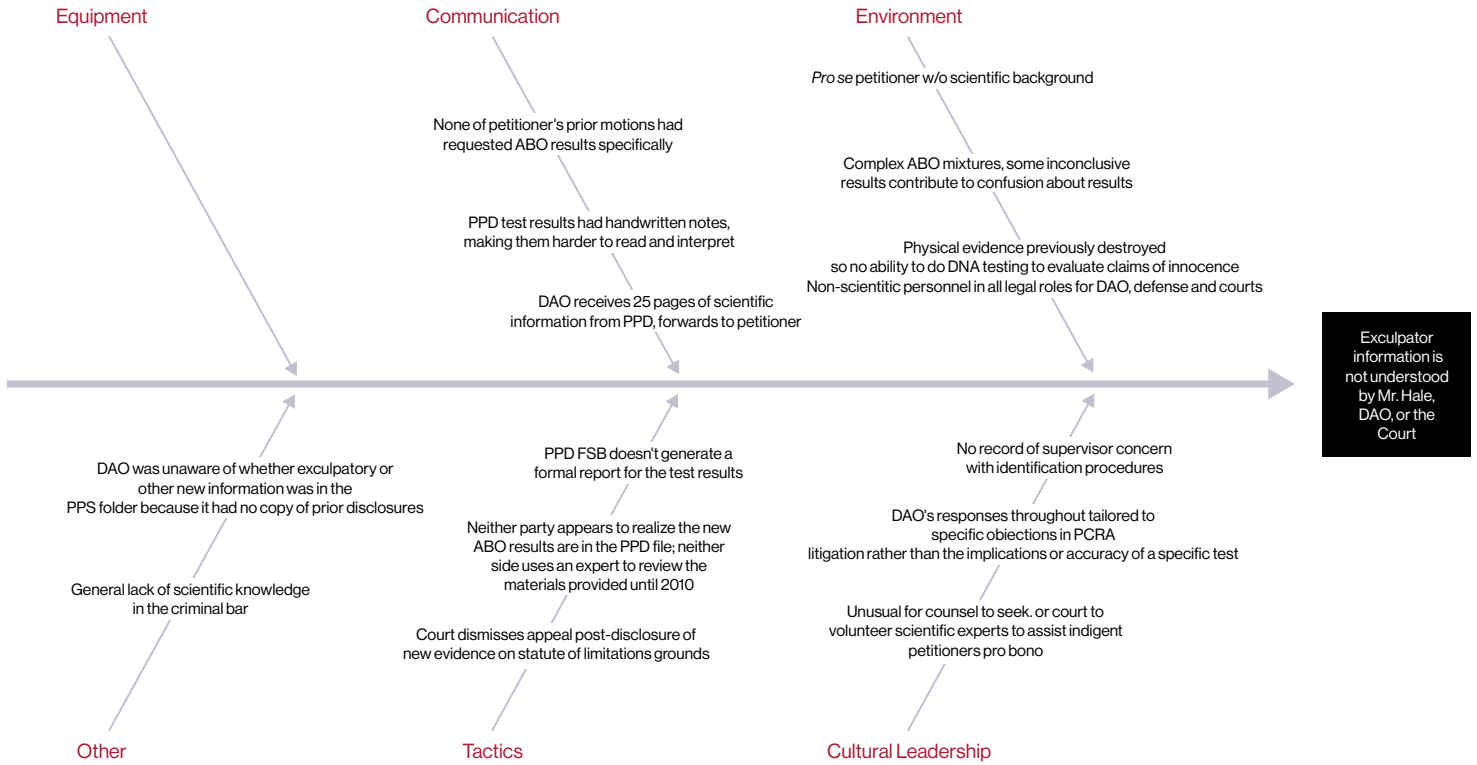
<sup>18</sup> The loss of the DAO's case file makes it impossible to know today whether this information had previously been in the DAO's possession prior to its disclosure from the FSB in 1998.

<sup>19</sup> The PERT was unable to learn whether Court Reporting Services responded to this letter, and none of the individuals interviewed by the PERT had any relevant recollection of this letter. As it was a letter rather than any sort of official filing there is no reason to believe its existence was known to the DA's Office.

<sup>20</sup> See fn 15.



Undesired Outcome 5: The impact of exculpatory information disclosed by the DAO to Mr. Hale in 1998 was not fully understood until Mr. Hale’s new counsel engaged an expert in 2010, roughly twelve (12) years after its disclosure.



**Figure 6. Contributing factors to the systemwide lack of understanding of scientific information disclosed through forensic testing**



Contributing Factor 28: In response to a request from the DAO to comply with Mr. Hale's 1998 request for scientific information related to his case, FBS sent DAO, and DAO forwarded to Mr. Hale, the ABO reference test results to him in a pile of 25 pages of lab materials.

***Recommendation 19: OFS should follow its current policy that any test result is issued in a report that is designed to provide the appropriate scientific information in a context that can be understood by downstream recipients of the report in the criminal justice system.***

Contributing Factor 29: While the DAO did acknowledge the possibility that newly disclosed information could be included in the packet of information it provided to Mr. Hale in 1998, the DAO did not know whether newly disclosed information was in the information disclosed because new attorneys not involved in the original case were sending the information and they did not have access to the prior DAO file because it had been lost.

Contributing Factor 30: The ABO reference test results consisted of a single sheet of paper with handwritten notes, and the FSB did not generate a report that would state the conclusion(s) of the test in a way that non-scientists could readily understand its significance. The ABO results were further complicated by the complexity of ABO mixtures, limitations associated with inconclusive results, and a lack of sufficient notes or reports to determine the most appropriate conclusions for all original evidence. These complications were compounded by the lack of evidence available for modern DNA analyses.

Contributing Factor 31: Mr. Hale was representing himself *pro se* and lacked the scientific knowledge and the access to scientific expertise that could have assisted him in translating the ABO reference test results and the accompanying handwritten notes.

- i. Mr. Hale filed multiple appeals proclaiming his innocence and decrying the lack of due process in his case, but none specifically used the ABO reference test in support of his actual innocence.
- ii. The DAO's responses and the litigation as a whole were tailored to the filed objections rather than the accuracy or implications of the ABO reference test.

Contributing Factor 32: Once the ABO reference sample test results were disclosed to the DAO and then to Mr. Hale, neither the DAO nor Mr. Hale appeared to be aware that new evidence had been disclosed, and neither party procured an expert to review the information provided by the FSB. Mr. Hale lacked the resources to engage an expert to assist him while he was filing petitions for relief *pro se*.

Contributing Factor 33: At the trial stage, "an accused is entitled to the assistance of experts necessary to prepare a defense." Com. v. Albrecht, 554 Pa. 31, 58, 720 A.2d 693, 707 (1998). Despite this obligation to provide experts to assist defense counsel or to indigent *pro se* litigants, counsel rarely petition the Court of Common Pleas to take advantage of such resources and many counsel are unaware of them. Mr. Hale's counsel neither petitioned the Court for such assistance nor procured it from other sources. As appropriate, the Court may request the OFS, as the accredited forensic service provider for the City of Philadelphia, to perform additional analyses or review scientific information for any or all parties associated with the case. It is noted that the OFS has performed analyses or reviews for the DAO Conviction Integrity Unit, Pennsylvania Innocence Project, and others for approved post-conviction reviews.

***Recommendation 20: Particularly in cases in which newly discovered scientific information may have been disclosed, the Court should ensure that sufficient funds are available to assist indigent defendants in securing the scientific expertise they need to meet the requirements of due process. In the event defendant is pro se or is represented by court-appointed counsel or the Defender Association, the Court should inform the defendant and/or counsel explicitly of any funds available from the Court to support the identification and/or retention of scientific expertise.***

Contributing Factor 34: There is a general lack of scientific training and knowledge among prosecutorial and defense counsel, and often among judges, in cases involving violent crime and scientific evidence.

***Recommendation 21: In cases in which scientific information will be used, the Court should encourage counsel to identify and work with specific experts in the relevant scientific field(s) who can ensure that all relevant information has been gathered, shared, and evaluated prior to trial.***



***Recommendation 22: Representatives of the criminal justice bar in Philadelphia should coordinate with the Pennsylvania Continuing Legal Education Board (PACLE) to an accredited Continuing Legal Education (CLE) course on scientific information and the availability of experts and funding for experts in cases with indigent defendants. All Defender Association attorneys and any court-appointed attorney in a criminal case involving scientific information should provide the Court with certification of completion of that course prior to taking on such cases.***

Contributing Factor 35: In January of 1999, roughly 18 months after the first disclosure of the ABO reference test to Mr. Hale, the trial court dismissed Mr. Hale's appeal based on statute of limitations grounds, stating that the ABO reference test was not newly discovered evidence because "the results of such tests were introduced into evidence at [his] trial." This was factually incorrect and revealed a lack of understanding of the existence of, and the import of, the newly disclosed test.

***Recommendation 23: The Court should ensure that judges in cases in which scientific information will be used have received the necessary training, Continuing Judicial Education, advice from relevant scientific experts, and/or other steps necessary to understand the scientific information relevant to the case. Judges should explain to counsel what steps they have taken to help ensure that all relevant information has been gathered, shared, and evaluated prior to trial.***



## Post-conviction agreement on significance of scientific evidence

While Mr. Hale continued petitioning for his release and proclaiming his innocence, the lack of comprehension of the relevance of the ABO blood sample test continued. None of the briefing from either party on Mr. Hale's third, fourth, and fifth petitions under the Pennsylvania Post-Conviction Review Act (PCRA) discussed the substance or factual significance of the ABO blood sample reference test. Instead, the appeals focused on other issues, including whether Mr. Hale's requests for additional testing were impossible to obtain, time-barred, or suffered from other procedural deficits.

Mr. Hale's breakthrough occurred in 2009, when the Pennsylvania Innocence Project (PAIP) was launched and agreed to represent Mr. Hale. The PAIP engaged an expert to review the scientific information, and the PAIP expert identified the ABO blood sample reference test results from the FSB. On July 5, 2010, the PAIP expert delivered a report to Mr. Hale's counsel concluding that the test results likely excluded Mr. Hale as the contributor of the semen in Victim's rape kit.

The PAIP expert concluded that the inhibitor test excluded Mr. Hale from being a contributor to the semen from Victim's rape kit. Later in July, PAIP filed an amended sixth PCRA on Mr. Hale's behalf explaining this newly understood information to the Commonwealth and the Court. The petition argued in relevant part that Mr. Hale was entitled to post-conviction relief because the Commonwealth failed to disclose these exculpatory inhibition study results, which established Mr. Hale's innocence, prior to his conviction.

After receiving Mr. Hale's amended sixth PCRA, confusion persisted within the DA's Office about the accuracy of the PAIP expert's report. The DAO Assistant District Attorney (ADA) handling the matter asked the FSB Forensic Lab Supervisor to review the PAIP expert's opinion and the related lab materials. The ADA then characterized the blood evidence as "somewhat confusing" and expressed a desire to obtain DNA testing, which (again) was not possible due to the prior destruction of

the physical evidence by the Commonwealth.<sup>21</sup> The FSB Lab Supervisor opined (apparently orally) that he could not exclude Mr. Hale as the rapist without knowing what other evidence had been used to convict him.<sup>22</sup>

Mr. Hale's counsel protested that the other evidence was irrelevant because the blood evidence itself excluded Mr. Hale from being the contributor of the semen on the vaginal sample. The ADA responded that she was "somewhat perplexed by your argument that the blood evidence somehow exculpates the defendant. We see no evidence that the rapist bled." This revealed a fundamental scientific misconception of the evidence, as the issue was that the blood type within the semen, rather than blood itself, was the conclusive proof that Mr. Hale was not the contributor of the semen.

During this period, the PPD restructured the FSB, replacing it with a new Office of Forensic Science (OFS) and appointing as Director of OFS a scientist with a Ph.D. and experience running a laboratory. At the urging of Mr. Hale's counsel, the DAO agreed to seek an opinion on the inhibitor test from the new Director. The Director provided a memorandum to the DAO in June 2011 stating that Mr. Hale was excluded as a contributor to the B proteins found in the vulva swab and recommending DNA testing to clarify the ambiguity of the conventional serological results.

The OFS Director's memorandum identified some mistakes in the expert report that Mr. Hale and his counsel had submitted in support of his PCRA. In part these mistakes were caused by limitations on the PAIP expert's time due to an impending deployment to Iraq. This in turn resulted in the first draft of the PAIP expert report being drafted by Mr. Hale's attorney, who then sent it to the PAIP expert for review and certification rather than having the scientist write the scientific report and having the attorney file it with the Court. Errors or ambiguities created by the layperson PAIP attorney were nonetheless in the final version of the PAIP report.

<sup>21</sup> Members of the PERT noted that it is not unusual for courts to decline to address issues that are not necessary to their ultimate resolution of the case, particularly in the postconviction context. In fact, if they did so, they could be faulted for giving advisory opinions. The destruction by the Commonwealth of physical evidence that could have led to Mr. Hale's exoneration, while Mr. Hale's appeals were actively being litigated, is something that Mr. Hale included in multiple petitions as a due process violation. Despite his numerous requests for some form of acknowledgement and accountability for this, no federal or Commonwealth court ruled on this issue, disposing of all other petitions on other valid grounds and simply remaining silent on the due process question of whether a court's destruction of potentially exculpatory evidence at the request of a prosecutor's office constitutes a due process violation.

<sup>22</sup> This statement was contained in an email from an ADA to Mr. Hale's attorney at the PAIP and attributed to Criminalistics Laboratory Unit supervisor within the PPD Forensic Service Bureau (FSB) Lab Director and was not directly relayed by the individual to whom the quote was attributed.



While none of the errors in the PAIP expert's report detracted from the power of the ABO blood sample reference test results, they provided a distraction that prevented the DAO and courts from engaging on the topic of whether Mr. Hale was factually innocent based on the data included in the inhibitor test.<sup>23</sup> The court in turn referenced these mistakes in granting the Commonwealth's motion to dismiss in January 2015. On appeal, the Pennsylvania Superior Court vacated the dismissal in September 2016 and remanded the case to the Court of Common Pleas for a hearing on the inhibitor test, concluding that the PCRA court had improperly resolved disputed scientific principles and findings on the papers. Only after this hearing was scheduled did the DAO relent and agree to vacate the charges against Mr. Hale, clearing a path for his release.

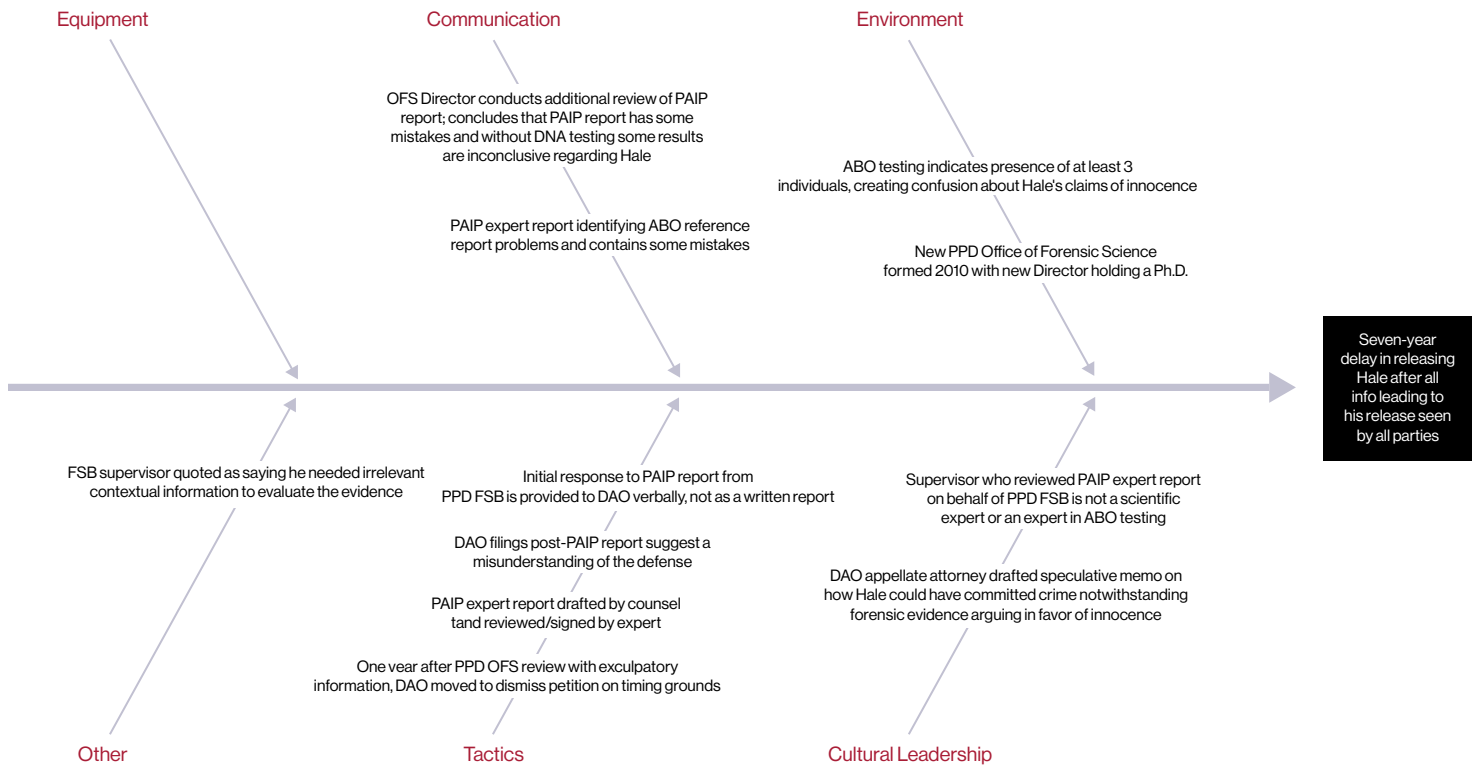
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<sup>23</sup> The DAO's response to the petition sought to dismiss on the basis that the petition was time barred. This procedural basis for rejection would have been available without regard to the mistakes in the expert report, but participants in the case pointed to the expert's errors as a good-faith rationale for not accepting Mr. Hale's claims of actual innocence.





Undesired Outcome 6: Once the forensic evidence that ultimately led to Mr. Hale’s exoneration was provided to all parties the parties did not reach agreement on its significance until 2017, seven (7) years after the initial scientific expert opinion that led to the release of Mr. Hale, nineteen (19) years after its disclosure and thirty-three (33) years after the test was conducted.



**Figure 7. Contributing factors to delays in releasing Mr. Hale after exclusionary scientific data was possessed by all parties.**



Contributing Factor 36: It appears that the FSB Criminalistics Laboratory Unit Supervisor provided his assessment of the PAIP expert report to the DAO verbally rather than in writing, preventing its objective review and discussion by all parties.

***Recommendation 24: The PPD OFS should ensure that scientific reviews of expert opinions provided in writing by a petitioner's expert(s) are responded to in writing in an appropriately responsive format and in a timely fashion to allow for reasonable dialogue and discussion about areas of agreement and potential disagreement, and how areas of disagreement might be resolved. The review should be written in a fashion that seeks to maximize its comprehension by laypeople and downstream stakeholders of the report in the criminal justice system.***

Contributing Factor 37: The FSB Criminalistics Laboratory Unit Supervisor who reviewed the PAIP expert report was not a scientific expert in blood tests or ABO secretor status.

***Recommendation 25: When soliciting a review of a scientific expert's report and conclusions, the DAO and PPD should seek a qualified expert in the specific field in question to conduct the review.***

Contributing Factor 38: The FSB representative who reviewed the ABO blood incorrectly was quoted in an email as suggesting that he could not exclude Mr. Hale as the perpetrator in this case because he needed to know "the other evidence used to convict him." If true, this may reveal a potential cognitive bias seeking context to establish the accuracy of a scientific test and further delayed the agreement of Mr. Hale's exclusion as a contributor of the semen found in this case.

***Recommendation 26: All OFS analysts should receive ongoing training about areas of potential cognitive bias and the OFS should be structured to minimize the potential of irrelevant task focus information to shape an analyst's opinion about the test the analyst is reviewing at any given time.<sup>24</sup>***

Contributing Factor 39: The DAO continued to object in court to the PAIP expert report on substantive ground, indicating multiple continued misunderstandings of Mr. Hale's argument: that the ABO reference test conclusively excluded Mr. Hale as the contributor of the semen that was provided by the actual perpetrator of the crime. Instead, the DAO continued to conflate

this as "blood evidence . . . that the rapist bled."

Contributing Factor 40: In 2010, the new leader of the newly reorganized Philadelphia Police Department Office of Forensic Science conducted a second review of the ABO reference test results and other scientific information in the case. He provided a written assessment that recommended "modern DNA analysis to clarify the ambiguity of the conventional serological analysis," despite the fact that DNA testing was not possible given the previous destruction of physician evidence by the Commonwealth.

Contributing Factor 41: The OFS review of the blood test and other data concluded that "the results in this case indicate the presence of at least three individuals." The report reviewed each piece of physical evidence in order of the PAIP expert's report, discussing the panties that were the subject of the ABO reference test on page 3. This did not prioritize for laypeople the OFS director's conclusion that "[b]ased on these results, Mr. Hale is excluded as being a contributor of the B proteins in this sample."

Contributing Factor 42: The OFS review continued "[h]owever, the results for the semen cannot be definitively determined. As such, no conclusion can be made as to the source of the semen."

***Recommendation 27: OFS should consider how best to provide information to downstream stakeholders who are unfamiliar with the nuance of the scientific field in question in ways that provide the absolute and relative importance of the data.***

Contributing Factor 43: The PAIP expert report was originally drafted by Mr. Hale's counsel and sent to the PAIP scientific expert for review and signature. Because of this, the PAIP expert report contained some inaccuracies that were sources of disagreement noted in the PPD OFS review. While these disagreements were unrelated to the blood test results that ultimately led to Mr. Hale's exoneration, they provided an additional source of conflict and time delay as the DAO and Mr. Hale's counsel attempted to resolve the dispute.

<sup>24</sup> This became official OFS policy after Mr. Hale's conviction. Office of Forensic Science, Quality Assurance Manual, Section 14, Training, and Section 25, Continuing Education.]



Contributing Factor 44: The Court of Common Pleas relied in part on the mistakes in the PAIP Expert Report to dismiss Mr. Hale's petition claiming that the ABO reference test conclusively proves his innocence.

Contributing Factor 45: In September 2012, more than one year after the issuance of the OFS review that agreed that Mr. Hale was excluded as being a contributor of the biological evidence in several items of evidence, the DAO again moved to dismiss Mr. Hale's petition on timing grounds. This suggested that the DAO was prioritizing conviction preservation and procedural finality over factual accuracy and actual innocence.

***Recommendation 28: The DAO should conduct training for all attorneys, and the OFS should conduct training for all analysts, discussing the Hale case and its unintended consequences and the risk of cognitive and other biases. The training should also ask all participants for additional recommendations for change based on the wrongful conviction of Mr. Hale and its contributing factors.***

Contributing Factor 46: After a new scientific hearing was ordered by the PA Superior Court, a DAO attorney drafted an internal memorandum in which he speculated on potential other scenarios that could have led to Mr. Hale being correctly identified as the perpetrator. Included among them was the theory that the victim had been incorrectly blood-typed at the hospital, meaning that Mr. Hale would have been the contributor of the B Antigens found in the relevant semen sample. This memo was entertained by the DAO as potential evidence of Mr. Hale's guilt notwithstanding the existence of a separate test at the PPD Forensic Science Bureau that reached the same result at the blood typing of the victim at the hospital.

***Recommendation 29: The DAO should ensure that its attorneys do not draft speculative memoranda hypothesizing about theories of guilt without evidence to support such theories.***



## Conclusion

In early 2017, as the parties were preparing for that hearing, the PAIP convinced the DAO's recently restructured Conviction Integrity Unit (CIU) to review Mr. Hale's conviction. As part of that review, the CIU and the PAIP met jointly with the Director of OFS and a new expert who had been retained by Mr. Hale. In that meeting, there was a high degree of consensus on the meaning of the forensic evidence, and in July 2017 the CIU agreed to move to have Mr. Hale's conviction vacated.

On July 13, 2017, Mr. Hale was released from prison, having served more than thirty-three years for a crime he did not commit, despite the fact that the inhibitor test that ultimately convinced the Commonwealth to agree to vacate Mr. Hale's the conviction was created on the last day of his trial in 1984. No new scientific data was generated after his conviction, but administrative, structural, and systemic issues prevented the information from being disclosed to Mr. Hale for more than thirteen (13) years. When it was disclosed, no scientist reviewed it (either for Mr. Hale or for the Commonwealth) and its significance was not understood for another twelve (12) years. And even when the PAIP expert issued a report explaining the significance of the evidence, the Philadelphia DAO continued to oppose Mr. Hale's release for another seven (7) years.



## Appendix A. Timeline.

Date	Event	Relevant Information
November 11, 1983	Victim sexually assaulted	Victim orally and vaginally raped.  Assailant used Victim's blouse to wipe his penis.
	Victim taken to hospital	Victim was hysterical and bleeding heavily following the attack
	Crime scene processed	Victim's underwear, blouse, and knee socks collected.
	Victim describes attacker to police officer	Description mentions a heavy-set African American male with a light complexion, 30-35 years old, 5'11" tall, weighing approximately 190 pounds, with small ears and a "baby face."
November - December 1983	Victim's parents take her to Florida to recover	Victim has no contact with the police during this period.
December 30, 1983	Victim describes attacked to police a second time	Description says attacker "in his early twenties," approximately 5'5" to 5'7" tall with a dark complexion and weighing approximately 165 pounds.
	Victim views composite photos	Victim selects one of 18 photos as looking like her assailant.
	Victim views slides	Victim views slides of potential assailants for 90 minutes and picks one of Mr. Hale as her assailant.
January 2, 1984	Victim views photo lineup	Lineup includes eight photos; Victim selects one of Mr. Hale as her assailant.
February 15, 1984	Victim views pre-trial lineup	Victim does not identify Mr. Hale as the man who attacked her. According to police, Victim stated immediately afterwards that she recognized Mr. Hale as the assailant but was afraid to identify him because she thought he could see her.
March 20, 1984	Preliminary hearing	Victim identifies Mr. Hale as her assailant in open court.
September 24, 1984	Mr. Hale's trial begins	
	Court takes custody of evidence	
September 25, 1984	Victim testifies	Victim identifies Mr. Hale as her assailant in open court.
September 26, 1984	Philadelphia FSB criminalistics technician testifies about blood evidence	Testimony states that testing of vaginal and vulvar samples containing blood and semen was inconclusive, blood type O was identified from cervical sample, blood type B identified from samples of blood and sperm from the victim's clothing, and blood type A from sample on victim's socks. Also, victim was blood type O and Mr. Hale was blood type A.
	Inhibition study of Mr. Hale's blood completed; not provided to investigators, prosecutors, or defense attorneys	Test concludes that Mr. Hale was type A secretor.
	Jury instructed	Jury told "The Commonwealth witness... has identified the defendant as the person who committed the crime. However, a mistake can be made in identifying a person, even by a witness attempting to be truthful. In determining whether or not to accept as accurate the identification testimony of [N.A.], you should take into consideration the following matters. Was the testimony of the identification witness generally believable, was her opportunity to observe sufficient to allow her to make an accurate identification, how did she arrive at the identification. You should consider all of the circumstances indicating whether or not the identification was accurate. Also, consider whether the identification testimony is supported by other evidence."
	Jury renders guilty verdict	



Date	Event	Relevant Information
October 4, 1984	Laboratory Division sends memo to Sex Crimes Unit on Mr. Hale's case	Memo does not include results indicating Mr. Hale's secretor status.
April 1986	Some physical evidence destroyed	
September 1986	Rape kit destroyed	
March 31, 1989	Mr. Hale files pro se "motion for court records" in Court of Common Pleas	Mr. Hale requests "laboratory report" in the motion.
May 1989	Some relevant clothing destroyed	
July 1989 – July 2000	Mr. Hale unsuccessfully seeks assistance from a variety of legal aid organizations	Some organizations cite the destruction of physical evidence as a complicating factor leading them to decline representation.
January 22, 1993	Mr. Hale writes letter to court's manager of court reporting	Mr. Hale requests help obtaining forensic reports.
February 1993	Some relevant clothing destroyed	
February 17, 1998	Mr. Hale files federal habeas petition in Eastern District of Pennsylvania	Mr. Hale asserts Commonwealth withheld exculpatory evidence and destroyed physical evidence in bad faith. He asks for discovery of physical evidence and laboratory tests.
June 24, 1998	Commonwealth files response to Mr. Hale's habeas petition	Commonwealth concedes that its trial file was lost, making it impossible to ascertain what materials were provided to trial counsel pretrial. Commonwealth avers that it will provide a copy of the Philadelphia Police Laboratory's file of laboratory reports to Mr. Hale.
July 8, 1998	Commonwealth provides Philadelphia Police Laboratory's file of lab reports to Mr. Hale	File includes the notes of the inhibition study showing Mr. Hale to be a type A secretor.
July 1998 – March 2009	Mr. Hale files third, fourth, fifth, and sixth PCRA's	Neither Mr. Hale nor the Commonwealth discusses the substance of the forensic reports, including the inhibition study.
January 11, 1999	Court of Common Pleas dismisses Mr. Hale's third PCRA as time barred	Court states that Hale could not avoid the time bar based on newly discovered evidence because he "was already aware of the results of the laboratory tests and the results of such tests were introduced into evidence at [his] trial."
May 2009	Mr. Hale obtains legal assistance from Pennsylvania Innocence Project	
July 5, 2010	Forensic expert retained by Mr. Hale provides written report	Expert concludes that the results of the inhibition study finding Mr. Hale to be a secretor excludes him as the contributor of the semen in N.A.'s rape kit.
July 6, 2010	Mr. Hale files amended sixth PCRA	Petition argues that Mr. Hale is entitled to post-conviction relief because the Commonwealth failed to disclose exculpatory inhibition study results.
December 7, 2010	ADA writes letter to Forensic Laboratory Supervisor	ADA asks Supervisor to review Mr. Hale's expert report and related lab records.
March 7, 2011	ADA writes letter to Forensic Laboratory Supervisor	ADA describes the blood evidence as confusing and suggests that DNA testing be performed.
March 9, 2011	Mr. Hale's counsel asks ADA to have Director of Forensic Science review Mr. Hale's expert report and related lab records	Counsel states, "It concerns me that [the Forensic Laboratory Supervisor] would say that he could not exclude Marshall as the rapist because he needed to know the other evidence used to convict him. From a strictly scientific point, there is simply no relevance to what the other evidence is. The science speaks for itself: Marshall either is or is not inculcated by the serology. Were there a confession or anything else, it could not change the basic scientific evidence."





Date	Event	Relevant Information
March 10, 2011	ADA response to Mr. Hale's request for Director of Forensic Science to review expert report	ADA states, "[I]t is our position that there is no relevance to the blood evidence and that the 'other evidence' supports the conviction. We are somewhat perplexed by your argument that the blood evidence somehow exculpates the defendant. We see no evidence that the rapist bled. Thus, there is no reason to assume that the blood on the victim belonged to the rapist. If you have found evidence in the record that there was a struggle and that the rapist, in fact, bled, please point to that place in the record. If not, we have to credit the victim's identification of defendant as the man who raped her, as the jury did."
June 29, 2011	Director of Forensic Science provides memorandum analyzing Mr. Hale's expert report and related lab records	Memorandum states that Mr. Hale is excluded as a contributor to the B proteins found in the victim's vulva swab and recommends DNA testing to clarify the ambiguity of the conventional serological results. Memorandum also identifies some mistakes in the expert report Mr. Hale submitted in support of his PCR
September 17, 2012	Commonwealth moves to dismiss Mr. Hale's sixth PCRA as time barred	Commonwealth points out mistakes in Mr. Hale's expert report, argues that the results of the inhibition study are not exculpatory, and asserts that his petition is time barred.
September 17, 2014	Court of Common Pleas dismisses Mr. Hale's sixth PCRA as untimely	
January 30, 2015	Court of Common Pleas issues opinion in support of its dismissal of Mr. Hale's sixth PCRA	Court concludes that, "[f]ar from being exculpatory, the evidence that Defendant claimed that the Commonwealth suppressed merely confirmed the testimony the jury already heard at trial." It also states that the conclusions in Mr. Hale's expert report "are without scientific basis and are directly contradicted by the generally accepted principles of serological testing."
September 23, 2016	Pennsylvania Superior Court issues opinion vacating dismissal of Mr. Hale's sixth PCRA and remanding for further proceedings	Court states that, "The proper way to resolve this conflict in the parties' factual contentions is to conduct a hearing in which the experts are subjected to examination. We cannot overemphasize the importance of resolving this disputed issue at a hearing" including the "overall conclusion that Appellant could not be a contributor to the semen deposits recovered from N.A.'s rape kit based upon the inhibition study profiles included in the 1998 production."
February 7, 2017	Mr. Hale's counsel writes to the Conviction Integrity Unit of the DAO asking for review of his conviction	Counsel highlights the notes of the inhibition study showing Hale to be a secretor in the letter.
Between February 7 and July 13, 2017	Mr. Hale's attorneys and expert meet with CIU and Garvey	Ultimately, the parties reach consensus on the meaning of the forensic evidence and agree that Mr. Hale's conviction should be vacated.
July 13, 2017	DAO moves to vacate Mr. Hale's conviction	2017



## Appendix B. Table of Contributing Factors and Recommendations

Undesired Outcome 1: Marshall Hale was arrested, then convicted, for a crime that he did not commit, in part based on inaccurate eyewitness identification.

Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 1:</u> The Philadelphia Police Department (“PPD”) had no written protocols in 1983 or 1984 describing the preferred methods of conducting an eyewitness identification process. Protocols that would have substantially changed the process used in this case were adopted in 2014.</p> <p><u>Contributing Factor 2:</u> PPD detectives conducted multiple interviews and gave the victim no fewer than seven (7) instances to describe and/or identify Mr. Hale as her attacker. The victim’s multiple differing descriptions called the accuracy of her identification of Mr. Hale into question.</p> <ol style="list-style-type: none"> <li>i. The victim of the crime was interviewed immediately after a violent attack. In such circumstances, due to the extreme trauma of the incident, some individuals are not able to provide clear and precise descriptions of their assailant(s).</li> <li>ii. The victim of the crime was interviewed again the same day of the attack in the hospital. She gave a different description of the attacker than she had given in the first interview.</li> <li>iii. The victim went to Florida for six (6) weeks after her stay in the hospital; upon her return, she was interviewed again, and provided a description that differed from both of her first two identifications.</li> </ol> <p><u>Contributing Factor 3:</u> PPD detectives provided the victim with repeat exposures to Mr. Hale’s picture during the investigation. This increased the potential for the victim’s eyewitness identification to be impacted by confirmation bias and other cognitive interference that could have reduced its accuracy.</p> <ol style="list-style-type: none"> <li>i. During one interview, PPD detectives showed Mr. Hale’s picture to the victim more than once, enhancing the likelihood that the victim would recall Mr. Hale and associate him with the perpetrator.</li> <li>ii. During one interview, PPD detectives showed the victim 18 composite images as well as carousel slides of potential attackers over a period of roughly 90 minutes. This departs dramatically from current PPD policy. The increased number of photos may have increased the likelihood of an inaccurate identification and added to the risk of further confirmation bias by the victim if she had seen Marshall Hale’s photograph before.</li> <li>iii. The victim was interviewed by PPD detectives a fourth time, three days after the prior interview, and selected Mr. Hale from an array of eight (8) photos. This procedure is not in compliance with current PPD protocols and created additional risk of confirmation bias on the part of the police and of the victim.</li> </ol>	<p><b><i>Recommendation 1: PPD officers conducting interviews with victims of crime should be aware of the potential for repeated exposures to the same individuals to contaminate victim eyewitness identifications, and during an investigation should make efforts to minimize repeated exposures of potential suspects to eyewitnesses.</i></b></p> <p><b><i>Recommendation 2: PPD should modify its policy for eyewitness identifications to include the following: if a victim/witness fails to make an identification based on a photo array or physical line-up and then makes a statement positively identifying the suspect, the PPD witnesses to this statement and the victim should be interviewed immediately and the interviews should be contemporaneously documented.</i></b></p>	<p>PPD</p>



Contributing Factor	Consensus Recommendation	Responsible Party
<p>iv. Approximately six weeks after the last photo array identification, and three months after the crime was committed, the victim failed to select Mr. Hale out of a live lineup, then immediately identified Mr. Hale as the perpetrator immediately after the live lineup and explained that her change of opinion was due to a fear that Mr. Hale could see her while she was selecting him.</p> <p>v. Approximately four (4) months after the attack, the victim conclusively and with certainty identified Mr. Hale in open court as her attacker.</p> <p>vi. Approximately ten (10) months after the attack, the victim conclusively and with certainty identified Mr. Hale in open court at trial as her attacker.</p>		
<p><u>Contributing Factor 4:</u> None of the eyewitness identifications made by Victim were recorded on video, nor were they carefully documented by officers in real time to indicate the similarities or differences among various descriptions given by the victim. These recordings – in video or in writing – might have allowed others to better evaluate the likelihood that the identifications were accurate.</p>	<p><b><i>Recommendation 3: PPD officers should record physical line-ups on video whenever possible.</i></b></p> <p><b><i>Recommendation 4: PPD should encourage its officers, when permitted by the individual being interviewed, to video eyewitness identifications when permitted by the person being interviewed.<sup>25</sup> If video recording is not possible, officers should carefully document the procedure by which the eyewitness identification is made as well as each statement and action made by the eyewitness during the identification procedure.</i></b></p>	PPD
<p><u>Contributing Factor 5:</u> The rapist was a Black male and Victim was an Hispanic girl; eyewitness identifications in such circumstances may be impacted by “cross-racial bias,” a reduced ability to accurately identify faces of people of races different from that of the eyewitness.</p>	<p><b><i>Recommendation 5: PPD Detectives should receive specific training on cognitive biases that may impact their investigations, including cross-racial bias and its potential to impact the accuracy of eyewitness identification. New detectives should receive this training prior to their promotion.</i></b></p>	PPD

<sup>25</sup> As a matter of law in Pennsylvania it is illegal for an officer to record an identification against the will of the witness. In addition, witnesses to crimes frequently do not wish to have their identifications recorded on video, and technology limitations may provide additional challenges to recording an eyewitness description or identification of a suspect.



Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 6:</u> There is no record of any police supervisor, ADA or other participant in the case raising concerns about the number of interviews that were conducted with the victim or the potential impact on the accuracy of her identification of Mr. Hale.</p>	<p><b><i>Recommendation 6:</i></b> PPD officers should present photo arrays to eyewitnesses of crimes in ways that conform to then-current PPD policies.</p> <p><b><i>Recommendation 7:</i></b> PPD should review its current policy on conducting photo arrays for eyewitness identification and ensure that the policy continues to conform with scientific consensus on methods to enhance accuracy and reduce the risk of bias or other impediments to accuracy.</p> <p><b><i>Recommendation 8:</i></b> Supervisors with Detective Divisions and Units should follow Directive 5.2.3, and review and sign the victim/witness interview log at the beginning of every shift and check on the well-being of any persons being or waiting to be interviewed. They should also review each eyewitness identification with a critical eye for factors that could impact the accuracy of the identification and ensure that Detectives are (a) considering such factors in the prioritization of leads in an investigation and (b) minimizing the risk of additional contamination of witness memory.</p>	<p>PPD</p>
<p><u>Contributing Factor 7:</u> No expert testimony was solicited or provided to educate the judge or juror on potential “risk factors” related to the eyewitness identification, including system and descriptor/estimator variables that might have impacted the accuracy of the victim’s eyewitness identification.</p> <p><u>Contributing Factor 8:</u> At the conclusion of testimony in the trial, the trial judge gave the jury instructions regarding eyewitness identification that did not fully address the descriptor or system variables that may have impacted the accuracy of the identification.</p>	<p><b><i>Recommendation 9:</i></b> The Criminal Procedural Rules Committee of the Supreme Court of Pennsylvania should consider whether to adopt the recommendations of the United States 3rd Circuit Court of Appeals for jury instructions in cases where an eyewitness identification is included as evidence in a criminal case.</p>	<p>Supreme Court of Pennsylvania Criminal Procedural Rules Committee</p>



Undesired Outcome 2: The Philadelphia Police Department Forensic Science Bureau (FSB) conducted blood tests ultimately used to support Mr. Hale's release. The tests were conducted on the last day of his trial, but a formal laboratory report was not issued and results were not disclosed in a timely fashion.

Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 9:</u> At the time of Mr. Hale's trial, DNA testing was not yet available for use in criminal investigations. As a result, conventional blood testing practices were used. These practices were less conclusive or comprehensive than DNA testing that became widely used during his appeals.</p> <p><u>Contributing Factor 10:</u> A blood type reference test known as an "ABO reference test" was conducted by the PPD FSB on the final day of Mr. Hale's trial using samples of Mr. Hale's blood and material recovered using a rape kit immediately after the assault. These test results were retained by the FSB but not shared with other agencies and not memorialized into a report.</p> <p><u>Contributing Factor 11:</u> No information about the ABO reference test appears to have been sent by the FSB to prosecutorial or defense counsel of record, or to the court.</p>	<p><b><i>Recommendation 10: The PPD OFS should follow its current policies that require every test result to be disclosed in a report to appropriate parties given the stage of the case (e.g., investigators, prosecutors, etc.)</i></b></p>	<p>PPD OFS</p>
<p><u>Contributing Factor 12:</u> Nothing in the record suggests that any counsel or the judge knew that the reference sample test was being conducted, even though it was one of a predictable panel of tests to be conducted in a rape case. The FBS (now OFS) had no mechanism for automatically alerting counsel in the Hale case that new test results had been generated in their case, and counsel did not actively seek out the new test results as they did not know the test was being conducted.</p>	<p><b><i>Recommendation 11: OFS should configure its LIMS system to automatically notify the Court, the prosecutor of record, and where possible the defense counsel of record of each new report generated by OFS in each criminal case.</i></b></p>	<p>PPD OFS, CCP (in process)</p>
<p><u>Contributing Factor 13:</u> The Forensic Science Bureau analyst who testified at trial was not the analyst who conducted the ABO reference test, and the ABO reference test had not been completed as of the time of her testimony at trial.</p> <p><u>Contributing Factor 14:</u> Neither DAO nor defense attorneys elicited testimony from FBS representatives about the comparison of samples to reference, which would likely have disclosed the existence of (or need for) the ABO blood reference test.</p> <p><u>Contributing Factor 15:</u> The Court did not require either the DAO or defense counsel to certify that all relevant scientific or other information in the possession of the government had been disclosed to the defense or that the defense had received same.</p> <p><u>Contributing Factor 16:</u> The analyst who conducted the reference sample test did not put the test results into a report that could be clearly understood by "downstream stakeholders" (e.g., attorneys, judges, jury members).</p>	<p><b><i>Recommendation 12: In cases in which scientific information will be used, the Court of Common Pleas should ensure that pretrial conferences are held among the parties and include a certification from each counsel and a knowledgeable representative from PPD OFS indicating that all parties are in agreement on the laboratory reports that have been generated to date; what (if any) reports remain to be generated and that all relevant information generated to date has been distributed to all parties. Trials should not be initiated prior to the completion and distribution to all parties of all agreed-upon forensic testing and reporting.</i></b></p>	<p>PPD OFS, CCP (CF 16 is no longer permissible under PPD OFS policy)</p>



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<p><u>Contributing Factor 17:</u> The volume of forensic testing requested by the criminal justice system of the PPD Office of Forensic Science (OFS), the successor to the FSB, exceeds the current capacity of the OFS, leading to delays in testing. The OFS Laboratory Information Management System (LIMS) is not tied to the Court of Common Pleas scheduling system and requires manual oversight to ensure that tests are completed in a timely fashion in advance of trial dates.</p>	<p><b><i>Recommendation 14: The OFS should receive whatever funding is necessary to ensure that its resources are adequate to meet the volume of forensic testing required by the Philadelphia criminal justice system within reasonable time frames.</i></b></p>	<p>PPD OFS</p>





Undesired Outcome 3: Physical evidence that could have been tested to assist in Mr. Hale’s claims of innocence was lost and/or destroyed by the Commonwealth of Pennsylvania and the Court of Common Pleas while Mr. Hale’s appeals were pending.

Contributing Factor	Consensus Recommendation	Responsible Party
<p><b>Contributing Factor 18:</b> Physical evidence that could have been used for further testing to evaluate Mr. Hale’s claims of innocence was destroyed while Mr. Hale’s case was under direct appeal and subsequently, preventing him from the ability to prove his innocence through DNA testing, as it became a preferred method of forensic analysis in sexual assault cases.</p> <ul style="list-style-type: none"> <li>i. The rape kit in the case was destroyed two years after his conviction but while his case was on direct appeal.</li> <li>ii. All of the victim’s clothing was destroyed three and one-half (3.5) years after the conviction, despite the filing of a petition by Mr. Hale seeking the physical evidence in question.</li> </ul> <p>The DAO consistently claimed that Mr. Hale’s requests for testing of physical evidence that could have supported his claims of innocence must be rejected because the evidence has been destroyed. The DAO characterized the destruction of physical evidence as “pursuant to routine court order” (emphasis added) and describe the destruction as “unsurprising.”</p>	<p><b>Recommendation 15:</b> <i>The Commonwealth of Pennsylvania should consider statewide standards for document retention in criminal and capital cases that would be applicable to the participants in the PERT.</i></p> <p><b>Recommendation 16:</b> <i>In the absence of state guidelines, the DAO, the Court of Common Pleas and the PPD, including the OFS should agree on policies for the storage and maintenance and handling of physical evidence that will preserve its utility in criminal cases at least as long, and potentially longer than the case is under post-conviction appeal.</i></p>	<p>Supreme Court of Pennsylvania Criminal Procedural Rules Committee; DAO, CCP, PPD, PPD OFS</p>
<p><b>Contributing Factor 19:</b> The Court was the custodian of physical evidence admitted at trial and did not have an effective chain of custody system.</p> <ul style="list-style-type: none"> <li>i. Physical evidence accepted by the Court in the Hale case was allegedly kept in a 5th floor storage room in the courthouse. This room was flooded, causing the evidence to allegedly be moved to a 6th floor storage room. This room was also flooded, causing the evidence to be moved to a third (unspecified) location. The evidence was not well marked or well organized and no representatives from the prosecution, defense, court, or Forensic Science Bureau were able to locate evidence as needed.</li> <li>ii. The Court provided a receipt for its collection of the evidence but not a location for the evidence and did not alert the parties when the evidence in its possession was moved.</li> </ul> <p><b>Contributing Factor 20:</b> The Court was not equipped to store biological and/or physical evidence safely and preserve its utility in criminal cases, including appeals.</p> <p><b>Contributing Factor 21:</b> No policies appear to exist governing the Court’s maintenance of evidence archives, including the methodology or environment required for the storage of physical or biological evidence collected in a case.</p>	<p><b>Recommendation 17:</b> <i>The Court of Common Pleas should only be the custodian of physical or biological evidence while an actual trial is progressing, and only for materials that must be displayed physically at trial. After the conclusion of the trial, the Court should turn all physical or biological evidence over to the OFS for storage, maintenance and archiving. OFS will ensure that physical and biological evidence materials are maintained for the duration of the evidence retention policies mentioned above, and that appropriate identification information has been shared with all counsel and the Court. OFS will also implement and maintain a unified tracking system allowing any participant with appropriate access to locate each specific item of evidence in each case in real time.</i></p>	<p>CCP, PPD, PPD OFS</p>



Undesired Outcome 4: Exculpatory information in Mr. Hale’s case was not disclosed to him until 1998, fourteen (14) years after his conviction.

Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 22:</u> Mr. Hale filed multiple requests seeking scientific information in his case that had not been previously disclosed.</p> <ul style="list-style-type: none"> <li>i. Mr. Hale filed a post-conviction petition roughly seven and a half (7.5) years after the test was completed seeking “laboratory reports.” The ABO blood reference test was not disclosed by the DAO in response to this petition.</li> <li>ii. Mr. Hale wrote a letter to the Manager of Court Reporting Services asking for help in obtaining “forensic report” [sic] from his case.</li> <li>iii. Almost twelve (12) years after his conviction, Mr. Hale filed a request for the production of physical evidence that did not include a request for testing; the ABO reference test results were not disclosed in response to this request.</li> <li>iv. In February 1998, roughly sixteen and one-half (16.5) years after his conviction, Mr. Hale filed a federal habeas petition in which he sought the disclosure of all physical and laboratory evidence related to his case.</li> </ul> <p><u>Contributing Factor 23:</u> A petitioner’s right to additional discovery under Pennsylvania’s Post-Conviction Review Act (PCRA) is limited to extraordinary circumstances in non-capital cases. 234 Pa. Code § 902. The request from a petitioner does not impose an obligation on the prosecutor to conduct any additional search or disclosure of such information under state or Federal law. This complicated Mr. Hale’s ability to obtain the previously undisclosed ABO reference test results.</p> <p><u>Contributing Factor 24:</u> The DAO could not respond to Mr. Hale’s 1998 habeas petition because it could not locate its case file on the case. The case file has never been located.</p> <p><u>Contributing Factor 25:</u> The DAO manages cases “horizontally,” meaning that different attorneys within the DAO handle different phases of a case, creating additional risk that a case file could be misplaced.</p> <p><u>Contributing Factor 26:</u> The DAO relied upon a single paper file to hold the information in Mr. Hale’s case and did not scan or otherwise preserve a copy of the case file that could have prevented or remediated the loss of the case file.</p> <p><u>Contributing Factor 27:</u> The DAO responded to Mr. Hale’s Feb. 1998 petition with a packet of information received from the FSB, including the first known disclosure of the ABO test results. Because the DAO lacked a complete case file, the DAO stated that it was unaware of whether or not there was new evidence in the file. There is no record of the DAO understanding, highlighting, or otherwise calling attention to the ABO reference test, other than to acknowledge the potential for new information to have been included in the FSB’s materials.</p>	<p><b><i>Recommendation 18: All DAO case files should be digitized and maintained in a secure environment that is constantly accessible to appropriate DAO employees. Physical evidence should be archived with the OFS and should be readily accessible to the DAO and other participants in a criminal case should the materials be needed.</i></b></p>	<p>DAO</p>



Undesired Outcome 5: The impact of exculpatory information disclosed by the DAO to Mr. Hale in 1998 was not fully understood until Mr. Hale's new counsel engaged an expert in 2010, roughly twelve (12) years after its disclosure.

Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 28:</u> In response to a request from the DAO to comply with Mr. Hale's 1998 request for scientific information related to his case, FBS sent DAO, and DAO forwarded to Mr. Hale, the ABO reference test results to him in a pile of 25 pages of lab materials.</p>	<p><b><i>Recommendation 19:</i></b> <i>OFS should follow its current policy that any test result is issued in a report that is designed to provide the appropriate scientific information in a context that can be understood by downstream recipients of the report in the criminal justice system.</i></p>	<p>PPD OFS</p>
<p><u>Contributing Factor 29:</u> While the DAO did acknowledge the possibility that newly disclosed information could be included in the packet of information it provided to Mr. Hale in 1998, the DAO did not know whether newly disclosed information was in the information disclosed because new attorneys not involved in the original case were sending the information and they did not have access to the prior DAO file because it had been lost.</p> <p><u>Contributing Factor 30:</u> The ABO reference test results consisted of a single sheet of paper with handwritten notes, and the FSB did not generate a report that would state the conclusion(s) of the test in a way that non-scientists could readily understand its significance. The ABO results were further complicated by the complexity of ABO mixtures, limitations associated with inconclusive results, and a lack of sufficient notes or reports to determine the most appropriate conclusions for all original evidence. These complications were compounded by the lack of evidence available for modern DNA analyses.</p> <p><u>Contributing Factor 31:</u> Mr. Hale was representing himself pro se and lacked the scientific knowledge and the access to scientific expertise that could have assisted him in translating the ABO reference test results and the accompanying handwritten notes.</p> <ol style="list-style-type: none"> <li>i. Mr. Hale filed multiple appeals proclaiming his innocence and decrying the lack of due process in his case, but none specifically used the ABO reference test in support of his actual innocence.</li> <li>ii. The DAO's responses and the litigation as a whole were tailored to the filed objections rather than the accuracy or implications of the ABO reference test.</li> </ol> <p><u>Contributing Factor 32:</u> Once the ABO reference sample test results were disclosed to the DAO and then to Mr. Hale, neither the DAO nor Mr. Hale appeared to be aware that new evidence had been disclosed, and neither party procured an expert to review the information provided by the FSB. Mr. Hale lacked the resources to engage an expert to assist him while he was filing petitions for relief pro se.</p> <p><u>Contributing Factor 33:</u> At the trial stage, "an accused is entitled to the assistance of experts necessary to prepare a defense." Com. v. Albrecht, 554 Pa. 31, 58, 720 A.2d 693, 707 (1998). Despite this obligation to provide experts to assist defense counsel or to indigent pro se litigants, counsel rarely petition the Court of Common Pleas to take advantage of such resources and many counsel are unaware of them. Mr. Hale's counsel neither petitioned the Court for such assistance nor procured it from other sources. As appropriate, the Court may request the OFS, as the accredited forensic service provider for the City of Philadelphia, to perform additional analyses or review scientific information for any or all parties associated with the case. It is noted that the OFS has performed analyses or reviews for the DAO Conviction Integrity Unit, Pennsylvania Innocence Project, and others for approved post-conviction reviews.</p>	<p><b><i>Recommendation 20:</i></b> <i>Particularly in cases in which newly discovered scientific information may have been disclosed, the Court should ensure that sufficient funds are available to assist indigent defendants in securing the scientific expertise they need to meet the requirements of due process. In the event defendant is pro se or is represented by court-appointed counsel or the Defender Association, the Court should inform the defendant and/or counsel explicitly of any funds available from the Court to support the identification and/or retention of scientific expertise.</i></p>	<p>CCP</p>



Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 34:</u> There is a general lack of scientific training and knowledge among prosecutorial and defense counsel, and often among judges, in cases involving violent crime and scientific evidence.</p>	<p><b><i>Recommendation 21: In cases in which scientific information will be used, the Court should encourage counsel to identify and work with specific experts in the relevant scientific field(s) who can ensure that all relevant information has been gathered, shared, and evaluated prior to trial.</i></b></p> <p><b><i>Recommendation 22: Representatives of the criminal justice bar in Philadelphia should coordinate with the Pennsylvania Continuing Legal Education Board (PACLE) to an accredited Continuing Legal Education (CLE) course on scientific information and the availability of experts and funding for experts in cases with indigent defendants. All Defender Association attorneys and any court-appointed attorney in a criminal case involving scientific information should provide the Court with certification of completion of that course prior to taking on such cases.</i></b></p>	<p>CCP, DAO, Defender Association</p>
<p><u>Contributing Factor 35:</u> In January of 1999, roughly 18 months after the first disclosure of the ABO reference test to Mr. Hale, the trial court dismissed Mr. Hale’s appeal based on statute of limitations grounds, stating that the ABO reference test was not newly discovered evidence because “the results of such tests were introduced into evidence at [his] trial.” This was factually incorrect and revealed a lack of understanding of the existence of, and the import of, the newly disclosed test.</p>	<p><b><i>Recommendation 23: The Court should ensure that judges in cases in which scientific information will be used have received the necessary training, Continuing Judicial Education, advice from relevant scientific experts, and/or other steps necessary to understand the scientific information relevant to the case. Judges should explain to counsel what steps they have taken to help ensure that all relevant information has been gathered, shared, and evaluated prior to trial.</i></b></p>	<p>CCP, DAO, Defender Association</p>



Undesired Outcome 6: Once the forensic evidence that ultimately led to Mr. Hale’s exoneration was provided to all parties the parties did not reach agreement on its significance until 2017, seven (7) years after the initial scientific expert opinion that led to the release of Mr. Hale, nineteen (19) years after its disclosure and thirty-three (33) years after the test was conducted.

Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 36:</u> It appears that the FSB Criminalistics Laboratory Unit Supervisor provided his assessment of the PAIP expert report to the DAO verbally rather than in writing, preventing its objective review and discussion by all parties.</p>	<p><b><i>Recommendation 24:</i></b> <i>The PPD OFS should ensure that scientific reviews of expert opinions provided in writing by a petitioner’s expert(s) are responded to in writing in an appropriately responsive format and in a timely fashion to allow for reasonable dialogue and discussion about areas of agreement and potential disagreement, and how areas of disagreement might be resolved. The review should be written in a fashion that seeks to maximize its comprehension by laypeople and downstream stakeholders of the report in the criminal justice system.</i></p>	<p>PPD OFS</p>
<p><u>Contributing Factor 37:</u> The FSB Criminalistics Laboratory Unit Supervisor who reviewed the PAIP expert report was not a scientific expert in blood tests or ABO secretor status.</p>	<p><b><i>Recommendation 25:</i></b> <i>When soliciting a review of a scientific expert’s report and conclusions, the DAO and PPD should seek a qualified expert in the specific field in question to conduct the review.</i></p>	<p>DAO, PPD OFS</p>
<p><u>Contributing Factor 38:</u> The FSB representative who reviewed the ABO blood incorrectly was quoted in an email as suggesting that he could not exclude Mr. Hale as the perpetrator in this case because he needed to know “the other evidence used to convict him.” If true, this may reveal a potential cognitive bias seeking context to establish the accuracy of a scientific test and further delayed the agreement of Mr. Hale’s exclusion as a contributor of the semen found in this case.</p>	<p><b><i>Recommendation 26:</i></b> <i>All OFS analysts should receive ongoing training about areas of potential cognitive bias and the OFS should be structured to minimize the potential of irrelevant task focus information to shape an analyst’s opinion about the test the analyst is reviewing at any given time.</i></p>	<p>PPD OFS (currently part of existing policies)</p>
<p><u>Contributing Factor 39:</u> The DAO continued to object in court to the PAIP expert report on substantive ground, indicating multiple continued misunderstandings of Mr. Hale’s argument: that the ABO reference test conclusively excluded Mr. Hale as the contributor of the semen that was provided by the actual perpetrator of the crime. Instead, the DAO continued to conflate this as “blood evidence . . . that the rapist bled.”</p> <p><u>Contributing Factor 40:</u> In 2010, the new leader of the newly reorganized Philadelphia Police Department Office of Forensic Science conducted a second review of the ABO reference test results and other scientific information in the case. He provided a written assessment that recommended “modern DNA analysis to clarify the ambiguity of the conventional serological analysis,” despite the fact that DNA testing was not possible given the previous destruction of physician evidence by the Commonwealth.</p> <p><u>Contributing Factor 41:</u> The OFS review of the blood test and other data concluded that “the results in this case indicate the presence of at least three individuals.” The report reviewed each piece of physical evidence in order of the PAIP expert’s report, discussing the panties that were the subject of the ABO reference test on page 3. This did not prioritize for laypeople the OFS director’s conclusion that “[b]ased on these results, Mr. Hale is excluded as being a contributor of the B proteins in this sample.”</p> <p><u>Contributing Factor 42:</u> The OFS review continued “[h]owever, the results for the semen cannot be definitively determined. As such, no conclusion can be made as to the source of the semen.”</p>	<p><b><i>Recommendation 27:</i></b> <i>OFS should consider how best to provide information to downstream stakeholders who are unfamiliar with the nuance of the scientific field in question in ways that provide the absolute and relative importance of the data.</i></p>	<p>PPD OFS</p>



Contributing Factor	Consensus Recommendation	Responsible Party
<p><u>Contributing Factor 43:</u> The PAIP expert report was originally drafted by Mr. Hale’s counsel and sent to the PAIP scientific expert for review and signature. Because of this, the PAIP expert report contained some inaccuracies that were sources of disagreement noted in the PPD OFS review. While these disagreements were unrelated to the blood test results that ultimately led to Mr. Hale’s exoneration, they provided an additional source of conflict and time delay as the DAO and Mr. Hale’s counsel attempted to resolve the dispute.</p> <p><u>Contributing Factor 44:</u> The Court of Common Pleas relied in part on the mistakes in the PAIP Expert Report to dismiss Mr. Hale’s petition claiming that the ABO reference test conclusively proves his innocence.</p> <p><u>Contributing Factor 45:</u> In September 2012, more than one year after the issuance of the OFS review that agreed that Mr. Hale was excluded as being a contributor of the biological evidence in several items of evidence, the DAO again moved to dismiss Mr. Hale’s petition on timing grounds. This suggested that the DAO was prioritizing conviction preservation and procedural finality over factual accuracy and actual innocence.</p>	<p><b><i>Recommendation 28: The DAO should conduct training for all attorneys, and the OFS should conduct training for all analysts, discussing the Hale case and its unintended consequences and the risk of cognitive and other biases. The training should also ask all participants for additional recommendations for change based on the wrongful conviction of Mr. Hale and its contributing factors.</i></b></p>	<p>DAO, PPD OFS</p>
<p><u>Contributing Factor 46:</u> After a new scientific hearing was ordered by the PA Superior Court, a DAO attorney drafted an internal memorandum in which he speculated on potential other scenarios that could have led to Mr. Hale being correctly identified as the perpetrator. Included among them was the theory that the victim had been incorrectly blood-typed at the hospital, meaning that Mr. Hale would have been the contributor of the B Antigens found in the relevant semen sample. This memo was entertained by the DAO as potential evidence of Mr. Hale’s guilt notwithstanding the existence of a separate test at the PPD Forensic Science Bureau that reached the same result at the blood typing of the victim at the hospital.</p>	<p><b><i>Recommendation 29: The DAO should ensure that its attorneys do not draft speculative memoranda hypothesizing about theories of guilt without evidence to support such theories.</i></b></p>	<p>DAO</p>





## Appendix C. Limitations of the SER

The PERT has identified [xx] contributing factors, leading to [xx] consensus recommendations for improvement to be implemented by the participating agencies. It is hoped that these recommendations will enhance the criminal justice system in Philadelphia. At the same time, it is important to acknowledge the limitations of the SER process.

First, the PERT's judgments of contributing factors and recommendations are based upon a data-driven analysis of the available documents and interviews with many of the individuals who participated in Mr. Hale's investigation, prosecution and appeals. While the Panel has reached conclusions leading to specific recommendations, these conclusions do not necessarily determine the objective "truth" of the events or their underlying causes. They are consensus products based on the data available to the PERT, and judgments about potential underlying factors that may - or may not - have played a role.

In this case, the data available were incomplete. The crimes for which Mr. Hale was convicted occurred almost 40 years ago. Much of the evidence gathered in his case was destroyed while the case was being appealed, and the trial files from both the DAO and Mr. Hale's attorney at trial were lost prior to the initiation of the PERT review.

The Quattrone Center was unable to contact and/or interview many of the participants in Mr. Hale's investigation, prosecution, defense, or appeals. This was for many different reasons, including the time since those events causing people to have retired, moved, and or passed away and individuals not replying to requests for interviews or declining to provide interviews. For those individuals who did provide interviews, the length of time between the events in question and the present day may have affected the individuals' ability to recall all facts related to the questions and events.

## Appendix D. Participants in the SER

### **Dana Bazelon**

*Philadelphia District Attorney's Office*

### **Marissa Bluestine**

*Quattrone Center for the Fair Administration of Justice*

### **Derek Brader**

*Dechert*

### **Bradley Bridge**

*Defender Association of Philadelphia*

### **Jules Epstein**

*Temple University Beasley School of Law*

### **Stephen Feiler**

*Administrative Office of the Pennsylvania Courts*

### **James Figorski**

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### **Michael Garvey**

*Philadelphia Police Department*

### **John Hollway**

*Quattrone Center for the Fair Administration of Justice*

### **Judy Leone**

*Dechert*

### **William Righter**

*Philadelphia Police Department*

### **Seema Saifee**

*Quattrone Center for the Fair Administration of Justice*

### **Jay Schleppenbach**

*Dechert*

### **The Hon. Zachary C. Shaffer**

*Court of Common Pleas First Judicial District of Pennsylvania*



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