The Peter L.
Zimroth Center
on the Administration
of Criminal Law
NYU SCHOOL OF LAW

Prosecutorial Misconduct in the Philadelphia District Attorney's Office

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Commonly Used Abbreviations

ADA: Assistant District Attorney

CIU: Conviction Integrity Unit (established by DA Larry Krasner)

CRU: Conviction Review Unit (established by DA R. Seth Williams)

DAO: Philadelphia District Attorney's Office

H-Binder: Homicide Binder

H-File: Homicide File

IA: Internal Affairs

PAS: Police Activity Sheet

PCRA: Post-Conviction Relief Act

PPD: Philadelphia Police Department

Acknowledgements

This project and report was made possible by the generous financial support of Vital Projects Fund, and we are grateful for their partnership.

The Zimroth Center would like to thank Research Scholar Patricia Cummings and former Research Scholar John Schatz for their assistance with research and in drafting the report.

We would also like to thank the many Zimroth student fellows who assisted with research, including Gaelin Bernstein, Maya Goldman, Ben Hoynes, Anaika Miller, Aadi Tolappa, and Shirley LaVarco.

We would also like to thank the staff at the Philadelphia District Attorney's Office who responded to and assisted in fulfilling our requests for information.

Graphic design work was done by Michael Bierman, and we thank him for helping bring the report to visual life.

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Introduction[1]

Prosecutors are unique actors in the criminal legal system. They wield an incredible amount of power and discretion. At the outset of a case, they are solely responsible for deciding whether to bring criminal charges and what charges to bring, which in turn influences the sentence a person will face, as well as whether that person will feel pressure to plead guilty to avoid harsh punishment. In short, prosecutors have powerful tools available to them, and different levers they can pull, to obtain a conviction.

On the other hand, prosecutors are not supposed to care only about winning convictions. As the Supreme Court has observed, prosecutors are not "ordinary part[ies] to a controversy"[2]—they are impartial sovereigns who must also ensure that "justice shall be done" in all their cases, even if justice means losing.[3] In other words, prosecutors are supposed to seek justice *above* convictions, because they are also "ministers of justice"[4] who have been charged with safeguarding defendants' rights by ensuring that they are treated fairly and given due process. Moreover, this obligation to pursue truth and justice does not end once a prosecutor obtains a conviction: as ministers of justice, prosecutors are also supposed to prevent and remedy wrongful convictions.[5]

In practice, these prosecutorial ideals have been criticized as ambiguous, unrealistic, and lacking in meaning, and legal commentators and academics have pointed out the myriad ways in which prosecutors have fallen short of this standard. For instance, one major critique is that the ideals of "doing justice" and being a "minister of justice" are little more than "pretty phrases"[6] that are vague and meaningless, and as a practical matter do not guide (or constrain) prosecutors. Another line of criticism focuses on prosecutors' cognitive biases which make it difficult, if not impossible, for them to fulfill their role as "ministers of justice," especially when they are readying cases for trial.[7] On this account, by the time of trial prosecutors are inclined to believe a defendant is guilty—after all, they (or their colleagues) have indicted the case and are ready to prove guilt beyond a reasonable doubt. When they are asked to perform their "minister of justice" duties by disclosing favorable information, prosecutors struggle to fairly evaluate whether information is or is not favorable to the defense. Finally, a separate line of criticism notes that, because of a longstanding lack of accountability within the profession, prosecutors have no incentive to abandon their commitment to winning and embrace their role as truth-seekers.[8] In sum, despite the Supreme Court's lofty pronouncements, it seems difficult for prosecutors to reconcile their desire to win with their obligation to be "impartial" ministers of justice in pursuit of the "truth."

This prosecutorial conundrum, *i.e.*, how to temper the desire to win with the obligation to seek truth and do justice, is not merely a theoretical issue. Rather, it cuts to the heart of the prosecutor's duties: although the prosecutor's job is increasingly

1. The information in the Introduction is taken from court findings and/or CIU conclusions regarding *Brady*, *Giglio*, and/or *Napue* violations. When courts and/or the CIU determined that these legal violations occurred, we have added additional facts for the reader to understand and assess the violation and the prosecutor's conduct.

2. Berger v. United States, 295 U.S. 78, 88 (1935).

3. *Id*.

4. American Bar Ass'n, Rule 3.8: Special Responsibilities of a Prosecutor-Comment.

5. *See id*.

6. *See, e.g.*, Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 Geo. J. Legal Ethics 1301 (1995-96); Jeffrey Bellin, *Theories of Prosecution*, 108 Cal. L. Rev. 1203 (Aug. 2020).

7. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science,* 47 Wm. & Mary L. Rev. 1587 (2006); Alafair S. Burke, *Brady's Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 Case W. Res. L. Rev. 575 (2007).

8. *See, e.g.*, Bennett L. Gershman, *The Prosecutor as 'Minister of Justice,'* N.Y. St. B.J. (May 1988); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?* 44 Vanderbilt L. Rev. 45 (1991); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?* 26 Fordham Urb. L.J. 607 (1999); Bennet L. Gershman, *"Hard Strikes and Foul Blows:" Berger v. United States 75 Years After*, 42 Lo. U. Chi. L.J. 177 (2010); Ellen S. Pogdor, *Bennett Gershman on the Prosecutor's Role as "Minister of Justice,"* 16 Ohio State J. Crim. L. 399 (2019).

multi-faceted, obtaining convictions, including by trying cases, remains a core job duty.[9] While there is nothing inherently wrong with winning convictions, winning for the sake of winning cannot, and should not, be the prosecutor's end all and be all. Rather, prosecutors must understand that their unique roles require more of them than a singular focus on their win-loss records, and they should not equate the mandate of "doing justice" with "winning convictions."

This Report, which focuses on criminal cases prosecuted by the Philadelphia District Attorney's Office from 1978 to 2021, illustrates the ways in which prosecutors have failed to move beyond the virtue of winning, and have neglected their role as truth-seeking, impartial ministers of justice. The cases in this Report were prosecuted over a roughly 45-year period, under different elected District Attorneys, and by different prosecutors, but they reveal certain common truths about how the Office approached its work. First, prosecutors saw themselves as advocates who represented victims and their families—not as impartial sovereigns whose goal was to do justice. Second, these prosecutors' foremost focus was on obtaining convictions—and not on ensuring truth or fairness. In pursuing convictions above all else, these prosecutors accepted police investigative conclusions as unfailingly accurate and assumed that the person who was arrested and charged must be guilty. In sum, the Office defined "doing justice" as "winning cases."[10]

The Culture of the Philadelphia District Attorney's Office

To understand the cases discussed in the Report, it is useful to understand the culture of the Philadelphia District Attorney's Office, which was in large part shaped by the political history of the city. In the 1960s and 1970s, as the nation increasingly favored punitive criminal legal policies in response to rising crime, the city of Philadelphia followed suit. Philadelphia Police Commissioner Frank Rizzo was known to respond to even minor unrest with "brute force," favoring the philosophy *spacco il capo*, or "break their heads," as the way to treat people accused of crimes.[11] Rizzo was up front about his policing strategy, telling the local news media, "You act properly, we act properly. You get tough, we get tougher. And that's the answer. I know of no other way to do it."[12]

Pursuant to this philosophy, he let the Philadelphia Police Department operate with "little accountability"[13] and fostered a culture that "the police could do no wrong,"[14] leading the United States Department of Justice to file a civil rights lawsuit against the PPD. When he was later elected mayor, Rizzo continued his tough on crime policies, which stoked racial division. Writing in 1979, the New York Times observed that Rizzo had polarized the city "along racial lines" and that he was a "one-issue Mayor" focused solely on "law and order."[15]

9. In making a descriptive claim about what prosecutors' offices do, we are not suggesting that obtaining convictions is *all* a prosecutor's office should do. Nor are we suggesting anything about how much prosecutors' offices should focus on obtaining convictions, as opposed to increasing offramps for people to avoid the criminal legal system, advocating for non-carceral responses whenever appropriate, and/or narrowing their office's criminal legal system footprint.

10. *See* Jonathan A. Rapping, "Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect," 51 Washburn L.J. 513, 559 (2012) (noting the tendency of prosecutors' offices to equate "the admonitional obligation to 'seek justice'…with obtaining convictions") (internal quotations omitted).

11. David Gambacorta and Barbara Laker, "Frank Rizzo Leaves a Legacy of Unchecked Police Brutality and Division in Philadelphia," Philadelphia Inquirer, June 3, 2020.

12. Transcript, "Into the Philadelphia D.A.'s Office," July 16, 2020.

13. Gambacorta and Laker, "Frank Rizzo."

14. *Id.*

15. Edward Schumacher, "For Mayor Frank Rizzo, One Issue Has Been Enough," New York Times, Aug. 19, 1979.

The District Attorney's Office, operating within this ecosystem, increasingly saw it's role as helping to enforce law and order. Over time, this meant embracing harsher punishments, and in particular the death penalty. The Office began to increasingly recommend the death penalty in murder cases[16]—a practice that exploded under District Attorney **Lynne Abraham**, who Mayor Rizzo described as "one tough cookie."[17] Media publications gave Abraham the nicknames "America's Deadliest DA" and "Queen of Death" because of her public commitment to the death penalty, which at one point led Philadelphia to have the third-largest death row population behind Los Angeles and Harris Counties, even though the latter two counties were much larger and had higher murder rates.[18]

DA Abraham was open about her "passionate" belief that the death penalty was "manifestly correct."[19] According to **DA Abraham**, the death penalty was not about deterrence—it was about the "feeling of control."[20] Describing the people her Office sentenced to death, she said that "[n]o one will shed a tear. Prison is too good for them. They don't deserve to live."[21] Elsewhere, she expressed her view that "she represent[ed] the victim and the family,"[22] and that that the death penalty was the ultimate vindication of the rights of the victim. When she retired from office, **Abraham** was (and remains) the longest-serving DA in the history of the Office. All told, she oversaw 108 death penalty sentences.[23] Many of those cases were handled by **ADA Roger King**, who won more death penalty cases than any other prosecutor in the Office and who seemed to take special pride in this fact: he kept photographs in his office of every person he sentenced to death, with the word "death" written across each one.[24] As discussed in the Case Appendix, several of **ADA King's** convictions were later overturned due to prosecutorial misconduct.

Abraham's successor, **R. Seth Williams**, ran on a platform of reform, observing that "crime prevention is more important than crime prosecution," and that "[w]e need to be smarter on crime instead of just talking tough."[25] But once elected, he seemed to back away from these positions. For instance, when Governor Tom Wolf issued a temporary stay on death penalty executions, citing race discrimination, poor defense representation, high costs, and the threat of executing innocent persons, **DA Williams** filed a lawsuit challenging the moratorium, calling it "flagrantly unconstitutional."[26] His legal claims were unanimously rejected by the Pennsylvania Supreme Court.[27]

After other district attorneys began to use DNA to exonerate innocent people, **DA Williams** announced the creation of the Conviction Review Unit ("CRU") to investigate wrongful convictions, declaring that Philadelphians "want us to charge the right people with the right crimes—nothing more and nothing less."[28] He claimed he wanted to follow in Dallas and Brooklyn's footsteps, where district attorneys in those cities created CRUs that were becoming national models. However, he appointed longtime homicide prosecutor **ADA Mark Gilson** (who prosecuted cases that were later found to be wrongful convictions)[29] to lead the unit, rather than an attorney with defense experience, and he structured the CRU so that it would be "working closely with"[30] the Law Division's Post Conviction Relief Unit, *i.e.*, the unit that was primarily responsible for *defending* convictions. Not surprisingly, two-and-a-half years into its creation, the CRU had not reversed a single case and had only

16. Sharon Pruitt-Young, "Before Krasner: The Wild and Wooly Saga of Philadelphia District Attorneys," Apr. 20, 2021.

17. Tina Rosenberg, "The Deadliest D.A.," New York Times, July 16, 1995.

18. *Id*.

19. *Id*.

20. *Id*.

21. *Id*.

22. *Id*.

23. "Lynne Abraham," Wikipedia.

24. Samantha Melamed, "King of Death Row," Philadelphia Inquirer, Nov. 11, 2021.

25. Josie Duffy Rice, "A 'Reformer' Who Reformed Nothing," Slate, Mar. 23, 2017.

26. *Id*.

27. *Comm. v. Williams*, 634 Pa. 290 (Pa. 2015).

28. Mensah M. Dean, "D.A. Creates New Unit to Review Homicide Convictions," Philadelphia Inquirer, Apr. 16, 2014.

29. In a recent CIU exoneration of Eddie Ramirez, which occurred outside the period covered by the Report, Gilson attacked the CIU and DA Krasner, calling the exoneration "jailbreak by affidavit." He also characterized the CIU's work as tainted by the DA's agenda to simply get as many people out of prison as possible, even though they were guilty, as he maintained Ramirez was. *See* Chris Palmer, "A Philly Man Will Be Freed From Prison After 27 Years as His Murder Case is Officially Tossed Out," Philadelphia Inquirer, Dec. 1, 2023.

30. *Id*.

one employee reviewing cases.[31] Nearly three years after its creation, DA Williams revamped the CRU, increasing staffing to four employees and removing the CRU from the Law Division.[32]

During his tenure, **DA Williams** was also dismissive of judicial findings of prosecutorial misconduct and claims of innocence. For instance, in Terry Williams' case, after a Philadelphia Court of Common pleas judge wrote a detailed opinion and appendix describing prosecutorial misconduct committed by **ADA Andrea Foulkes** in two separate murder trials, **DA Williams** issued a combative statement attacking both the court and Williams and claiming that **ADA Foulkes** had been "unfairly victimized."[33] In Jimmy Dennis' case, after the federal district court issued an opinion that harshly criticized the Commonwealth for suppressing favorable information, and concluded that Dennis was likely innocent, **DA Williams** expressed disappointment that the federal court had accepted the defense's "slanted factual allegations" and had bought Dennis' "newly concocted alibi defense" (which, incidentally, was not new and had been raised at trial).[34] When the Third Circuit sitting *en banc* vacated its earlier three-judge panel ruling and granted Dennis habeas relief, **DA Williams** stated that the Office would review its options in light of the "compelling dissent by four federal judges, who concluded that the evidence against Dennis remains 'strong.'"[35]

In short, various elected DAs actively shaped the Office into a place where "doing justice" meant winning convictions. The Office's alignment with victims also forced them into a zero-sum, high stakes game: a win meant that victims and their families were vindicated and "dangerous" criminals were locked up, while a loss meant that victims and their families were left to suffer while the "bad guys" remained free. Perhaps not surprisingly, then, the Office developed a reputation in some quarters for aggressively playing this game. Prosecutors viewed trial as "a game to win,"[36] and they adopted a distorted view of their constitutional and ethical obligations because of their collective focus on pursuing and defending convictions at all costs.

The Philadelphia District Attorney's Office Today

The Philadelphia District Attorney's Office is the largest prosecutor's office in Pennsylvania and has over 600 employees, including lawyers, detectives, and support staff.[37] Larry Krasner is the current Philadelphia District Attorney. DA Krasner was elected to his first term in office in 2017, and he ran on a platform that included ending mass incarceration; addressing and fixing race disparities in the criminal legal system; and holding police accountable for misconduct. In a 2021 reelection contest that many viewed as a referendum on his policies, DA Krasner comfortably defeated Carlos Vega—a former ADA who was backed by law enforcement and received one of the largest expenditures from the city's police union in more than a decade.[38]

31. Opinion, "Inquirer Editorial: DA Seth Williams Seems More Interested in Self-Promotion Than Results," Philadelphia Inquirer, Nov. 22, 2016.

32. Press Release, "Philadelphia District Attorney R. Seth Williams Announces Enhanced Conviction Review Unit to Investigate and Review Innocence Claims," Philadelphia District Attorney's Office, Feb. 8, 2017; Bobby Allyn, "Philly DA Restructures Unit Investigating Inmate Claims of Innocence," WHYY.

33. Philadelphia DAO, "Statement on Terrance Williams Hearing," Sept. 28, 2012.

34. David Love, "How a Philadelphia DA Who was Elected to Reform Criminal Justice is Keeping More Innocent Black Men in Jail," Atlanta Black Star, Sept. 26, 2016.

35. Marc Bookman, "Three Murders in Philadelphia," Slate, May 12, 2017.

36. Melamed, "King of Death Row."

37. Philadelphia DAO, "About the Office,".

38. Akela Lacy and Alice Speri, "Philadelphia District Attorney Larry Krasner Trounces Police-Backed Primary Challenger," The Intercept, May 18, 2021.

The Conviction Integrity Unit

The Report builds in part on the work done by the Office's current Conviction Integrity Unit ("CIU"), which DA Krasner established in 2018. The CIU is not a continuation of the Conviction Review Unit that was established by former DA R. Seth Williams in 2014 and then revamped in 2017. When DA Krasner established the CIU, he hired Patricia Cummings as its supervisor. Cummings is a longtime leader in the innocence movement who also headed the CIU in the Dallas County District Attorney's Office. Cummings headed the Philadelphia CIU from 2018 to 2021. The CIU's primary goal is to identify and undo wrongful convictions of people who are innocent and/or have been deprived of their constitutional right to a fair trial.[39] Since its inception in 2018 through 2021, the CIU has reviewed and investigated hundreds of Philadelphia homicides and other violent crimes involving allegations of prosecutorial misconduct. After identifying cases with meritorious claims, the CIU litigated those cases in both federal and state court, which led to the exoneration of **24 people** and to the overturning of **10 wrongful convictions**.[40]

Whenever possible, the CIU files publicly available pleadings in support of their requests to vacate convictions and/or dismiss criminal charges. These pleadings usually detail the CIU's investigation, which can include allegations raised by the convicted person that their trial was tainted by police and/or prosecutorial misconduct, as well as any independent findings that the CIU separately uncovers. The pleadings also detail the CIU's conclusions regarding whether the convicted person's constitutional rights were violated and whether, as a result, the Office no longer has confidence in the conviction or the underlying charges. Notably, the CIU's work is not limited to exonerations. While they frequently move to vacate a conviction or to dismiss charges, they also negotiate pleas to lesser charges to more adequately reflect a person's culpability.

In some cases, the CIU's pleadings have identified the trial and post-conviction prosecutors who worked on a prosecution that led to a wrongful conviction. However, because the CIU's primary focus is on remedying wrongful convictions and freeing innocent people from prison, its pleadings are not concerned with prosecutorial misconduct *per se* and are instead focused on the misconduct insofar as it supports the strongest legal and factual arguments for why a conviction should be vacated. Accordingly, the CIU does not always detail the misconduct that occurred throughout the life cycle of a case, such as in post-conviction proceedings. Nor does it always as a matter of course identify the prosecutors who worked on these cases.

The Law Division

The Law Division handles appeals and other post-conviction challenges to convictions and sentences in both state and federal court. In general, Law Division prosecutors defend convictions, which sometimes means that they are defending trial prosecutors' conduct and decisions. Law Division prosecutors tend to specialize in appellate and post-conviction work and generally do not try cases. If a convicted person files a state habeas petition pursuant to the Post-Conviction Review Act, Law Division prosecutors will handle these petitions.

The Law Division's Federal Litigation Unit ("FLU") represents the Commonwealth in appeals that are filed in federal court, including federal habeas petitions. In March 2021, the Office hired an experienced federal habeas litigator, Matthew Stiegler, as Supervisor of the FLU.[41] ADA Stiegler headed the FLU for two years until he stepped down in February 2023. During his tenure, the FLU stopped reflexively defending convictions in favor of individually reviewing each case to decide whether to defend it or concede relief[42] The FLU ultimately agreed to two exonerations and conceded habeas relief in 21 other cases based on a variety of legal grounds other than *Brady* or *Napue* violations.[43]

The Philadelphia DAO: Historical Discovery Policies and Practices

While investigating wrongful convictions, the CIU became aware of several old discovery policies and practices employed by Office prosecutors that appeared to violate *Brady* and *Giglio*. While these policies and practices are no longer followed within the Office, they were not formally documented,

39. See Philadelphia DAO, "Overturning Convictions—and an Era: Conviction Integrity Unit Report January 2018-June 2021," at 1, available at https://github.com/phillydao/phillydao-public-data/blob/master/docs/reports/Philadelphia%20CIU%20Report%202018%20-%202021.pdf?utm_source=Main+Media+List&utm_campaign=a50ed89cd6-EMAIL_CAMPAIGN_2020_07_22_01_40_COPY_01&utm_medium=email&utm_term=0_3be4269e47-a50ed89cd6- (last visited July 27, 2023).

40. The National Registry of Exonerations defines an exoneration as occurring when a person who has been convicted of a crime is officially cleared after new evidence of innocence becomes available. *See* National Registry of Exonerations, "Glossary." Neither the Pennsylvania nor the United States Supreme Court have defined "actual innocence" or recognized it as a claim upon which a petitioner can obtain post-conviction relief.

41. ADA Stiegler was rehired in 2023 as senior adviser to DA Krasner. In his new role, he will build the Office's Brady Unit, which will train prosecutors and provide guidance on their disclosure obligations.

42. Stiegler, Matthew @MatthewStiegler, https://twitter.com/MatthewStiegler/status/1629878877622353923, Feb. 26, 2023.

43. *Id.* Because these legal grounds tend not to implicate prosecutorial misconduct, given that they are not *Brady* or *Mooney-Napue* claims, there tended to be less internal pushback against FLU's decisions to concede relief. As part of ADA Stiegler's work, the FLU also recommitted itself to citing and recognizing adverse case law and attempting to distinguish its legal and factual arguments within the bounds of precedent.

which makes it difficult to ascertain how long they were in place. As discussed below, these historical policies and practices largely reflected the culture of the Office, in that they prioritized winning over justice. They also violated, and/or were inconsistent with, *Brady* and *Giglio*, because they encouraged prosecutors *not* to disclose favorable information, including impeachment information, or they permitted prosecutors *not* to search police investigative files for favorable information, despite their constitutional obligation to do so. These historical policies are discussed in detail below.

(Not) Documenting Witness Falsehoods

For some unknown period, the Office's Homicide Unit endorsed a policy of not documenting or disclosing a witness' initial statements whenever the police and/or prosecutor felt that the witness was not being truthful. The CIU and Law Division learned about this policy when they litigated Lavar Brown's PCRA petition, which cited an email from former **Homicide Deputy Chief ADA Ed Cameron** detailing this policy. In the email, **ADA Cameron** stated that "almost all cooperaters [sic] and most civilian witnesses don't tell the truth at first;" that the "better detectives don't take notes or write down the obvious lies" and instead only write down statements once the witnesses were "ready" to be truthful; and that the Homicide Unit "never advise[s] defense attorneys about this" practice.[44] In other words, **ADA Cameron** described a policy where police and prosecutors purposefully avoided documenting or disclosing witness falsehoods—even though the prosecutor's constitutional and ethical obligations demanded that they do exactly the opposite—and purposefully declined to notify defense counsel of this practice.

(Not) Disclosing Cooperation History

In the same email, **ADA Cameron** described the practice of selectively disclosing a witness' cooperation history, which were also endorsed by the Office's Homicide Unit. **ADA Cameron** wrote that when a witness cooperated or provided information in a case, the Homicide Unit "routinely"[45] redacted information about other cases where that witness cooperated. He also said the Homicide Unit "frequently oppose[d] requests for information"[46] about a witness' cooperation history, because he believed the "discovery rules" did not require this disclosure. Finally, he noted that the Homicide Unit "advise[d] detectives to take separate [sic] statements on other cases" where the cooperator provided information, ostensibly so that the prosecution could make siloed disclosures that would not clue defense counsel in to the full extent of a witness' history of cooperation in other matters.[47] Once again, **ADA Cameron** endorsed a policy at odds with what *Brady* and *Giglio* required—namely, the disclosure of information affecting or impacting a witness' credibility or bias, including their history of cooperating with law enforcement and the benefits they might have received in exchange.

(Not) Reviewing the H-File

For some unknown period, the Office had a practice whereby trial prosecutors relied on the police to provide them with relevant information, including investigation documents, needed to prepare for trial. Pursuant to this practice, homicide detectives would review the H-File—which is the investigation file that is created and maintained by the police when they investigate a homicide—and then select a smaller universe of documents from the H-File to give to the trial prosecutor. This smaller subset of documents was commonly referred to as the H-Binder. Trial prosecutors would then rely on the H-Binder to prepare for trial.

Pursuant to this policy, trial prosecutors did not themselves review the H-File or otherwise cross-check the documents that the police provided them. As a result, prosecutors often did not know what they did not know—and this was evident in many of the exonerations in the Case Appendix. For instance, because prosecutors often did not personally review the H-File themselves, they did not know whether the police investigated alternate suspects; whether there was information that *did not* support the defendant's guilt; or whether the police undertook a thorough investigation before focusing on the defendant who was ultimately charged. This practice also conflicted with the prosecution's obligation under *Brady* to find and disclose favorable information, including information that might be known only to the police.

(Not) Disclosing Police Activity Sheets

For some unknown period, the Office used to routinely withhold information found in Police Activity Sheets ("PAS"). The Philadelphia Police Department uses PAS to, among other things, document the investigative steps taken in an investigation, and the PAS maintained within the H-File. The PAS often contained

44. App. to Supplement and Amendment to Successor Pet. for Writ of Habeas Corpus and For Collateral Relief from Criminal Conviction, Ex. 37, *Comm. v. Brown*, No., CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. June 28, 2021).

45. *Id.*

46. *Id.*

47. *Id.*

additional details and information that were not always found in other police documents, including formal witness statements or investigative memoranda. In fact, the PAS were sometimes the only record of what a witness said, because the police did not always formally document a witness' statement.

The CIU learned that the Office used to routinely withhold PAS in the discovery process, and that when defense counsel learned about this policy and practice and began to make specific requests for the PAS, the Office initially resisted disclosure and sought judicial review to determine if they had to be disclosed. As noted in the Case Appendix, several CIU exonerations and negotiated pleas stemmed from favorable information in the PAS not being disclosed to defense counsel, including the prosecutions of Curtis Crosland, Jehmar Gladden, and Andrew Swainson.

(Not) Reviewing Police Officer Disciplinary Files

For some unknown period, the Office routinely failed to review or disclose police disciplinary records. Pursuant to this policy, the Office notified defense counsel that if they wanted information on a law enforcement witness, they should subpoena the officer's files themselves. This notification was given to defense counsel in Rod Matthews' case, where the prosecution never reviewed the IA files for its police officer witnesses and thus never learned that they gave statements about Matthews' arrest to IA investigators that conflicted with their eventual trial testimony. This blanket refusal to search police files also conflicts with the prosecutor's obligation to disclose impeachment information, as well as the obligation to find and disclose favorable information known to or in the possession of the police. This obligation stems from a United States Supreme Court case, *Kyles v. Whitney*, which is discussed in greater detail in the Legal Background Section below.

New Discovery Policies

The Office's current discovery policy instructs prosecutors to disclose information that is exculpatory, impeaching, or mitigating, without considering whether the information is material.[48] This policy also states that exculpatory information must be disclosed regardless of whether the information was oral or not otherwise recorded, and regardless of whether the criminal case is resolved via plea. Finally, the policy makes clear that prosecutors have a continuing duty to find and disclose favorable information, and that this duty continues through the post-conviction phase of a case. While the current discovery policy endorses open-file discovery as a way to prevent prosecutors from withholding information by determining that it is not "material," it also acknowledges that it presents logistical challenges—namely, the ability to electronically store case material for effective disclosure. Instead, the Office pledges a commitment to implementing open-file discovery as soon as practicable.[49]

The Office has also created a database to ensure that they comply with disclosure obligations regarding law enforcement witnesses. The Police Misconduct Database ("PMD") is an internal database maintained by the CIU and available to all prosecutors in the DAO to ensure that they comply with their constitutional obligation to find and disclose impeachment information about law enforcement witnesses.[50] As part of this obligation, the DAO asks the Philadelphia Police Department to provide IA reports about a variety of offenses committed by officers, which are then documented in the PMD.[51] The PMD is not a public database, and details about which officers are included are not made public.[52]

48. Philadelphia District Attorney's Office, "Philadelphia DAO Policies on: (1) Disclosure of Exculpatory, Impeachment, or Mitigating Information, (2) Open-File Discovery," Eff. Oct. 1, 2020.

49. The Law Division has managed to adopt open file discovery and implement it, despite these practical impediments.

50. *See* Philadelphia DAO Press Release, "FOP Lawsuit Over Police Misconduct Disclosures Dismissed for Third Time," June 22, 2023.

51. *See* Chris Palmer, "The FOP Lost its Court Battle Against the DA Office's Alleged 'Do Not Call List' of Cops," Philadelphia Inquirer, June 22, 2023.

52. *Id*.

Case Research: Scope and Methodology

The DAO granted the Peter L. Zimroth Center on the Administration of Criminal Law at NYU School of Law (the "Zimroth Center") access to Office case files to conduct its research. In granting access to these files, the Office's goal was to increase transparency about how it handled past prosecutions. The Office also understood that the Report would, whenever possible, identify the trial and post-conviction prosecutors who worked on these cases, *i.e.*, cases where the CRU, the CIU, and/or a court found that a *Brady/Giglio/Napue* violation occurred. Accordingly, the Zimroth Center sought to identify the prosecutors who tried these cases and defended these cases in post-conviction proceedings, and their names have been bolded throughout the Report. To be clear, merely because the Report bolds the name of a prosecutor who tried one of these cases or defended one of these cases in post-conviction proceedings does not mean that that prosecutor engaged in prosecutorial misconduct as defined in the Report.[53] Rather, the names are included for context and completeness, and readers should review the Case Appendix and the individual case descriptions to understand each prosecutor's role. In certain instances, the Zimroth Center was not able to access the DAO trial files to identify the trial prosecutor, and we note whenever this occurred.

Both the Office and the Zimroth Center felt it was important to identify prosecutors for several reasons. First, prosecutors are rarely identified in judicial opinions or legal filings,[54] which makes it difficult for the public to assess how the Office obtains and defends convictions. Second, in cases where the CRU, the CIU, and/or a court found prosecutorial misconduct as defined in the Report, the failure to identify trial prosecutors can contribute to the public perception that they are not held accountable for their actions, and this can in turn erode community trust in the Office's work. Third, post-conviction prosecutors played a role in how the Office addressed (or did not address) prosecutorial misconduct as defined in the Report, including by denying the existence of *Brady/Giglio/Napue* violations that were later found by the CRU, the CIU, and/or a court; by applying legal precedent and/or interpreting facts in a manner that courts later found to be unreasonable; or by arguing that the Office should be permitted to retry a defendant after a conviction was vacated due to prosecutorial misconduct, because Pennsylvania's Double Jeopardy provision only penalized prosecutors who intentionally committed misconduct. Fourth, identifying the prosecutors in these cases where the CRU, the CIU, and/or a court found prosecutorial misconduct as defined in the Report will help the Office determine what policy solutions are necessary to improve its work, including whether to audit or scrutinize cases handled by these prosecutors.

The Report identifies and summarizes casing involving prosecutorial misconduct, which is a term that often refers to a broad range of prosecutorial actions.[55] In our Report, we define "prosecutorial misconduct" as CIU investigative findings and/or judicial conclusions that prosecutors (i) withheld favorable information from the defense, and/or (ii) presented and/or failed to correct false evidence, including false testimony, at trial. We identified these cases from among the following case categories:

CIU Cases: This includes cases investigated by the CIU established by DA Larry Krasner. These cases include wrongful convictions that resulted in exonerations, as well as negotiated pleas. We included all cases that were investigated while Patricia Cummings was the CIU supervisor, even if the exoneration or other case resolution occurred after she left the Office;

CRU Cases: This includes cases litigated by the Conviction Review Unit ("CRU") established by DA R. Seth Williams;

State Post-Conviction Cases: This includes successful post-conviction challenges to convictions or aspects of a sentence imposed, including petitions filed pursuant to the Pennsylvania Post-Conviction Relief Act, petitions filed on direct appeal, and petitions seeking to prevent retrial based on Double Jeopardy grounds;

Federal Post-Conviction Cases: This includes successful post-conviction petitions seeking habeas corpus relief in federal courts, where the Law Division's Federal Litigation Unit represented the Commonwealth in these proceedings. These cases were initially litigated as PCRA petitions in state court, which denied relief, and at least one case involves a finding that a convicted person's misconduct allegations were plausible;

Retrial Acquittals: This includes cases that were tried by the Office multiple times and resulted in at least one conviction during the life cycle of the case before a jury acquittal; and

"Immaterial" Cases: This includes post-conviction challenges litigated in state and federal court, where courts found (i) favorable information that (ii) was suppressed but nonetheless sustained the conviction because the favorable information was not material to the outcome of the case.

53. *See* Report, supra at 9 for the definition of "prosecutorial misconduct."

54. *See, e.g.*, Adam M. Gershowitz, "Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct," 42 U.C. Davis L. Rev. 1059 (2009) (noting that courts, even when they reverse convictions for serious misconduct, tend not to identify prosecutors, and citing scholarship observing this phenomenon).

55. *See, e.g.*, Quattrone Center on the Fair Administration of Justice, *Hidden Hazards: Prosecutorial Misconduct Claims in Pennsylvania, 2000-2016* at 10 (2022); Kathleen M., Ridolfi, Maurice Possley, Northern California Innocence Project, "Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009" (2010), available at (last visited July 27, 2023); Bennett L. Gershman, "Mental Culpability and Prosecutorial Misconduct," 26 Am. J. Crim. L. 121 (1998).

We included cases these cases because we see a difference between the prosecutor's pretrial obligation to disclose favorable information and an appellate court's post-conviction review of whether any given failure to disclose favorable information was serious enough to warrant a new trial. By including these cases, we are deliberately taking an expansive understanding of the prosecution's pretrial disclosure obligations—as opposed to focusing on what they can withhold because of their own belief that the information is not material.[56] We also see a meaningful distinction between a legal conclusion that an error is harmless and the idea that such conduct is nonetheless inconsistent with the Office's expectations for how trial prosecutors should approach their disclosure obligations.

These different case categories also illustrate the challenges convicted persons face when seeking relief in the absence of a functioning CIU. For the most part, CIU cases were litigated in a largely non-adversarial manner, usually following an investigation and the provision of open-file discovery to defense counsel. In contrast, when convicted persons brought claims in state and federal post-conviction cases, the Law Division handled these cases and, until recently, approached them in an adversarial manner, which often led to years of delay and opposition from the Office before relief was ultimately granted.

Lastly, we imposed some limitations on identifying and reviewing cases for inclusion in the Report. In searching for cases in the state and federal post-conviction categories, we reviewed legal databases including LexisNexis and Westlaw. Our initial searches yielded a substantial number of cases where prosecutorial misconduct was alleged, but because the case was dismissed on various procedural grounds, the allegations were not substantively addressed. We believe that these cases merit further analysis. However, given the large volume of these cases, and the fact that that each case would have required something akin to a full CIU investigation—which was beyond the scope of our project—we did not include these cases in the Report.

Legal Background: Relevant Federal and State Case Law

The Case Appendix largely deals with findings and conclusions that the Office (i) relied on false evidence to obtain a conviction and/or failed to correct false evidence at trial, and (ii) violated its constitutional and ethical obligations to disclose favorable information, including impeachment information, to defense counsel. Some of the cases in the Case Appendix are also the product of Pennsylvania state law, which permits the prosecution to admit a witness' prior inconsistent statement when the witness recants or otherwise disavows it when called to testify.

To provide context for the cases summarized in the Report, we have included a short summary of the relevant federal and state law that governs the prosecution's obligations regarding false evidence and the disclosure of favorable information.

The Duty to Refrain From Using False Evidence: *Mooney* and *Napue*

A minority of the Report's cases pertain to the prosecution's use of false evidence, including false testimony, to obtain a conviction. The prohibition on the use of false evidence was developed in a series of cases that dealt with prosecution witnesses who gave false testimony. In *Mooney v. Hollohan*, the Supreme Court recognized a prohibition on the prosecution's knowing use of false testimony to obtain a conviction. The *Mooney* Court held

56. *See, e.g.*, Janet C. Hoeffel and Stephen I. Singer, *Activating a Brady Pretrial Duty to Disclose Favorable Inforamtion: From the Mouths of Supreme Court Justices to Practice,* 38 N.Y.U. Rev. of L. and Social Change 467 (2015); Ellen Yaroshefsky, "Why do Brady Violations Happen?: Cognitive Bias and Beyond," The Champion (May 2013).

that the prosecution's use of false testimony was a "deliberate deception of court and jury" and was "inconsistent with the rudimentary demands of justice..."[57]

The Court subsequently imposed a duty on the prosecution to correct false and misleading testimony. In *Alcorta v. Texas*, it held that prosecutors had a duty to refrain from soliciting misleading testimony and to correct such testimony if it occurs.[58] In *Alcorta,* the prosecutor elicited testimony from a key prosecution witness that fostered a false impression about the nature of the relationship between the witness and the victim. Although the testimony was not false, it was still misleading, and this violated the defendant's right to due process. Then, in *Napue v. Illinois,* the Court held that prosecutors have a duty to correct false testimony, even when the falsehood relates solely to impeachment of a witness and not the central issue of the defendant's guilt or innocence.[59]

In *Mesarosh v. United States* and *Giglio v. United States*, the Court made clear that the prosecutor need not have personal knowledge of the falsehood, and that the presentation of such false testimony still violates due process in the absence of the prosecution's personal knowledge of the falsity.[60] In *Mesarosh*, the prosecutor unknowingly presented false testimony at trial, but the Court still granted the defendant a new trial, because "the dignity of the United States Government" did not "permit the conviction of any person on tainted testimony."[61] In *Giglio*, the prosecution presented testimony from a key cooperating witness who lied about whether he was promised any benefits in exchange for his testimony. The prosecutor did not know that the witness had been promised leniency and as such did not correct the witness' testimony. However, the Court still found a due process violation despite the prosecution's lack of personal knowledge of the falsehood.

Lastly, defendants who raise a *Mooney-Napue* claim must show that the false or misleading testimony was material to their trial. However, this materiality standard is not identical to the one used to assess *Brady* violations. In contrast, the *Mooney-Napue* materiality standard is easier to meet: to establish materiality, a person must show a "*reasonable likelihood* that the false testimony could have affected the judgment of the jury."[62] The rationale for this more lenient standard is that the use of false testimony cuts to the heart of the trial, because it "involves a corruption of the truth-seeking function of the trial process."[63]

The Duty to Disclose Favorable Information: *Brady v. Maryland*

The majority of cases in the Report deal with so-called "*Brady* violations." In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[64] Put differently, a prosecutor commits a *Brady* violation when she (i) suppresses (ii) favorable information that is (iii) material to guilt or punishment.

At its core, *Brady* focuses on the fairness of the trial. The Court created the *Brady* rule because of its belief that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[65] It also reasoned that this disclosure obligation was necessary because the prosecution should not be the "architect of a proceeding that does not comport with standards of justice."[66] The *Brady* obligation is notable because it requires prosecutors to assist the defense in making its case and thus "represents a limited departure from a pure adversary model."[67]

In subsequent cases, the Supreme Court has defined the contours of the prosecution's *Brady* obligation. For instance, in *Giglio v. United States,* the Court held that *Brady* covers not just information that tends to exculpate the accused or point to another perpetrator, but also impeachment information that casts doubt on the accuracy or reliability of a witness or

57. *Mooney v. Hollohan*, 294, 103, 110-12 (1935).
58. *Alcorta v. Texas*, 355 U.S. 28 (1957).
59. *Napue v. Illinois*, 360 U.S. 264 (1959).
60. *Mesarosh v. United States*, 351 U.S. 1 (1956); *Giglio v. United States*, 405 U.S. 150 (1972).
61. *Mesarosh*, 351 U.S. at 9.
62. *United States v. Agurs*, 427 U.S. 97, 103 (1976)(emphasis supplied).
63. *Id.*
64. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
65. *Brady*, 373 at 87.
66. *Id.* at 88.
67. *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

witnesses. Impeachment information can be especially important, because in some instances the reliability of a witness may be determinative of a defendant's guilt or innocence.[68] In *Kyles v. Whitley,* the Court further clarified that the prosecution has a duty to learn of and disclose all favorable, material information "known to others acting on the government's behalf in the case, including the police,"[69] because they are considered part of the prosecution team.

In a series of rulings from 1976 to 2009, the Court clarified *Brady*'s requirement that favorable information also be "material." The first ruling, *United States v. Agurs*, held that suppressed information is "material" when it creates reasonable doubt that did not otherwise exist or creates a reasonable probability of a different outcome.[70] In *United States v. Bagley,* the Supreme Court clarified that a "reasonable probability" of a different outcome exists when the prosecution's suppression of evidence "undermines confidence in the outcome of the trial."[71] In 1995, the court decided *Kyles v. Whitley,* where it held that information is material if it "put[s] the whole case in such a different light as to undermine confidence in the verdict."[72] In *Strickler v. Greene,* the Court held that the key question in assessing the "materiality" of undisclosed information is whether, in the absence of the suppressed information, a defendant received a trial resulting in a verdict worthy of confidence.[73] In *Cone v. Bell,* the court elaborated that if the undisclosed information would affect "at least one juror,"[74] then this was sufficient to undermine confidence in the outcome of a trial.

The Supreme Court has also cautioned that, in assessing whether favorable information is material, the inquiry is not merely a straightforward balancing or "sufficiency of the evidence" test. That is, courts are not supposed to weigh the undisclosed favorable information against the inculpatory information that was disclosed at trial and then ask if the balance of the evidence is nonetheless sufficient to support a conviction, even after considering the newly disclosed information.[75] Rather, the inquiry is a "holistic" one that focuses on whether, in light of the undisclosed information, the verdict was worthy of confidence.[76]

Finally, both the Pennsylvania Supreme Court and the Third Circuit have held that, in assessing whether favorable information is material, there is no requirement that the information also be admissible at trial. In *Commonwealth v. Willis*, the Pennsylvania Supreme Court held that "admissibility at trial is not a prerequisite to a determination of materiality under *Brady,*" because the "touchstone of materiality" is whether, had the information been disclosed to the defense, the result of the trial would have been different.[77] Likewise, in *Dennis v. Sec'y Penn. Dep't of Corr.*, the Third Circuit held that there is no admissibility requirement under *Brady*, and that imposing one would "not comport with" the long line of United States Supreme Court case law recognizing that impeachment material falls within *Brady*'s purview without any consideration of whether it would be admissible.[78]

The Tension Between Appellate Standards and Prospective Disclosure Obligations

While *Brady* sought to ensure fairness and justice in criminal trials, some commentators have criticized it for actually undermining these goals.[79] One of the most pointed criticisms is that *Brady,* which laid out the *appellate*, or post-conviction, standard of review for deciding when to grant a new trial, has wrongly been interpreted as establishing the *pretrial* standard that governs the prosecutor's obligation to disclose favorable information. In other words, the problem with using *Brady*'s appellate standard in the pretrial context is that it invites prosecutors to withhold favorable information, so long as they can come up with arguments for why the information is not material, and it does not encourage them to take a liberal or expansive view of their constitutional disclosure obligations.

68. *Giglio v. United States*, 405 U.S. 150, 154 (1972). *See also United States v. Starusko*, 729 F.23d 256, 260 (3d Cir. 1984) (information that alters the jury's judgment of the credibility of a crucial prosecution witness is favorable evidence).

69. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

70. *United States v. Agurs,* 427 U.S. 97, 112-13 (1976).

71. *United States. v. Bagley*, 473 U.S. 667, 678 (1985).

72. *Kyles*, 514 U.S. at 434-35.

73. *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999).

74. *Cone v. Bell*, 556 U.S. 449, 452 (2009).

75. *Kyles*, 514 U.S. at 434-35.

76. *Dennis v. Sec'y Pa. Dep't of Corr.*, 834 F.3d at 303.

77. *Comm. v. Willis*, 616 Pa. 48, 84 (Pa. 2012).

78. *Dennis v. Sec'y Pa. Dep't of Corr.*, 834 F.3d at 308-9.

79. *See, e.g.,* Daniel Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533 (2010); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531 (2007).

Indeed, many prosecutors have interpreted *Brady* as allowing them to withhold favorable information, so long as they can come up with an argument that the information is not material. An example of this approach to *Brady* is seen in the Philadelphia DAO's 2021 Continuing Legal Education ("CLE") training on a prosecutor's *Brady* obligations, which was hosted by the Law Division. The CLE training materials did not instruct Office prosecutors to broadly interpret their obligations by disclosing *all* favorable information before trial. Nor did it distinguish between the appellate and pretrial standards for disclosure. Instead, the materials taught that information "must be" (i) favorable *and* (ii) material in order to qualify as *Brady* information.[80] Moreover, the CLE materials instructed ADAs that evidence "may not be material if it contradicts abundant prosecution evidence," and that statements regarding alternate suspects, which would qualify as information tending to exculpate a defendant, might not constitute *Brady* information if the statements are "not credible" and are "outweighed by other evidence."[81]

In short, the Law Division's CLE lecture taught Office prosecutors to apply a materiality assessment before they disclosed favorable information. Specifically, it instructed that they could evaluate favorable information and decide whether to disclose it based on their assessment of whether the information was material, including whether it was (i) "credible," and/or (ii) outweighed by other "abundant" evidence of guilt.[82] This contradicts the Supreme Court and the Third Circuit's materiality analysis, which does not permit prosecutors to make their own credibility assessments or to weigh favorable information against "abundant evidence" of guilt.

The materiality analysis in the Law Division's CLE materials also highlights another problem with applying *Brady's* appellate standard in the pretrial context: it essentially forces prosecutors to guess at whether a given piece of information is material. As previously noted, *Brady* requires pretrial disclosure of information so that the defense can make meaningful use of it in preparing their case, as well as at trial. This means that a prosecutor seeking to determine materiality at the pretrial stage must evaluate information *before* the trial has played out, which requires them to make an educated guess as to how the trial will unfold and what the defense might argue. In sum, by telling prosecutors that they need only disclose material information, the Law Division is essentially telling prosecutors to ask, "is a given piece of information sufficient to undermine my confidence in a guilty verdict I haven't yet achieved based on the rest of the evidence?"[83]

Although troubling, the Law Division's CLE training and approach to *Brady* disclosures is not unique. In practice, many prosecutors believe that the *post-conviction* appellate legal standard, which governs whether to vacate a conviction in the face of prosecutorial suppression of information, is also the standard that defines their *pretrial* disclosure obligations.[84] Some scholars have argued that this is an incorrect interpretation of *Brady* and its progeny, because these cases were only determining the proper appellate standard for when to vacate a conviction, and that this misapplication of postconviction standards to pretrial disclosure obligations has wreaked havoc on any notion of fundamental fairness expressed in *Brady*.

Brady Materiality: Pennsylvania State Courts v. The "Inferior Federal Courts"

From 2013-2016, the Pennsylvania Supreme Court and federal courts in the Third Circuit were engaged in a dispute over the proper legal test for determining whether favorable information is material pursuant to *Brady*. This dispute played out in a series of federal habeas petitions alleging *Brady* violations, which were filed by convicted persons after their state PCRA claims were denied. These denials were based in part on state courts' conclusionsthat the information was not material, and in many of these proceedings, the state courts adopted the Law Division's legal analysis. However, when these convicted persons advanced their claims in federal court, the federal courts granted them relief in the form of a new trial. In doing so, the federal courts criticized the state courts for improperly applying federal law governing *Brady* materiality.

What is notable about this dispute is that both the Law Division and the Pennsylvania state courts, including the state Supreme Court, seemingly ignored the federal courts' legal analysis and its repeated findings that the state was improperly interpreting

80. Philadelphia DAO, "July 2020 CLE Selected Topics in 21st Century Prosecution," (July 23-24, 2020). Copy on file with author.

81. *Id.*

82. The CLE materials also told prosecutors that if the evidence "hurts" then they should disclose it but did not provide further guidance on how to determine when evidence "hurts." Nor did the CLE materials explain how to assess if evidence will "hurt" if the prosecution is entitled to withhold evidence that they believe is (i) outweighed by "abundant" evidence of guilt, or (ii) not credible.

83. Alafair Burke, *Commentary: Brady's Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 Case W. Res. L. Rev. 575, 576 (2007) (internal quotations omitted).

84. Janet C. Hoeffel and Stephen I. Singer, *Activating a Brady Pretrial Duty to Disclose Favorable Inforamtion: From the Mouths of Supreme Court Justices to Practice*,38 N.Y.U. Rev. of L. & Social Change 467 (2002). Noting that this mismatch has "wreaked havoc on any notion of fundamental fairness expressed in *Brady.*" *Id.* at 469.

and applying federal law. Specifically, as discussed below, the Law Division continued to advance a legal test for *Brady* materiality that conflicted with federal law, and this test was in turn adopted by Pennsylvania state courts, despite repeated criticism from the federal courts, including the Third Circuit.

The first case in this dispute involved James Lambert, who was convicted of a robbery-murder based on testimony from key cooperator and prosecution witness Bernard Jackson. Lambert alleged a *Brady* violation because the trial prosecutor did not disclose that Jackson had initially given police a statement identifying another man, not Lambert, as his co-conspirator. In Lambert's state proceedings, the Pennsylvania Supreme Court found that no *Brady* violation occurred because the information was cumulative of Jackson's other numerous inconsistent statements that had been disclosed, and on which he was thoroughly impeached. In other words, because Lambert had made other inconsistent statements that were disclosed, and because defense counsel had an opportunity to impeach Lambert's credibility on those statements, the undisclosed statement would not have made a difference in the outcome of the trial.

However, when Lambert filed a federal habeas petition that was eventually decided by the Third Circuit in 2013, it held that the undisclosed information would have opened new avenues of impeachment, and that this meant the information could not have been cumulative. In its opinion, the Third Circuit also expressed skepticism over why the Office would bring a death penalty case against Lambert when its key witness had essentially zero credibility, given his admitted involvement in the crime and his bid for leniency, as well as the fact that he had made a multitude of inconsistent statements about the crime.

The next case in the dispute involved Jimmy Dennis, who was convicted of robbery-murder and was sentenced to death. Dennis filed a PCRA petition alleging multiple *Brady* violations alleging the suppression of information implicating alternate suspects, and the suppression of information tending to exculpate him, because the information supported his alibi that he was on a city bus around the time of the murder. The Pennsylvania Supreme Court adopted the Law Division's materiality analysis and rejected Dennis' claims. In doing so, the state high court held that, even after considering the suppressed favorable information, it was far outweighed by the other evidence of guilt presented at trial.

When Dennis filed a federal habeas petition, the federal district court granted him relief, going so far as to conclude that Dennis had been sentenced to death even though he was likely innocent. When the Law Division appealed the district court's ruling, the Third Circuit initially vacated the district court's ruling and reinstated his conviction and death sentence. However, Dennis successfully moved to have the case reheard by the entire Third Circuit. Sitting *en banc*, the Third Circuit held that the Pennsylvania Supreme Court (and, by extension, the Law Division), had used the wrong test to determine materiality. In a lengthy opinion clarifying various aspects of *Brady*, the Third Circuit found that the Pennsylvania Supreme Court used the "sufficiency of the evidence" test, which weighed the suppressed information against the disclosed inculpatory information and then asked if there was sufficient evidence of guilt. The Third Circuit noted that this test had long been rejected by the United States Supreme Court in favor of a holistic test that asked whether, considering the suppressed information, Dennis received a fair trial—that is, a trial resulting in a verdict worthy of confidence.

The dispute over the proper test for materiality continued in Esheem Haskins' case. Haskins was convicted of murder and sentenced to life imprisonment, and he filed a PCRA petition alleging that the prosecution suppressed favorable information that supported his defense that another man committed the murder. Once again, the Pennsylvania Supreme Court employed the "sufficiency of the evidence" test to hold that the information in Haskins case was not material, because the other overwhelming evidence of guilt presented at trial would not have led to an acquittal.

However, when Haskins filed a federal habeas petition that was eventually heard by the Third Circuit, it granted Haskins relief. It held that courts are supposed to focus on whether the suppressed information led to a verdict worthy of confidence, and it also noted that the proper materiality inquiry under federal law was whether there was a reasonable probability of a different outcome—which could have included an acquittal, a hung jury, or a conviction on a lesser charge. Once again, the Third Circuit's criticism of the Pennsylvania Supreme Court was also a criticism of the Law Division, because the Law Division offered the legal analysis that the Pennsylvania Supreme Court ultimately adopted. Moreover, the Law Division also pointedly ignored Third Circuit precedent: when they defended Haskins' conviction before the Third Circuit, they did not discuss or cite the Third Circuit's *en banc* decision in Jimmy Dennis' case and its lengthy discussion of how to analyze materiality pursuant to *Brady*.[85]

85. Br. for Appellees, *Haskins v. Superintendent, Greene SCI*, No. 17-2118 (3d Cir. May 22, 2018).

The dispute between the state and federal courts came to a head in Ricardo Natividad's case. Natividad was convicted of crimes stemming from a carjacking and a murder, and after his conviction he alleged *Brady* violations involving suppression of information (i) that would have led to the discovery of a favorable eyewitness who did not identify Natividad as the murderer, and (ii) that implicated an alternate suspect who made numerous inculpatory statements about the murder. As in Dennis' and Haskins' cases, the Pennsylvania Supreme Court used the "sufficiency of the evidence" test: it weighed the suppressed information against the information elicited at trial to ask if there was still sufficient evidence of guilt.

However, this time, the Pennsylvania Supreme Court did not ignore the ongoing dispute. In its opinion, it acknowledged the federal courts' ongoing criticism of its *Brady* analysis—but it also struck a defiant tone. Specifically, it acknowledged that the Third Circuit's *Dennis* opinion was "highly critical" [86] of the state court's legal analysis, and it said it was "mindful of those pointed criticisms."[87] However, the state high court went on to observe that Pennsylvania state courts were "bound by decisions of the U.S. Supreme Court, not the *opinions of the inferior federal courts*."[88] It then applied the "sufficiency of the evidence" test to deny Natividad's PCRA petition. When Natividad filed a federal habeas petition alleging the same *Brady* claims, the federal district court held that SCOPA once again applied the wrong legal test for determining *Brady* materiality, and it granted him a new trial.

Does Prosecutorial Misconduct Require Intent?

Neither the *Mooney-Napue* nor the *Brady* line of cases require any showing of prosecutorial intent. This is because these cases are rooted in due process concerns, and the "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."[89] But if prosecutorial intent is not relevant to whether a person received a fair trial, this raises the question of why we (and others) refer to *Brady* and *Mooney-Napue* violations as a type of "prosecutorial *misconduct*," since this phrasing suggests some level of wrongdoing. In fact, the Pennsylvania Supreme Court has gone so far as to declare the phrase "prosecutorial misconduct" meaningless, because it covers everything from comparatively more serious due process violations to trial objections.[90]

We do not believe the term "prosecutorial misconduct" lacks meaning simply because it covers a wide range of conduct. A better way to understand our usage of the term is that it applies to all prosecutorial actions that violate the law or other relevant rules that govern prosecutorial action in criminal cases, without regard to the prosecutor's intent.[91] This definition is consistent with how state and federal courts assess allegations of *Brady* and *Mooney-Napue* violations, *i.e.*, by focusing on the fairness (or lack thereof) of the trial, and not the prosecutor's mental state. This definition also recognizes that acquittals, exonerations, and court-ordered dismissals of convictions and/or charges are not, standing alone, evidence that the prosecution in those cases acted with bad intent. On the other hand, our definition of "prosecutorial misconduct" is broad enough to allow for a finding of bad intent—that is, whether a prosecutor acted recklessly or intentionally—in any given case.

Separately, we note that while intent may not factor into whether a prosecutor violated *Mooney-Napue* or *Brady*, intent is relevant to other related issues. For instance, the Office must assess prosecutorial intent in deciding whether the Double Jeopardy clause will prohibit a subsequent prosecution. In deciding whether to discipline a prosecutor, the Office will also need to understand the prosecutor's mental state. Intent is likewise important for Office supervisors, because they need to understand how and why misconduct occurred—including whether a mistake was made in good faith or was the product of reckless or intentional behavior—as this will influence the solutions and sanctions they might propose. Lastly, we think facts that bear on intent are important to give the public a more complete understanding of the prosecutorial misconduct that occurred, including whether certain prosecutors were failing to exercise reasonable care, proceeding recklessly with respect to their constitutional duties, or intentionally violating the law.

86. *Comm. v. Natividad*, 650 Pa. 328, 370 n. 18 (Pa. 2019).

87. *Id.*

88. *Id.* (emphasis supplied).

89. *Smith v. Phillips*, 55 U.S. 209, 219 (1982). *See also Comm. v. Tedford*, 598 Pa. 639, 686 (Pa. 2008) ("the Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty.") (quoting *Mabry v. Johnson*, 467 U.S. 504, 511 (1984)).

90. *Id.*

91. *See* Quattrone Center, *Hidden Hazards* at 7 (observing that Pennsylvania state and federal courts define "prosecutorial misconduct" as "any action taken by a prosecutor that does not comport with a law or procedural or ethical rule governing prosecutorial activity at any point in a criminal proceedings, regardless of the prosecutor's intent.").

Accordingly, the Report includes facts that are probative of determining a prosecutor's intent. Wherever possible, we also note where CIU prosecutors spoke with trial and/or post-conviction prosecutors about prosecutorial misconduct allegations, or when these prosecutors were called as witnesses at post-conviction evidentiary hearings, because their recollections and explanations may bear on an assessment of intent. To be clear, we are not suggesting that these interviews are necessary before the CIU or the DA can or should make decisions about case exonerations or employment sanctions. After all, we note that prosecutors routinely seek indictments and convictions by arguing that the accused has shown the required mental state based on circumstantial evidence that does not include a statement by the accused. Instead, we note where they spoke with CIU prosecutors about the case and/or gave testimony about it so that the reader can assess the prosecutor's explanation for how they handled the case.

Finally, we note that it may not be possible in every case to precisely discern prosecutorial intent. Sometimes, the circumstances surrounding the non-disclosure of information or the improper reliance on objectionable testimony may be the only evidence available from which to evaluate intent, and we obviously cannot peer into the prosecutor's mind or perfectly reconstruct case files to know what they knew at the time they handled the case. However, despite these challenges, we believe it is important for the Office and the community it serves and represents to have access to as much of the facts underlying these cases as possible, so that they can make their own judgments and draw their own conclusions about the prosecutorial actions in these cases.

Pennsylvania State Law: *Brady-Lively* and Witness Recantations

Pennsylvania state law permits prosecutors to proceed to trial in cases where their witnesses recant. In *Commonwealth v. Brady,* Pennsylvania became one of a minority of states to allow the prosecution to present prior inconsistent statements as substantive evidence "where the declarant is a witness at trial and available for cross-examination." [92] This means that if a prosecution witness makes a police statement and later recants and disavows it, the Office can still use her police statement and admit it as substantive evidence. In *Commonwealth v. Lively*, the Pennsylvania Supreme Court imposed the following limits on *Brady*: (i) the statement had to be given under oath at a formal legal proceeding; (ii) the statement had to be reduced to writing signed and adopted by the witness; or (iii) the statement had to be a contemporaneous verbatim recording of the witness' statement.[93]

By imposing these limits, the *Lively* court was trying to ensure that only *reliable* prior statements were admitted as evidence. However, in practice, the Office has not appeared concerned about whether a witness' police statements were accurate or whether the police interrogations that produced these statements were free of coercion or abuse. Instead, the cases in this Report illustrate that prosecutors willingly accepted statements and confessions at face value, even when they conflicted with other evidence found in the case, or they ignored mounting allegations of police misconduct during interrogations and tried to prevent defendants from raising these allegations at trial. Thus, the practical effect of *Brady-Lively* is that prosecutors know they can still go to trial, even if their witness recants, because they can simply admit their police statements. For instance, in Ronald Thomas' case, when every single one of their key eyewitnesses recanted, the prosecution obtained a conviction by admitting these witnesses' police statements.

The solution to the thorny problem of witness recantations is not an easy one. We acknowledge that witnesses recant for other reasons, such as intimidation and/or hesitation over testifying in public. However, the balance that the Office historically struck led them to prosecute cases where *all* their witnesses recanted, and/or where key witnesses recanted due to police misconduct, and where trial prosecutors discounted or ignored the possibility of police misconduct. In short, because *Brady-Lively* allowed them to admit all manner of witness statements without regard to the interrogation that produced the statements, prosecutors were arguably incentivized to ignore witnesses' claims of police misconduct, because even if a witness recanted, they could easily admit the witness' written statement to police, even if there was the "specter of illicit coercion," and in spite of the "damning nature" [94] of some of these witness statements that were later found to have been coerced.

92. *Commonwealth v. Brady*, 507 A.2d 66, 67 (Pa. 1986).

93. *Commonwealth v. Lively*, 610 A.2d 7, 8 (Pa. 1992).

94. See *State v. Mancine*, 590 A.2d 1107, 1116 (N.J.1991) (imposing fifteen-factor inquiry into circumstances under which the prior inconsistent statement was given, due to "specter of illicit coercion" and "damning nature" of such coerced statements).

Prosecutorial Misconduct and Public Safety

Most of the cases in the Report detail prosecutorial misconduct that resulted in wrongful convictions[95] that were not rectified for many years. The misconduct that led to these wrongful convictions caused multiple different harms.

The first and most obvious harm is that innocent people spent an often-lengthy amount of time in prison, including on death row, for crimes they did not commit. When they were released, many had been incarcerated for decades and were left to rebuild their lives with little financial or emotional support. A second harm is that the actual perpetrators who committed these crimes were not caught, let alone prosecuted, raising the real possibility that they went on to commit other crimes—and given the passage of time and the inevitable decaying of witness memory and other evidence, it is unlikely that a new investigation will catch the real assailant. Third, in some instances, the Commonwealth may have arrested and charged the right person, but because of prosecutorial misconduct, they faced insurmountable hurdles in retrying the person.

These latter two harms are often overlooked when commentators talk about the problem of wrongful convictions. However, a brief survey of the Case Appendix illustrates how wrongful convictions undermine public safety. For instance, in Jahmir Harris' wrongful conviction, an alternate suspect was only identified by the CIU when it reinvestigated the case years later. To date, this person has not been charged. Likewise, in Christopher Williams and Theophalis Wilson's case, the Commonwealth wrongfully convicted Williams and Wilson of three murders and fought their appeals. When the CIU reinvestigated their convictions, prosecutors found credible evidence pointing to different alternate suspects, but by then nearly thirty years had passed. In Anthony Wright's case, he was convicted of sexual assault and murder. He asked for DNA testing in 2005, but it was not completed until 2013, when the DNA test results showed that a man named Ronnie Byrd was the likely assailant. Byrd died in prison in 2013 and was never held accountable for the rape and murder. At least some of this delay in identifying Byrd can be attributed to the prosecution, because it opposed Wright's request. Although the Pennsylvania Supreme Court granted Wright's request for DNA testing in 2011, the Commonwealth did not actually conduct testing until 2013—the same year Byrd died. Finally, in Kareem Johnson's case, the Commonwealth had evidence that Johnson was at the scene of a murder, because a baseball cap with his DNA on it was left at the scene. However, the prosecution rushed to trial before they fully understood their own evidence, which led them to make false arguments and to offer false testimony from law enforcement witnesses. These mistakes were so reckless that the Pennsylvania Supreme Court concluded that the Double Jeopardy clause prohibited the Office from retrying Johnson, even though other evidence suggested that he was present during the crime.

Relatedly, when misconduct happens and a conviction is vacated many years later, this sudden turn of events impacts victims and their families. Where they once thought the right person was convicted, wrongful convictions and exonerations leave victims with the same questions they had at the outset of the investigation: who harmed their loved one and would they "hurt someone else's loved one"[96]? In some instances, the harm is magnified when they learn that the prosecutors who assured them that the criminal case would bring "closure and healing" misrepresented the facts or charged the wrong person—as Louise Talley's family member alleged happened when the Office wrongfully convicted Anthony Wright.[97]

In short, the Report's discussion of prosecutorial misconduct should not be understood as focusing *just* on the innocent or the wrongfully convicted and their unfair treatment (although

95. The term "wrongful conviction" can encompass different situations, including (i) convictions of innocent people, (ii) convictions where there was a constitutional error or miscarriage of justice resulting in the grant of a new trial where the case is either dismissed or an acquittal occurs because there is insufficient evidence to prove guilt beyond a reasonable doubt, or (iii) convictions where the person committed the offense for which they were charged, but constitutional error or a miscarriage of justice has tainted the case thus resulting in a successful retrial or plea of guilty.

96. Chris Palmer, "A Philly Man was Cleared of Murder Charges Because of Ties to 2 Disgraced Ex-Homicide Detectives," Philadelphia Inquirer, July 24, 2023.

97. Shannon Coleman, "Carlos Vega's 'Win At All Costs' Prosecution," The Philadelphia Citizen, Apr. 12, 2021. Ms. Coleman is the niece of Louise Talley, whom Anthony Wright was wrongfully accused of raping and murdering. Ms. Coleman's daughter was a paralegal in the CIU at the time she authored this commentary.

that is obviously a legitimate focus). Instead, the Report is best understood as advocating for both *fairness* and *safety*. The Report's policy recommendations will improve fairness in the criminal legal system by lessening the likelihood that (i) innocent people are convicted of crimes they did not commit or (ii) people are convicted based on insufficient evidence of guilt or are otherwise subjected to miscarriages of justice during their trial. But what is equally important is that these recommendations will also increase the likelihood that police and prosecutors will focus their time and resources on identifying the correct people to hold accountable before heading down a rabbit hole, or before their conduct so taints a prosecution that it becomes difficult to retry someone.

Common Themes: Prosecutorial Misconduct and the Philadelphia DAO

This section summarizes the common themes and fact patterns we encountered in our review of the cases summarized in the Case Appendix.[98] Although these cases were prosecuted across a roughly 45-year period, under different elected district attorneys, by different trial and post-conviction prosecutors, and in both state and federal courts, the following common themes and fact patterns emerged:

Trials Are Games to Be Won

This theme was omnipresent. Put simply, prosecutors approached trials as games to be won, and they prioritized winning convictions over searching for truth or safeguarding defendants' rights;

Trusting Cooperators and Informants

Prosecutors were quick to trust and rely on cooperating witnesses and/or informants, even when other evidence suggested they were being untruthful, and they sometimes failed to disclose the promises they made to these cooperators;

Ignoring Alternate Suspects

Prosecutors failed to disclose information implicating alternate suspects, *i.e.*, information suggesting that another person (or persons) committed the crime;

Ignoring Police Misconduct

Many of the cases involved police misconduct[99] committed by a discrete group of Philadelphia homicide detectives. The Office was aware that at least some of these detectives had either been accused of misconduct, or that several of their investigations had fallen apart at trial, yet they persisted in trying cases that they investigated;

Aggressively Defending Convictions and Misapplying the Law

When people challenged their convictions and alleged misconduct, the Law Division responded aggressively, often denying the allegations without investigating whether the convicted person's allegations were plausible or misapplying the law to argue that there were no *Brady* violations;

Brady Versus Grand Jury Secrecy

In a small subset of cases, the Office's lack of policy regarding *Brady* disclosures and grand jury proceedings led prosecutors to fail to disclose favorable information, and to make misleading statements about whether favorable information existed.

These case themes are discussed in greater detail below. To aid readers, we have cited cases from the Case Appendix where these themes were prevalent. The Case Appendix contains a more detailed summary and discussion of each of these cases.

98. For more detailed factual analyses, please see the Cases Appendix.

99. Some of these officers were later charged with criminal conduct arising from these cases, and at least one officer was convicted.

Trials Are Games to Be Won[100]

A common theme across all the cases is that the Office valued convictions, and they approached trials as games to be won. This emphasis on winning meant that prosecutors' competitive instincts kicked in, and they focused primarily on how they could obtain a guilty verdict. In other words, they accepted police conclusions at face value, instead of independently scrutinizing the investigation and the evidence to decide whether there was sufficient evidence to charge the case, let alone whether the correct person was charged. The Office's historical internal discovery policies also reflected this approach: as previously noted, for some unknown period,[101] prosecutors did not personally review the H-File associated with their case and instead relied on the police to provide them with relevant information for trial.

The failure to independently scrutinize their cases meant that the Office took questionable cases to trial, *i.e.*, they tried cases where there was little reliable evidence of guilt, where the theory of guilt was contradicted by other evidence, or where the only evidence of guilt was based on uncorroborated cooperator or informant testimony. In these cases, it appears that prosecutors' competitive instincts were high: they seemed to gear up for the challenge of winning a tough case and were not focused on whether the lack of evidence was actually an indication that the Commonwealth had charged the wrong person. For instance, in at least three cases where the person charged had an alibi (Willie Veasy, Shaurn Thomas, Dwayne Thorpe), prosecutors did not appear to meaningfully investigate the alibi or otherwise question whether a serious error had been made. Instead, they seemed motivated to attack the alibi in order to get the trial win.

The cases also suggest that prosecutors behaved aggressively, perhaps because they were seeking every competitive advantage that would help them obtain a win. Sometimes, this meant they engaged in gamesmanship, *i.e.*, they interpreted facts or legal rules in way that benefited their case but were not necessarily consistent with truth-seeking. For instance, in Arkel Garcia's case, the prosecution played snippets of Garcia's recorded jail phone calls with his mother during her cross-examination. These jail calls were disclosed in the middle of trial and not during the normal pretrial discovery process. The calls were also taken out of context and left the jury with the misleading impression that Garcia's mother thought he resembled the suspect shown on video surveillance. However, when the CIU later listened to these jail calls in full, it was apparent that his mother was saying the opposite—that she thought Garcia did not resemble the suspect and that she thought he was innocent.

In other instances, prosecutors seemed so intent on winning that they behaved recklessly with respect to their disclosure obligations. For instance, in Kareem Johnson's case, the prosecution pushed forward with a death penalty case without first ordering a criminalistics report that would have detailed all the evidence and testing done in the investigation. As a result, the prosecution failed to understand the DNA and forensic evidence in their own case and convicted Johnson based on evidence that did not exist. In other cases, the prosecution may have intentionally disregarded their obligation to disclose favorable information. For instance, in Terry Williams' case, Philadelphia Court of Common Pleas Judge M. Teresa Sarmina issued an opinion and appendix detailing her conclusions that the prosecution deliberately suppressed favorable information about Williams to successfully obtain a first-degree murder conviction and death sentence after they failed to do so in an earlier trial against Williams.

For more, read: **Matthew Connor, Ronell Forney, James Frazier, Arkel Garcia, Jahmir Harris, Chester Hollman, Arthur Johnson, Kareem Johnson, Frederick Leach, Ah Thank Lee, William Lynn, Orlando Maisonet, Sherman McCoy, Dontia Patterson, Eric Riddick, Edward Ryder, Andrew Swainson, Clayton and Shaurn Thomas, Dwayne Thorpe, Willie Veasy, Albert Washington, Terry Williams, Zachary Wilson, Anthony Wright**.

Trusting Cooperators and Informants[102]

The Office relied extensively on cooperators and/or jailhouse informants to obtain convictions. These witnesses were often problematic, because (i) they were testifying in the hope of getting leniency in their own criminal cases, (ii) they had substance abuse and/or mental health issues that raised questions about their ability to accurately perceive or recall events, or (iii) their version of events conflicted with other evidence in the case or suggested they were lying or otherwise minimizing their own involvement. Despite these shortcomings, the Office readily relied on their version of events. In many cases,the prosecution

100. The cases referenced in this section are based on legal pleadings, judicial opinions, information obtained from the DAO trial file, and publicly available information, including media articles.

101. The CIU discovered this practice during one of its investigations. Because the policy was never formally adopted or written down anywhere, it is difficult to know how long it was followed within the Office.

102. The cases referenced in this section are based on legal pleadings, judicial opinions, information obtained from the DAO trial file, and publicly available information, including media articles.

promised leniency to a cooperator or informant and then either failed to disclose these promises or failed to correct these witnesses' misleading testimony when they denied receiving or being promised any benefits.

For more, read: **Edward Bulovas, Curtis Crosland, William Hallowell, James Lambert, John Miller, Lamar Ogelsby, Walter Ogrod, Donald Outlaw, Andrew Swainson, Neftali Velasquez, Anthony Washington, Christopher Williams, Theophalis Wilson, Troy Coulston**.

Ignoring Alternate Suspects

The prosecution often failed to disclose alternate suspect information. Sometimes, these alternate suspects had motive to commit the crime or were seen in the vicinity of the crime, but the police either did not investigate them at all or conducted only a limited investigation to try to link them to the defendant who was eventually charged. Other times, police received tips about alternate suspects that contained indicators of reliability, but they did not follow up on these leads. For instance, in Jahmir Harris' case, the prosecutor attested that she reviewed the police files, yet she was somehow unable to find and disclose alternate suspect information that the CIU was later able to identify when it reviewed those same files.

For more, read: **Jahmir Harris, Chester Hollman, Antonio Martinez, Ricardo Natividad, Donald Outlaw, Dontia Patterson, Christopher Williams, Theophalis Wilson, Clayton and Shaurn Thomas**.

Ignoring Police Misconduct

Police misconduct tainted many of the cases in the Report. The misconduct included (i) abusive and coercive interrogations of witnesses and suspects, (ii) fabricating confessions, (iii) planting evidence, and (iv) giving false and misleading testimony at trial. Much, although not all, of the misconduct in the cases was committed by a group of Philadelphia homicide detectives. In some of these cases, the Office was aware that certain detectives had been accused of misconduct, either because IA presented the Office with evidence or because a Philadelphia Court of Common Pleas judge found allegations of misconduct to be credible. In these instances, the Office did not question whether the detectives' conduct impacted the integrity of the other cases before the Office, and they did not open an investigation into the detectives' conduct. Instead, once the misconduct allegations were made public, the Office focused on how to continue prosecuting cases associated with these detectives by "erasing" the detective from the investigation, *i.e.*, on crafting their case so as not to call the detective as a witness, thereby avoiding having to address the allegations of misconduct.

Beginning in 2019, the Office's CIU and Special Investigations Unit indicted Detectives Philip Nordo, Martin Devlin, Frank Jastrzembski, Manuel Santiago, and James Pitts for criminal conduct stemming from their work investigating homicides.[103] Nordo and Pitts were indicted for their own individual misconduct, while Devlin, Jastrzembski, and Santiago were indicted for their misconduct in the criminal investigation and subsequent civil lawsuit stemming from Anthony Wright's wrongful conviction. Nordo was convicted in 2022, while the criminal cases against Pitts, Devlin, Jastrzembski, and Santiago remain pending. The misconduct and alleged misconduct committed by these detectives are discussed below.

Detective Philip Nordo[104]

Nordo was a Philadelphia police officer and homicide detective from 2002 until 2017, when he was terminated after he made improper payments to an informant who later served as a witness in two prosecutions where Nordo was the investigating detective. After the payments came to light, the Office began investigating Nordo and found that he abused his position of power to sexually coerce and assault suspects and witnesses, including at least once in a police interrogation room. Nordo would also bribe his victims with the promise of reward money or by putting money into their prison or jail commissary accounts, and he would either suggest he could protect them or help them out in exchange for sex or imply that he could hurt them if they did not agree to his sexual advances.

When the CIU and the Office's Special Investigations Unit began investigating Nordo's misconduct, they learned that the Office had notice of Nordo's misconduct as early as 2005, when IA received a complaint from a suspect that Nordo fondled him and forced him to masturbate while he was detained in a police interrogation room. Investigators recovered kleenex from the interrogation room and had it tested for DNA. While DNA testing was pending, the IA complaint was referred to the Office in 2005. However, the Office declined to pursue criminal charges against Nordo. After the Office declined charges, the DNA test results came back positive for ejaculate and tended to corroborate the

103. As a result of the misconduct tied to these homicide detectives, the CIU also created policies and procedures for reviewing cases involving these detectives.

104. Chris Palmer and Mark Fazlollah, "An Ex-Philly Homicide Detective's Fall From Star Investigator to Accused Rapist," Philadelphia Inquirer, Feb. 22, 2019; Chris Palmer, "Former Philly Homicide Detective Philip Nordo Was Found Guilty of Sexually Assaulting Witnesses While on the Job," Philadelphia Inquirer, June 1, 2022.

suspect's allegations.[105] The CIU later learned that the Office declined the case without even waiting for the DNA test results. In subsequent pleadings relating to exonerations linked to Nordo, the Office acknowledged that it had this evidence of Nordo's misconduct from the time it received the IA complaint.

Following a grand jury investigation, Nordo was indicted in 2019 and charged with crimes that included rape, sexual assault, and official oppression.[106] He went to trial on the charges and in 2022, he was convicted and was sentenced to 24½ to 49 years in prison.[107]

For more, read: **James Frazier, Arkel Garcia, Marvin Hill, Sherman McCoy, Ronald Thomas, Neftali Velasquez**.

Martin Devlin, Frank Jastrzembski, and Manuel Santiago[108]

Retired detectives Martin Devlin, Frank Jastrzembski, and Manuel Santiago worked in the Philadelphia Police Department's homicide unit at a time when that unit cleared roughly 80 percent of its cases—the highest clearance rate in any big city, and about 20 percentage points better than the national average. (This clearance rate dropped to 43 percent after police were told to start videotaping interrogations and to notify witnesses that they were free to leave and not under arrest).[109] The detectives sometimes worked together on investigations, and Devlin and Worrell were partners in the police department's Special Investigation Unit, which handled high-profile and cold cases that other units could not solve. Devlin earned the nickname "Detective Perfect" for his ability to solve tough cases."[110] Devlin's supervisor, Larry Nodiff, noted Devlin's "outstanding" ability to develop rapport with people he interrogated, and that he would talk "very politely, calmly, and … people would cooperate."[111] Devlin also claimed that he could take down verbatim handwritten transcriptions of confessions.

In 2021, Devlin, Santiago, and Jastrzembski were indicted and charged with, among other things, perjury and false swearing of charges stemming from their investigation of the rape and murder of Louise Talley, which resulted in Anthony Wright's wrongful conviction. The indictment alleged that Devlin and Santiago coerced Wright into a false confession that included false details about the clothing he was wearing during the crime, and that Jastrzembski executed a search warrant at Wright's home, where he falsely claimed to have found the clothing in Wright's bedroom. Wright was convicted, but DNA testing later exposed problems with the police investigation. First, the DNA evidence pointed to Ronnie Byrd as the perpetrator. Second, DNA testing on the clothing Jastrzembki claimed to have found in Wright's bedroom did not have Wright's DNA on it. Instead, only the victim's DNA was found on it, suggesting that the clothing was worn by and belonged to her. As of the date of the Report, the criminal charges against them are pending.

For more, read: **Jimmy Dennis, Walter Ogrod, Andrew Swainson, Clayton and Shaurn Thomas, Anthony Wright, Willie Veasy**.

James Pitts[112]

James Pitts was a Philadelphia police officer and detective from 1996 until 2019, when he was reassigned from active duty and placed on restricted leave pending an investigation into accusations that he physically assaulted and forcibly coerced confessions from multiple defendants and witnesses. In 2022, Pitts was indicted for perjury and obstruction of justice stemming from his interrogation of Obina Onyiah, which led Onyiah to falsely confess to murder and contributed to his wrongful conviction. The Office was aware of allegations about Pitts' abusive conduct during interrogations when the Philadelphia Inquirer wrote a 2013 article about three murder prosecutions that fell apart because of allegations that Pitts and his partner, Detective Ohmarr Jenkins, coerced or abused witnesses and

105. *Id*.

106. Press Release, "Former Homicide Detective Philip Nordo Accused of Sexual Assault, Theft, Found Guilty on all Counts," Philadelphia District Attorney's Office, June 1, 2022.

107. Chris Palmer and Samantha Melamed, "Predator in Blue," Philadelphia Inquirer, Feb. 27, 2023.

108. Philadelphia DAO, "PPD Detectives Involved in Wrongful Rape and Murder Conviction, Retrial of Anthony Wright Charged Following Grand Jury Investigation," Aug. 13, 2021.

109. Samantha Melamed, "The Case That Collapsed," Philadelphia Inquirer, Oct. 14, 2021.

110. *Id*.

111. *Id*.

112. Mensah M. Dean, "Same 2 Cops Built 3 Murder Cases That Fell Apart," Philadelphia Inquirer, Nov. 5, 2013; Mark Fazlollah, "Accused Philly Police Officers Get Reassigned to the 'Last Place' They Should Be, Critics Say," Philadelphia Inquirer, Mar. 22, 2019; Samantha Melamed, "Dozens Accused a Detective of Fabrication and Abuse. Many Cases He Built Remain Intact." Philadelphia Inquirer, May 13, 2021.

defendants.[113] In 2022, Police Commissioner Danielle Outlaw indicated that Pitts would be terminated following a suspension.[114] As of the date of the Report, the criminal charges against Pitts are pending.

For more, read: **Hassan Bennett, Derrill Cunningham, Obina Onyiah, Dwayne Thorpe**.

Other Officer Misconduct

While homicide detectives were involved in the bulk of the wrongful convictions discussed in the Report, other Philadelphia police officers engaged in misconduct involving non-homicide cases. Some of these officers gave false or misleading testimony about the circumstances of a suspect's arrest or what they found at a crime scene, while other officers were involved in illegal searches. In these cases, the prosecution either failed to critically evaluate the officers' testimony to see if it comported with other evidence and/or failed to disclose relevant *Giglio* impeachment information about the officers.

For more, read: **Termaine Hicks, Rod Matthews, Anthony Shands**.

Aggressively Defending Convictions and Misapplying the Law

When convicted persons challenged their convictions, the Law Division aggressively defended these convictions and reflexively denied allegations of prosecutorial misconduct. Sometimes, they made legal arguments that were contrary to well-established Supreme Court and Third Circuit case law or ignored or otherwise downplayed allegations of misconduct. Until recently, the Law Division also permitted prosecutors to deny misconduct allegations without first reviewing the DAO trial file or H-File to determine if their denials were true or had any factual basis. This "deny first" policy ignored the Office's constitutional and ethical obligations to find and disclose favorable information, as well as the duty of candor owed to the court and opposing counsel. It also meant that the Office missed earlier opportunities to uncover misconduct. The Law Division also displayed a certain cynicism toward misconduct allegations. For instance, in Curtis Crosland's case, they dismissed him as a "serial filer" who was wasting judicial resources. The CIU later exonerated Crosland after finding he was likely innocent.

Pennsylvania ethics rules[115] also required the Law Division to acknowledge and cite case law that was directly adverse to its legal arguments. This is part of the duty of candor owed to the court and opposing counsel, and one purpose of the rule is to encourage argument over the legal standards and rules that are properly applicable to a given case. However, in some instances, the Law Division violated the spirit of this ethics rule. For instance, when the Law Division opposed Esheem Haskins' federal habeas petition, it ignored the Third Circuit's *en banc* decision in Jimmy Dennis' case (the "*Dennis* decision"), which contained a lengthy discussion of Supreme Court precedent and prior Third Circuit precedent discussing the proper definition and application of *Brady* materiality. The decision to ignore the *Dennis* decision completely, *i.e.*, to not cite it or otherwise distinguish its holding from Haskins' case appears to violate the duty of candor, even though the *Dennis* decision was plainly applicable to Haskins' case, given that the Law Division partially opposed relief on the ground that any suppressed information was not material.

For more, read: **Lavar Brown, Curtis Crosland, Jimmy Dennis, Marshall Hale, Esheem Haskins, Chester Hollman, James Lambert, Ricardo Natividad, Walter Ogrod, Obina Onyiah, Andrew Swainson, Clayton and Shaurn Thomas, Dwyane Thorpe, Anthony Washington, Terry Williams, Theophalis Wilson, Zachary Wilson**.

Brady Versus Grand Jury Secrecy

Although this issue did not arise frequently,[116] the Office's lack of a clear policy regarding *Brady* disclosures and grand jury materials resulted in favorable information being withheld. For instance in Curtis Crosland's case, a key prosecution witness testified before the grand jury and admitted to fabricating a murder allegation, but her testimony was never disclosed, even though the prosecutor who questioned her before the grand jury was the same prosecutor who handled Crosland's trial. Then, when Crosland was retried and a different prosecutor took over the case, the CIU found that she did not have this

113. Dean, "Same 2 Cops Built 3 Murder Cases."

114. Dorian Geiger, "Ex-Philadelphia Cop Charged in Beating of Now-Exonerated Man Who Spent 11 Years in Prison," Oxygen True Crime, Mar. 4, 2022.

115. *See* 204 Pa. Code § 3.3., "Rule 3.3 – Candor Toward the Tribunal" (2023).

116. This type of suppression issue—the failure to find and disclose favorable information learned through grand jury proceedings—is especially difficult to track, because it is hard to catch. From defense counsel's perspective, they do not have access to grand jury materials in the first instance, and as such they have almost no way to know of the existence of the grand jury investigation, let alone if favorable information exists. From the CIU's perspective, although they have access to grand jury materials, the universe of materials is so voluminous and is not organized in any searchable fashion that there is no practical way to comb through it.

witness' grand jury transcript in her file, which suggests that the first trial ADA did not share the witness' grand jury testimony, and that she likely did not search grand jury materials for favorable information.

In Ronald Thomas' case, the Office's lack of a policy regarding how to account for an active grand jury investigation led a trial prosecutor to make misleading statements about Detective Nordo. In Thomas' case, he was charged with murder based on an investigation that involved Nordo, who by this time was the subject of an active grand jury investigation. Although the trial ADA was not personally involved in the Nordo grand jury investigation and was not privy to the evidence it was hearing, he was aware of the allegations against Nordo and knew or should have known that there were allegations of sexual impropriety between Nordo and a witness. This ADA also knew that the grand jury was meeting and actively developing evidence. Despite the existence of the grand jury investigation, the trial ADA made representations about the scope of Nordo's alleged misconduct that were subsequently contradicted by the grand jury's findings of fact in an indictment it issued against Nordo.

For more, read: **Curtis Crosland, Ronald Thomas**.

The Factors Contributing to Prosecutorial Misconduct

After reviewing the cases and summarizing the prosecutorial misconduct that occurred, we identified certain factors that contributed to or enabled the misconduct. Accordingly, this section summarizes the following factors that fostered or encouraged the misconduct:

When You Win, You "Do Justice"

As a starting point, the Office culture, which emphasized winning over other values, contributed to and enabled prosecutorial misconduct;

The Office's Historical Discovery Policies and Practices

Some of the misconduct was a natural consequence of trial prosecutors adhering to the Office's historical discovery policies (discussed *supra*), which violated *Brady* and *Giglio*;[117]

Pennsylvania State Law

Pennsylvania state law governing the admissibility of witness statements, and appellate case law pertaining to *Brady* violations, incentivized prosecutors to take questionable cases to trial and to defend questionable convictions;

A Lack of Accountability

A lack of accountability—both in the Office and with respect to state bar disciplinary authorities—created an environment where prosecutors were not meaningfully sanctioned or disciplined for misconduct, and were not encouraged to err on the side of caution with respect to their constitutional and ethical disclosure obligations.

When you Win, You "Do Justice"

As previously noted, a series of elected District Attorneys presided over an Office with a "historic aggressive culture"[118] that equated winning with "doing justice." For instance, fromer homicide prosecutor **ADA Judy Rubino** described her job as "getting the worst people off the streets" and "representing the families of murder victims."[119] Likewise, former homicide chief **ADA Mark E. Gottlieb** observed that he was "an advocate" who "want[ed] to use everything"[120] at his disposal to obtain a conviction—including threatening the death penalty. Like **ADAs Rubino** and **Gottlieb**, **DA Lynne Abraham** described

117. In highlighting these external influences, we are not minimizing the role individual prosecutors played or suggesting that they are not responsible for their actions. Rather, we seek to identify Office values and how they influence prosecutors' decision-making, because this is an important factor for elected district attorneys to consider as they seek to change their offices' attitude and approach to cases.

118. Rosenberg, "The Deadliest D.A."

119. Linda Loyd, "Judith Frankel Rubino," Philadelphia Inquirer, July 13, 1997.

120. Rosenberg, "The Deadliest D.A."

the Office as "represent[ing] the victim and the family," and when she sought the death penalty, she descried it as the "right thing to do" [121] for victims and their families.

The Office also communicated the importance of winning through the prosecutors they chose to recognize: an annual award that was once given to homicide prosecutors was named after **ADAs Rubino** and **Roger King**.[122] **ADA Rubino** received media praise for winning almost all her cases,[123] and **ADA King** won more death penalty cases than anyone else.[124] As previously noted, he also celebrated his wins with photographs of the people he convicted and sentenced to death.[125] At his retirement in 2008, he was heralded as "the most accomplished prosecutor in the history of the office,"[126] and as recently as January 2018, **ADA King** had a conference room named after him in the Office.[127] The Case Appendix contains several cases prosecuted by **ADAs Rubino** and **King** that were vacated, either because the CIU determined that they were wrongful convictions, or because a court found the prosecutions to be tainted by constitutional error.

In short, Office culture encouraged prosecutors to view themselves as advocates who represented victims and their families, and to see cases as high-stakes, zero-sum games: winning meant taking "bad guys" off the streets, often by sentencing them to death, while losing meant letting bad guys get away with it *and* failing victims and their families. Moreover, by recognizing and rewarding prosecutors who won nearly all their cases, the Office signaled that prosecutors who wanted professional advancement and respected careers should *want* to win—an ethos that is seen in the cases. This emphasis on winning above other values created an environment where prosecutors were encouraged to behave aggressively and to ignore their constitutional and ethical obligations to disclose favorable information and refrain from relying on false evidence at trial.

The Office's Discovery Policies and Practices

As described above, the Office's discovery policies and practices violated *Brady* and *Giglio*. Accordingly, some of the misconduct identified in the Case Appendix was a natural consequence of prosecutors adhering to or following Office rules that operated in opposition to the prosecution's constitutional and ethical disclosure obligations.

Pennsylvania State Law

As previously discussed in the Legal Background section, Pennsylvania state law made it easier for prosecutors to take questionable cases to trial and to defend questionable convictions. The *Brady-Lively* rule permitting prosecutors to introduce witness' prior police statements meant that prosecutors could still try cases even when all their witnesses recanted or refused to testify. This rule also meant that prosecutors were not incentivized to investigate witnesses' allegations of coercion or abuse during the interrogation process, because the prosecution could ignore these claims and still proceed to trial using the witness' statement.

Pennsylvania state courts also incentivized prosecutors to defend questionable convictions. The Legal Background section detailing the ongoing dispute between the Pennsylvania Supreme Court and Third Circuit federal courts highlights the way in which the Law Division and the state courts continued to advance—and adopt—legal arguments that were not consistent with federal law. The throughline in the *Lambert*, *Dennis, Haskins,* and *Natividad* cases is that the Law Division repeatedly employed a "sufficiency of the evidence" test that was then endorsed and adopted by the Pennsylvania Supreme Court, which denied convicted persons relief. That is, the Law Division continued to defend convictions based on an incorrect application of federal law and largely ignored the federal courts' decisions rejecting this application, and in each case, SCOPA upheld the conviction and adopted this faulty legal analysis. This feedback loop between the Law Division and the state courts meant that the Office "won" their appeals in state court—even though they ignored the federal courts' repeated criticisms. It also meant that even if a convicted person successfully challenged their conviction in federal court and had the state court decision vacated, they still had to spend additional years in prison while they fought for the correct legal interpretation of the law to be applied to their case.

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121. *Id*.

122. *See* Press Release, "Philadelphia District Attorney Announces Organizational Changes to His Leadership Team," Feb. 11, 2016; Chris Palmer "Roger King, 72, 'Larger Than Life' Retired Philly Homicide Prosecutor," Philadelphia Inquirer, Aug. 24, 2016.

123. Howard Altman, "Judi's Justice," My City Paper, June 14-21, 2001.

124. Melamed, "King of Death Row."

125. *Id*.

126. Daniel Craig, "Report Highlights Lynne Abraham as One of America's Deadliest Prosecutors," Philly Voice, June 30 2016.

127. Melamed, "King of Death Row."

A Lack of Accountability: Office Sanctions

A lack of prosecutorial accountability encouraged prosecutors to behave aggressively and/or take risks with respect to their constitutional and ethical disclosure obligations. As illustrated in the Case Appendix, when prosecutors were alleged to have committed misconduct, (i) the Office largely defended them and the verdict, and (ii) the state bar association did not take any action in the face of misconduct. Taken as a whole, this lack of accountability meant that prosecutors were not incentivized to consider the risk of adverse consequences for their misconduct and were instead incentivized to take risks and act aggressively to obtain and defend convictions.

For instance, when a Philadelphia court issued a detailed opinion and appendix describing **ADA Andrea Foulkes**' misconduct and gamesmanship across two homicide trials for Terry Williams, **DA Seth Williams** issued a public statement aggressively defending her. He called her a victim and said she did nothing wrong. He issued this public statement even though the court took the unusual step of conducting its own independent review of the DAO trial file and H-File and found evidence of **ADA Foulkes'** misconduct that even Williams' counsel did not. Likewise, in Lavar Brown's case, when **ADA Cari Mahler** found evidence corroborating Brown's allegations of prosecutorial misconduct, she did not disclose it or concede that Brown was entitled to relief. Instead, she continued to defend the trial prosecutors' actions, despite having investigated and found facts that corroborated Brown's allegations that the trial team committed misconduct.

We only found one instance where the Office conducted an internal review of a wrongful conviction and concluded that the prosecutor may have behaved improperly—and even then, it was not geared toward understanding what went wrong at trial and how to avoid future mistakes. In Ah Thank Lee's case, after he was exonerated, he sued the city for his wrongful conviction. The Office conducted an internal assessment of the trial, which was critical of **ADA Fisk**'s conduct—although there is no indication she was ever disciplined. The internal assessment was conducted by the Law Division's Civil Litigation Unit, which often assists the Philadelphia City Solicitor in civil litigation and thus appears to have been focused on the litigation risk stemming from Lee's civil lawsuit. Accordingly, this review was likely not part of a larger attempt to audit the case or learn from errors.

Ah Thank Lee's case involved a robbery-murder committed by three assailants. A challenge in the case was that witnesses had identified four different men as the possible assailants: Lee, Cam Ly, Benson Luong, and someone known as "Kwa Jai." The Commonwealth ultimately settled on Lee, Ly, and Luong as the three assailants and tried them all separately. Ly was convicted first. When Lee went to trial, he argued that he was innocent and had been mistakenly identified as Kwa Jai. **ADA Fisk** responded that this did not mean Lee was innocent, because the three assailants could have been Lee, Ly, and Kwa Jai. The problem with **ADA Fisk's** argument was that Ly had already been convicted, and the Commonwealth had a warrant for Luong's arrest as the third and final assailant. When defense counsel raised these facts, **ADA Fisk** argued that if Luong were located and arrested, he would be released because there was no evidence of his involvement. Lee was then convicted, and after his trial, **ADA Fisk** tried and convicted Luong as the third assailant.

Internal DAO documents criticized **ADA Fisk** for her conflicting theories of the assailants' identities and her "mix-and-match" approach that offered up competing theories of liability. For instance, **Civil Litigation Unit Chief ADA Karen Brancheau** described **ADA Fisk**'s contradictory theories across trials as "unorthodox…advocacy,"[128] while a separate, undated internal analysis of **ADA Fisk**'s trial conduct described her strategy as "shockingly disingenuous" and a "wholly disingenuous argument"[129] given that the Commonwealth wanted to arrest Luong as the third assailant. Despite these criticisms, there is no indication the Office took any disciplinary or other action against **ADA Fisk**.

A Lack of Accountability: the Pennsylvania Disciplinary Board

The Pennsylvania Disciplinary Board has also declined to sanction Office prosecutors for misconduct. In Anthony Wright's case, he was tried twice for rape and murder and was acquitted at his second trial. Prior to his retrial, new DNA evidence revealed problems with the case. First, DNA evidence suggested that Ronnie Byrd committed the rape and murder. Second, the clothing Wright was supposedly wearing during the crime did not have Wright's DNA on it—it only had the victim's DNA on it. This contradicted the police investigation, wherein Wright supposedly confessed to wearing the clothing in question, which detectives then claimed to have found in Wright's bedroom when they executed a search warrant. Despite this new DNA evidence, the Office retried Wright on the theory that he and Byrd

128. Ltr. from K. Brancheau, Chief, Civil Litigation Unit, to L. Sitarski, Chief Deputy City Solicitor re: Alen (Ah Thank) Lee, June 12, 2006 (copy on file with author).
129. *Id*. at 2-3.

committed the crimes together. After he was acquitted at his retrial, Wright sued the city and the detectives who investigated his case. During depositions in his case, he obtained information suggesting that the detectives gave false and misleading testimony at both his trials, and that **ADA Bridget Kirn** was aware of the detectives' false testimony.

During Wright's civil lawsuit, his counsel deposed the detectives and asked them whether they ever discussed the new DNA evidence with **ADA Kirn**. At their depositions, the detectives all described a meeting with **ADA Kirn** before the start of the second trial, where she briefed them on the results of the new DNA tests. **ADA Kirn** was also deposed in Wright's civil suit, and she did not dispute or challenge the detectives' recollections of their pretrial meeting where they discussed the DNA test results. The detectives' deposition testimony contradicted their trial testimony: when they were asked at trial about their knowledge of the DNA test results, they denied any knowledge of the DNA evidence in the case. At the time they testified, **ADA Kirn** failed to correct this testimony, despite her personal knowledge of its falsity.

The Innocence Project filed a detailed bar complaint with citations to the detectives' contradictory trial and deposition testimony, as well as **ADA Kirn**'s acquiescence to the detectives' recollection. Despite the straightforward nature of the inconsistencies between the detectives' trial testimony and their later deposition testimony, as well as the fact that these inconsistencies bore heavily on the credibility of the detectives as key prosecution witnesses, the Pennsylvania Disciplinary Board dismissed the complaint.

The Path Forward: Reform Recommendations

The cases in the Report illustrate the factors that enabled and fostered prosecutorial misconduct within the Office. To lessen the risk that prosecutors will continue to commit misconduct, the Report makes several recommendations, which are discussed below.

Change Office Culture

Prosecutors must change what they value. The old approach—of treating trials as a game to be won using all available leverage—led to the misconduct detailed in this Report. Rather than elevating the importance of winning above all else, the Office must emphasize the importance of fairness and the search for truth as important goals that are themselves important and not merely secondary to winning. To be clear, in making this recommendation, we are not suggesting that Office culture absolves individual prosecutors of wrongdoing. Rather, we are suggesting that the choices prosecutors make are influenced by the values of the Office—and that the old value of "winning means doing justice" has not served the Office or the community. Instead of celebrating trial wins and permitting prosecutors to hang photographs of defendants they convict on their walls, the Office should celebrate prosecutors who acted to ensure fairness and who made the right decision, even if it meant losing or weakening their case. In other words, the focus should be on the process and not just the outcome: so long as prosecutors ensured fair process and erred on the side of ensuring fairness, this is what should be celebrated and recognized.

"The Coach Gets to Pick the Team"

Sometimes, changing Office culture means changing Office personnel. When DA Krasner first took Office, he fired or requested the resignations of multiple prosecutors. At the time, this move was viewed somewhat controversially.[130] Although the Office did not release the names of the people who left, it appears that some of the prosecutors who were terminated or asked to resign were involved in some of the cases detailed in the Case Appendix, including **Gwen Cudjik**, **Mark Gilson**, **Bridget Kirn**, **Cari Mahler**, **Andrew Notaristefano**, and **Carlos Vega**.[131]

In response to DA Krasner requesting his resignation, **ADA Notaristefano** told the media that he was asked to leave on the eve of a murder trial, "without explanation," and that he had worked hard and sacrificed a lot to make the city safer.[132] **ADA Cudjik** said she had been willing to stay and work for DA Krasner and "continue to do what we do," and she was "devastated" by her firing.[133] **ADA Gilson** said he was shocked by his dismissal, and he said there was no rhyme or reason to the firings.[134] In contrast, a source in the Office described the list of people as comprised of "supervisors with different visions, veteran high-salaried do nothings or younger prosecutors associated with misconduct."[135] **ADA Vega** sued DA Krasner and the City of Philadelphia in federal court, alleging that histermination constituted age discrimination.[136] The case went to trial in 2022, and a jury found that **ADA Vega's** termination was not discriminatory.

130. Chris Palmer, Julie Shaw, and Mensah M. Dean, "Krasner Dismisses 31 from Philly DA's Office in Dramatic First-Week Shakeup," Philadelphia Inquirer, Jan. 5, 2018; Solomon Jones, "Larry Krasner Needed to Clean House in the D.A.'s Office," Philadelphia Inquirer, Jan. 9, 2018 (discussing "fake outrage" over firings); Daniel Denvir, "Philadelphia Media Slam Newly Elected DA Krasner for Firings But House Cleaning Advances His Promise of Equal Justice," The Appeal, Jan. 16, 2018.

131. Ryan Briggs and Max Marin, "Leaks Show Krasner Firings Targeted Top Staff, 'Porngate' Prosecutor," City & State Pennsylvania, Jan. 5, 2018.

132. Palmer, Shaw, and Dean, "Krasner Dismisses 31."

133. *Id.*

134. Briggs & Marin, "Leaks Show Krasner Firings."

135. *Id.*

136. Jeremy Roebuck, "Krasner's 2018 Firing of Top Homicide Prosecutor Was Not Discriminatory, Jury Finds," Philadelphia Inquirer, Nov. 21, 2022.

Independently Scrutinize Cases

The Office must independently scrutinize the cases they take to trial to ensure there is sufficient, reliable evidence of guilt. Many of the cases involving prosecutorial misconduct had weak evidence, *i.e.*, they rested on a cooperator's uncorroborated statement or a single eyewitness account; a "confession" that was contradicted by other evidence; or statements made by witnesses who later recanted and claimed police abuse and/or coercion. As a starting point, the Office must look for possible red flags to ensure that this evidence is in fact reliable. This means asking the police to corroborate a cooperator or informant statement whenever possible and ensuring that the police interrogation was conducted in a way that minimizes inaccuracies and false confessions. If a "confession" conflicts with other evidence gathered in the investigation, or if a cooperator's statement cannot be corroborated, the trial prosecutor should not turn a blind eye to this in favor of pushing the case forward to trial. Likewise, while *Brady-Lively* allows a prosecutor to admit witness statements even after they recant, this evidentiary rule should not be used as a free pass to ignore red flags suggesting that the statements were coerced or otherwise not reliable.

To encourage prosecutors to evaluate cooperator and informant statements, the Office should create checklists with common indicators of reliability and truthfulness, including whether the police were able to corroborate the cooperator or informant accounts, how often the cooperator provided information to the police in other investigations, and what benefits the cooperator has received. Using checklists is a good starting point, because it can start a dialogue between the Office and the police about the nature and quality of the police investigation, including the presence of alternate suspects or evidence that undermines guilt, as well as the role that cooperators played, whether the police tried to verify or corroborate their statements, and what promises were made or benefits were given to them. Relatedly, the Office must ensure that the police adequately document their interactions with cooperators and informants, and prosecutors should be prepared to request this documentation to ensure that they are collecting impeachment information for disclosure.

Promote Open-File Discovery in Trial and Post-Conviction Proceedings

As discussed above, the Office has revised its discovery policies and has expressed a commitment to open-file discovery that also entails upgrading its electronic infrastructure and case management system.[137] Of course, open-file discovery is only effective if the prosecution actively searches for information, including information known only to the police. As such, the Office should continue to emphasize that open-file discovery does not absolve the prosecutor of their duty to find and disclose information that may be in the possession of the police, because this is the only way to ensure that open-file discovery contains the full universe of documents to which a defendant is entitled. Continued adherence is also important, because as the cases in the Report illustrate, sometimes the favorable information that led to a defendant's exoneration was sitting in the DAO trial file or H-File—and could have been found earlier, had the Office reviewed these files or made them available to defense counsel.

The Office must also ensure that prosecutors are searching for and disclosing favorable, exculpatory information without regard to materiality, including during post-conviction proceedings. Materiality assessments should be avoided, because the prosecution is not always well-positioned to understand whether a given piece of information is (or is not) material. Nor is a prosecutor in a position to understand whether information is material to the defense's trial preparation or their theory of the case.

An example of the danger of grafting a materiality requirement onto pretrial disclosures can be seen in Esheem Haskins' case. In that case, Haskins alleged that the prosecution suppressed favorable information corroborating his defense that another man committed the crime. In a subsequent PCRA hearing, the trial prosecutor, **ADA Jason Bologna**, testified that he deliberately withheld a letter written by a defense witness because he believed the letter was not material, because it contained information that was cumulative of another statement the witness gave to police. However, **ADA Bologna** turned out to be wrong—the letter was not cumulative of the witness' other statement and was in fact material, because it corroborated Haskins and his witness' claim that another man committed the crime. When Haskins filed a federal habeas petition alleging these facts, the federal court ultimately granted him a new trial.

The Office should also consider creating checklists to assist prosecutors in reviewing case information and ensuring that favorable information is being disclosed. For instance, a substantial number of exonerations were linked to the failure to disclose information about alternate suspects and the failure to also ask for and disclose PAS. A checklist with common categories of potential *Brady* information can ensure that prosecutors are complying with their duty to find and disclose favorable

137. *See* Philadelphia District Attorney's Office, "Phila DAO Policies."

information. These checklists also have the added benefit of highlighting possible case weaknesses, as well as ensuring that prosecutors are reviewing relevant information to understand the police investigation and the evidence supporting (or undermining) the defendant's guilt.

Safeguard the CIU's Independence

The Office must ensure the continued independence of the CIU to pursue exonerations and post-conviction modifications of sentences. As a starting point, the CIU should remain separate from the Law Division, because this is a prerequisite to ensuring CIU independence. We note that CIU independence was threatened as recently as 2019, when the Law Division unsuccessfully sought quasi-veto power over CIU cases. Specifically, the Law Division wanted to provide input on all pending CIU cases, to review all CIU pleadings prior to filing, and to have the DA serve as a tie-breaker in the event the Law Division disagreed with any aspect of the CIU's analysis.[138] These requests ostensibly arose due to disagreements with the CIU over its litigation positions in ongoing cases. These disagreements are not surprising—the two units have different (and sometimes competing) missions, and in some of the exonerations, the CIU discovered that the Law Division had advanced erroneous legal arguments and aggressively defended what turned out to be wrongful convictions. But these competing missions also illustrate why the CIU should remain independent from the Law Division: because the CIU is uniquely situated to be able to reinvestigate convictions and determine whether dismissal or some other form of relief is appropriate.

Independence is also about more than just being separate on an organization chart. It means the Office must promote policies and procedures that insulate the CIU's work product from being used improperly in other cases. In at least two cases involving convictions tied to former detective Philip Nordo, the CIU's work product was misinterpreted by the Law Division and misused in post-conviction proceedings. As a starting point, the CIU screens cases before it accepts them for a full investigation, and it is not always able to move forward with every case after its initial screening. However, this does not mean that every CIU declination is equivalent to a determination that the person is guilty, or that the case was free from constitutional or other serious errors—and it would be misleading and wrong to suggest that a court should draw these conclusions. But in several instances, the Law Division cited the CIU's declinations to suggest that a conviction was sound and should not be disturbed.[139] These specific cases involved CIU screening of cases involving Detective Philip Nordo, and the Law Division relied on these declinations despite being told by CIU prosecutors that their declinations were limited in scope and content.

To triage the numerous cases involving Nordo, the CIU and the Law Division had specific policies for screening these convictions. Because the CIU did not have the capacity to investigate every case in which Detective Nordo was involved, they conducted a preliminary review to determine whether initial evidence suggested that that his involvement compromised the conviction. In crafting this screening policy, the CIU expressly noted that it might reject a case for failing to meet internal CIU criteria unrelated to Nordo, or it might be unable to conclude, based on the current facts, whether Nordo's involvement compromised the conviction, and that the question would have to be litigated further. In this latter instance, the CIU made clear to the Law Division that its rejection of a case was not a conclusion that there was no Nordo-related misconduct. Nor did it mean that the CIU had otherwise determined that the conviction was valid or defensible. In short, the CIU clearly stated that its rejection of Nordo-related cases should not be taken as an endorsement or legal opinion that the underlying conviction was valid, or that any other non-Nordo claims in the petition lacked merit.

Despite these caveats, the Law Division cited the CIU's screening and rejection of at least two cases to argue that a Nordo-related conviction should be sustained.[140] In *Commonwealth v. Woodard*, **ADA Shayna Gannone** cited the CIU's review and rejection of Woodard's case as evidence that relief was not warranted, pointing to the CIU's review of the record and interview of at least one witness. However, this argument contradicted what an ADA in the CIU had previously told **ADA Gannone**, *i.e.*, the CIU had conducted only a limited review, and the CIU ADA flagged a separate allegation of police misconduct for **ADA Gannone** to review, which suggested the possibility of unresolved factual allegations that might entitle Woodard to relief. In *Commonwealth v. Edwards*, **ADA Gannone** again argued that no relief was warranted because the CIU had reviewed Edwards' conviction and declined to take his case. However, an ADA in the CIU had previously emailed **ADA Gannone** about the case, explaining that

138. Mem. from P. Cummings, CIU Supervisor to CIU ADAs & Staff, re: CIU and the Law Division – Independence and Communications, Sept. 3, 2020 (on file with author).

139. Mem. from P. Cummings, CIU Supervisor to DA L. Krasner, Law Division Supervisor N. Winkelman, Law Division Ass't Supervisor P. George re: CIU-Law Division Rejection Issues (Legal, Ethical, & Practical Concerns), Oct. 14, 2020 (on file with author).

140. *Id.* at 5-8.

because of a tight review deadline—which was partly caused by **ADA Gannone**—she was not able to review the H-File because it was located at the Philadelphia Police Department (which at the time refused to allow the CIU into the building to scan or copy the file). Thus, the CIU ADA had declined the case because of these external factors, and not because she substantively found the case lacked merit.

The need to insulate the CIU's work product from misinterpretation or misuse by the Law Division arises in part from the two units' different missions. The Law Division's mission has traditionally focused on defending convictions, which means that they may argue that, while favorable information was suppressed, the information was not material to the case and the conviction should be sustained. This contrasts with the CIU's work, which considers whether mistakes were made that were serious enough to either result in a wrongful conviction or a miscarriage of justice, either of which undermines faith in the outcome of a case. Because the two units and are doing fundamentally different work, it would be improper to allow the Law Division to use the CIU's preliminary conclusions as circumstantial evidence of the soundness of a conviction.

Change the Law Division's "Defend First" Approach

The Case Appendix sheds light on how the Law Division's "defend first" approach resulted in a host of problems, from lengthy delays for people who were wrongfully convicted; to prosecutors reflexively denying misconduct allegations without reviewing the DAO trial file or H-File to determine if they had a good faith basis for their denials; to prosecutors making aggressive factual and legal arguments in order to defend convictions, rather than squarely engaging with the facts and the federal case law. These problems make clear that the Law Division must change its approach, which applies a default assumption that all convictions *should* be defended so long as they legally *can* be defended. Instead, the unit should take a more flexible and individualized approach to post-conviction work[141] that encourages appeals prosecutors to assess cases and concede relief where appropriate.

This approach has several benefits. First, it recognizes the possibility that error occurred that is serious enough to merit relief without forcing a convicted person into protracted litigation. Second, it lessens the likelihood that the Law Division will be forced to make strained factual and/or legal arguments in cases that are not defensible, because they will be encouraged to concede relief in those instances. This point is especially important, because in PCRA proceedings involving *Brady* materiality, they tended to downplay or ignore federal law to defend convictions in the face of allegations that the prosecution violated *Brady*. Third, it preserves the credibility of the Office by avoiding scenarios like those that occurred in James Lambert and Jimmy Dennis' cases, where federal courts harshly rebuked the Office for poor decision-making and questioned its judgment. Lastly, conceding relief where appropriate lessens the cognitive dissonance between trial prosecutors who are now trying to liberally approach their constitutional and ethical obligations and seeking to safeguard due process and fairness at trial, and Law Division prosecutors who are then searching for any legally defensible ground upon which to defend a conviction

Lastly, the Office should consider implementing a screening mechanism to ensure that cases that rightfully belong in the CIU do not get handled by the Law Division, or change the Law Division's "defend first" approach to concede relief whenever it is appropriate to do so. As the Case Appendix shows, the Law Division's "defend first" approach meant they were often skeptical of prosecutorial misconduct allegations and/or claims of innocence that turned out to be correct. They spent considerable time opposing defendants who sought relief, even though the information supporting these allegations was often in the DAO trial file or H-File—which the Law Division might have found, had they conducted a preliminary inquiry or given opposing counsel discovery. It appears that the Office has recently begun to bridge the gap between the CIU and the Law Division. As noted above, in March 2021, Matthew Stiegler was hired as the supervisor of the Federal Litigation Unit in the Law Division, in part to address cases that were not within the CIU's purview but still merited some form of relief to correct a miscarriage of justice.

Foster Accountability: the Carrot and Stick Approach

The Office should adopt a "carrot and stick" approach to accountability through the creation of a unit that will both support and advise prosecutors and seek accountability when misconduct occurs. Right now, it does not appear that any one unit is responsible for advising ADAs on their legal and ethical obligations or holding them accountable. While the CIU could be a valuable resource for educating the Office, their primary focus is on reinvestigations and remedying wrongful convictions and other miscarriages of justice. As such, the Office should consider

141. As noted above, this individualized approach to cases was adopted by the FLU when ADA Stiegler headed the unit. However, the FLU handles a narrow subset of cases filed in federal court—this approach was not broadly adopted by the Law Division.

tasking a separate unit or supervisor with creating Office-wide training and serving as a resource for prosecutors who need real-time assistance with their cases.

At the pretrial stage, the unit should be available to support prosecutors and serve as a resource when they have questions about their disclosure obligations. This unit should also oversee Office-wide training on key legal and ethical issues to ensure that prosecutors are being educated in a manner consistent with the Office's values and with federal and state case law. At the back end, the unit should work with the Law Division to track appellate and post-conviction decisions that include key legal developments or that criticize prosecutorial conduct. The unit should also work with the DA to create accountability measures where prosecutors are found to have committed misconduct.

The creation of a separate unit has several benefits. First, it will be separate from the CIU and the Law Division and will not require those units to dilute their missions or reallocate their workload to take on these additional tasks. Second, it can serve as a bridge between these units and the rest of the Office by holding trainings based on CIU cases and findings and tracking court cases from Law Division proceedings to ensure that the Office stays updated on legal developments. Third, it can advise the DA on how to respond to findings of misconduct, whether they are discovered by the CIU or during federal or state court litigation. While many of the prosecutors who worked on cases investigated by the CIU are no longer employed by the Office—some retired, while others were asked to resign or were fired from their positions after DA Krasner took office—it is possible that future CIU investigations or Law Division cases will address questionable conduct by current Office prosecutors. Should this happen, the Office must have structures in place to hold them accountable.

Improve Legal Training

The Office must ensure that it trains prosecutors to take a liberal and expansive approach to their constitutional and ethical disclosure obligations. While this is important for every prosecutor's office, it seems especially important here, because the Philadelphia DAO has historically misunderstood its obligations and employed discovery policies that appear to violate the Constitution. For instance, as discussed above, the Homicide Unit had a policy and practice of ignoring initial witness falsehoods and not documenting them until they gave a statement that police and prosecutors thought was true, which violated *Brady* and *Giglio*. Likewise, in a recent federal habeas case involving **William Johnson**, a key witness against Johnson wrote letters to the trial prosecutor, **ADA Carlos Vega**, and **DA Lynne Abraham**, that police had coerced her into implicating Johnson. According to the Office's court filings, prosecutors asked **DA Abraham** about the letters and why they had not been disclosed, and she said that if **ADA Vega** did not disclose them, it was because he thought the witness' claims were "bullshit,"[142] even though *Brady* and *Giglio* do not permit the prosecution to withhold information simply because they do not believe it is true. (For her part, **DA Abraham** said that the Law Division gave the court "false information" because she "never mentioned Carlos Vega at all.")[143]

The Office should also reconsider whether the Law Division is the best unit to lead trainings on *Brady-Giglio* pretrial disclosures. As a general matter, the Law Division is primarily concerned with whether any legal error is serious enough to merit a new trial. But, as discussed in the Legal Standards section, this appellate standard does not focus on whether a trial prosecutor acted properly at the front-end and instead encourages prosecutors to think narrowly about their disclosure obligations, because it conceives of *Brady* as permitting prosecutors to withhold information so long as it is not material. This focus—on what a prosecutor need *not* disclose, or what they can fail to disclose while still preserving a conviction—is seen in a recent Law Division legal training about a prosecutor's *Brady* obligations.

As previously discussed *supra*, the Law Division hosted a CLE training and invited former **ADA Thomas Dolgenos** to lecture about recent *Brady* developments in state court. During his time in the Office, **ADA Dolgenos** defended several convictions that were later criticized and vacated by federal courts, including James Lambert's and Jimmy Dennis' cases. In this 2020 CLE lecture, **ADA Dolgenos** focused on the Pennsylvania Supreme Court's opinion upholding Ricardo Natividad's conviction for possible constitutional violations. At the time of his lecture, the CIU was actively investigating Natividad's conviction. The Law Division did not consult the CIU about whether this was an appropriate case to use as training material. Nor did the Law Division appear to consider whether the Natividad opinion was appropriate training material, given the Third Circuit's ongoing criticism of SCOPA's misapplication of federal law.

142. Chris Palmer, "Suspect in Murder of Off-Duty Cop Walks Free After Former Top Prosecutors Committed 'Egregious' Misconduct, Officials Say," Philadelphia Inquirer, June 8, 2023, available at (last visited Aug. 21, 2023).

143. *Id.*

After the CLE training was held, the CIU reviewed **ADA Dolgenos**' lecture and drafted a memorandum to the DA detailing its concerns regarding how **ADA Dolgenos** taught the law and facts of the Natividad case. For instance, Dolgenos emphasized the Pennsylvania Supreme Court's holding that Natividad had to show that newly discovered favorable information would have "effectively gutted" the prosecution's case in order to be material and to cast "reasonable doubt about guilt."[144] However, this was not the materiality test endorsed by either the Supreme Court or the Third Circuit, both of which held that, so long as suppressed information undermined confidence in the outcome of the trial, then materiality was shown. It does not appear that **Dolgenos** clarified the proper federal test for materiality or explained that the Pennsylvania Supreme Court misapplied the law on materiality in Natividad's case. Nor does it appear that Dolgenos contrasted the *Natividad* holding with prior Third Circuit holdings criticizing SCOPA for using the "sufficiency of the evidence" test.

The CIU also noted that **Dolgenos** advanced a narrow interpretation of the prosecution's disclosure obligations. Rather than encouraging prosecutors to take a liberal view of what they ought to disclose, he invited them to decide whether favorable information was material by highlighting two aspects of the *Natividad* opinion. First, he cited the portion of the opinion holding that favorable information may not be material if it contradicts abundant prosecution evidence. Then, he cited the holding that alternate suspect information may not be material where the information is not credible and is outweighed by other evidence. It does not appear that **Dolgenos** cautioned prosecutors about cognitive biases that may lead them to overweight the "abundance" of guilt in their own case or underweight the value of a given piece of information because they are not privy to how defense counsel will prepare their case. Nor does it appear that **Dolgenos** explained that individually evaluating each piece of information along these lines would contradict Supreme Court and Third Circuit case law, which instructs prosecutors to consider the *cumulative impact* of favorable information that has been withheld.

The CIU also took issue with Dolgenos' description of the facts in *Natividad*, because it seemed to minimize the impact and significance of the suppressed information. For instance, he described the suppressed information as (i) a handwritten note indicating that a witness named "John Maculla" saw the shooting, and (ii) statements regarding alternate suspect Rolston Robinson. However, he omitted that the Maculla note contained an address for the witness, and description of the assailant, as well as the tag number of the car in which the assailant fled. Nor did he appear to explain that the note, once discovered by Natividad's counsel, enabled them to identify "John Maculla" as John McCullough, a witness who saw the shooting and who happened to know Natividad from a community youth program, and who affirmatively said that Natividad was not the shooter. Likewise, **Dolgenos** did not explain that the statements about Robinson included statements from multiple witnesses who heard Robinson confess to killing the victim, as well as Robinson's own statement to police admitting to being at the scene of the crime and providing a detailed description of what the victim looked like shortly after he was killed.

After **Dolgenos**' training, the CIU concluded its investigation into Natividad's conviction and found that his case was tainted by *Brady* violations. The CIU conceded Natividad's right to federal habeas relief, and the federal district court agreed and vacated his conviction. In its opinion, the court concluded that the Pennsylvania Supreme Court's legal analysis and conclusions were contrary to clearly established federal law, in part because it employed a legal test that had long been rejected by the Supreme Court and the Third Circuit.

Care About Judges

Wrongful convictions and exonerations can serve as the starting point for improved prosecutorial accountability by bringing to light past prosecutorial misconduct. But the Office cannot vacate convictions or dismiss charges on its own—only judges are permitted to do this. The Case Appendix illustrates the importance of judges in ensuring that the harmful outcomes of prosecutorial misconduct are remedied. Simply put, judges have an important role to play, both in ensuring that miscarriages of justice are remedied and enabling prosecutors to fulfil their ethical mandate to do justice, even after a conviction has been obtained.

For instance, readers can see contrasting judicial approaches to allegations that Detective James Pitts abused and coerced statements and confessions from witnesses and suspects. At a PCRA hearing where Judge M. Teresa Sarmina of the Philadelphia Court of Common Pleas heard numerous witnesses testify about Detective James Pitts' coercive and abusive interrogation tactics,

144. *Comm. v. Natividad*, 200 A.3d at 33 (quoting *Agurs v. United States*, 427 U.S. 97, 112-13 (1976)). The Pennsylvania Supreme Court's citation to *Agurs* is misleading, because subsequent Supreme Court precedent expanded on *Agurs* to clarify that materiality does not require a showing that the suppressed evidence would have resulted in acquittal.

she found the witnesses credible—and she found Detective Pitts not credible. Her opinion detailing Pitts' behavior lay the groundwork for the CIU's directive that the Office stipulate that Pitts engaged in a "pattern and practice" of abusive and coercive misconduct. In contrast, when Brandon Sawyer filed a PCRA petition and was granted an evidentiary hearing on his claim that Detective Pitts interrogated him for three days while he was a 15-year-old, without giving him access to his parent or an attorney, he had seven witnesses testify about their experience with Pitts when he interrogated them. Despite these witnesses' testimony, Judge Barbara McDermott of the Philadelphia Court of Common Pleas found nothing to indicate any pattern or practice of abusive conduct.[145]

As another example, when CIU and PCRA counsel jointly agreed that Neftali Velasquez was entitled to a new trial, Judge Genece Brinkley refused to accept the parties' stipulations that the prosecution failed to disclose favorable information about key prosecution witnesses and denied Velasquez relief. Shortly thereafter, Judge Brinkley was stripped of her criminal case assignments after a preliminary investigation found that she had imposed illegal sentences, allowed sentences to run past their maximum date, and failed to schedule critical hearings.[146] Once Velasquez's case was reassigned, Judge Lilian Ransom of the Philadelphia Court of Common Pleas vacated Velasquez's conviction, paving the way for Velasquez to be exonerated.

In Jahmir Harris' case, Judge Rosemary Defino-Nastasi vacated Harris' conviction but initially refused to dismiss the charges against him. Instead, she criticized the CIU's investigation and ordered the Office to take specific investigative steps regarding an alternate suspect before she would agree to dismiss the charges. According to the CIU's pleadings, Judge Defino-Nastasi suggested that the CIU did not care about public safety, and as a result she had to order these investigative steps to protect the community.[147] To end Harris' wrongful prosecution, the CIU was forced to file a motion objecting to Judge Defino-Nastasi's order on the ground that it violated the separation of powers between the judiciary and the prosecution and infringed on the prosecutor's discretion to continue or discontinue a case. In its motion, the CIU noted that remedying a wrongful conviction was not predicated on also prosecuting someone else for the offense, and it further noted that Judge Defino-Nastasi's objections to the CIU's investigation appeared to stem from her objection to the Office's current policies, including the fact that the CIU collaborated with PCRA counsel on the investigation and refused to treat the PCRA petition as a "fully adversarial proceeding[]."[148] When the CIU pushed back against the court's belief that prosecutors should function primarily as advocates and not as ministers of justice, Judge Defino-Nastasi granted the *nolle prosequi* motion—but she criticized the CIU's investigation and its identification as a potential suspect as "unsubstantiated,"[149] and she claimed that the CIU's filings were "utterly inappropriate" and meant to "harass and influence the court."[150]

Going forward, one possible solution to the judiciary's discomfort with the CIU's "non-adversarial" approach is for the Office to explain the CIU's work to promote transparency and a better understanding of the work that often precedes the motion that the CIU files seeking to vacate a conviction and/or dismiss charges against a defendant. In fact, the Office offered to meet with the judiciary after several judges expressed an interest in better understanding the CIU's work and the pleadings it filed when it sought to exonerate people, but on the eve of the meeting, Philadelphia Court of Common Pleas Judge Leon Tucker cancelled the training because he believed it was an improper *ex parte* communication between the Office and the courts. It should be noted that the training would not have discussed specific cases; nor would it include cases that were pending before the courts or that may be filed in the future.

145. Philadelphia Inquirer, "The Homicide Files: Brandon Sawyer," May 7, 2021.

146. Chris Palmer, "The Philly Judge Who Jailed Meek Mill Has Had All Her Criminal Cases Reassigned, Kicking Off a Legal Battle," Philadelphia Inquirer, Dec. 21, 2022.

147. Obj. to Feb. 26, 2021 Order to Further Investigate as a Condition Precedent to Grant *Nolle Prosequi* at 4 ¶ 6, *Comm. v. Harris*, CP-51-CR-0007962-2013 (Phila. Ct. Comm. Pl. Mar. 3, 2021).

148. *Id.* at 11 ¶ 29.

149. We note the tension between Judge Defino-Nastasi's accusation that the CIU did not care about public safety and her public comments criticizing the CIU's investigation of an alternate suspect who was being actively investigated for murder, because the public criticism could have endanger the Office's future attempts to prosecute the actual perpetrator.

150. Samantha Melamed, "A Philadelphia Man Who Was Wrongfully Convicted of Murder Eight Years Ago was Released From Prison Friday Night," Philadelphia Inquirer, Mar. 12, 2021.

Conclusion

The Report focuses on cases involving prosecutorial misconduct that occurred in the Philadelphia District Attorney's Office over a 45-year period. We sought to identify prosecutors who committed misconduct at the trial and post-conviction levels, as well as to highlight the common fact patterns across the cases and the factors that contributed to the prosecutorial misconduct in these cases. In identifying and summarizing these cases, we also wanted the public to have sufficient facts to evaluate the work done by Office prosecutors, who were supposed to be working to ensure the safety and fair treatment of everyone in the community.

We hope that the Report also provides a learning opportunity for the Office—to take the information gleaned from CIU exonerations, habeas grants, and retrial acquittals to improve the way prosecutors approach their cases. The Office should ensure that its prosecutors are trained on past practices and policies that led to wrongful convictions and unjust outcomes, so that they can watch out for these common pitfalls in their own cases.

Finally, we end on the idea that an Office culture which elevates the blind desire to win above all else is antithetical to public safety. Focusing on winning without concern for whether the right person has been charged and convicted does more than harm just the wrongfully convicted person and the victims and their families. Prosecutorial misconduct means that years, if not decades, can go by before the Commonwealth realizes their mistake—but by then, it is often too late to restart the criminal investigation. No one is made safer by this outcome. In short, we hope that the public is motivated by both the unjust process that resulted in wrongful convictions, and by the fact that prosecutorial misconduct undermines public safety by raising the likelihood of mistakes and obscuring the fact that the true perpetrator of a crime remains free.

Case Appendix

The information in the Case Appendix is taken from court findings and/or CIU conclusions regarding *Brady*, *Giglio*, and/or *Napue* violations. When courts and/or the CIU determined that these legal violations occurred, we have added additional facts for the reader to understand and assess the violation and the prosecutor's conduct.

William Hallowell (1978)[1]

William Hallowell was convicted of, among other things, first-degree murder, and sentenced to life imprisonment. He filed a PCRA petition seeking a new trial, alleging that the prosecution suppressed favorable information about his co-conspirator, who had cooperated with the prosecution. His petition was eventually heard by the Pennsylvania Supreme Court, which vacated Hallowell's conviction after finding that the prosecution failed to disclose benefits that were promised to his co-conspirator.

After he won his PCRA petition, Hallowell moved to prohibit a retrial on Double Jeopardy grounds. However, Hallowell's motion was denied by the Pennsylvania Supreme Court.

The Criminal Investigation and Trial

In 1973, William Hallowell and Charles Way were charged with first-degree murder for the death of Hallowell's mother. Hallowell went to trial in 1974, and Way cooperated[2] and testified against Hallowell. Way's testimony was crucial to the case because he was the only witness to the murder. When Way was cross-examined about his motive for cooperating, he testified that he just wanted to "clear it all up."[3] Way also denied that the Office promised him anything in exchange for his testimony.

Defense counsel called **Chief of Homicide ADA Edward Rendell** as a witness and cross-examined him about Way's cooperation. **ADA Rendell** testified that he had sole authority to offer and/or approve the offer of benefits to a witness or co-defendant, and he denied offering, or giving permission to offer, leniency to Way. **ADA Rendell** also testified that the only benefit Way received was being allowed to remain out of jail until Hallowell's trial, so that Way could avoid being coerced or threatened by other inmates.

Hallowell was convicted of first-degree murder and sentenced to life imprisonment.

Way Receives a Favorable Sentence

After he testified at Hallowell's trial, Way was sentenced for his role in the crime. At his sentencing hearing, Way testified that, from the moment he was arrested, and prior to giving any statement to police, he was promised leniency in exchange for his cooperation. Way further testified that he agreed to cooperate based on representations made by his defense counsel and **ADA Rendell**. The ADA[4] who handled the sentencing hearing corroborated Way's testimony, telling the court that Way had negotiated a plea to second-degree murder, and the Office agreed to recommend a sentence of two-to-eight years, all of which was conditioned on Way's cooperation at trial. Based on the negotiated plea agreement, the court sentenced Way to the Office's recommended term of two-to-eight years.

The Prosecution Suppressed Favorable Information

Hallowell appealed his conviction on the ground that Way's trial testimony was false and misleading, and that **ADA Rendell** misled the trial court and the jury into believing that no benefits had been offered to Way. **ADAs Steven Goldblatt** and **Adrian Diluzio** opposed Hallowell's appeal. **ADA Diluzio** conceded that Way's agreement with Office had not been disclosed, and that Way's testimony was false and misleading, but he nonetheless defended the non-disclosure of this information on the ground that the trial ADA had no personal knowledge of the agreement.

The Pennsylvania Supreme Court rejected this argument as inconsistent with Supreme Court case law, which focused solely on the defendant's right to a fair trial, and not the prosecutor's good or bad faith. SCOPA also held that the Office was treated as one entity for purposes of knowledge, and that a promise by one prosecutor was to be attributed to the Office as a whole. The court further held that Way perjured himself when he denied that he was promised anything or given any benefits. With respect to **ADA Rendell**, SCOPA found his testimony misleading, because while he may not have personally approved any deal with Way, it appeared that his predecessor had. The Court concluded that the Office was "guilty of perpetrating a falsehood and a fraud upon the Court, jury, and people of this Commonwealth…."[5] Based on these findings, it vacated Hallowell's conviction and granted him a new trial.

1. The information in this section is taken from various sources. *See,.e.g., Comm. v. Hallowell*, 477 Pa. 232 (1978); *Comm. v. Hallowell*, 497 Pa. 203 (1981).
2. We were unable to identify the prosecutor who handled Hallowell's trial.
3. *Hallowell*, 477 Pa. at 235.
4. We were unable to identify the prosecutor who handled Way's sentencing hearing.
5. *Hallowell* at 236.

Hallowell Loses His Double Jeopardy Motion

Hallowell subsequently filed a Double Jeopardy motion to prohibit his retrial. Despite its earlier ruling that the Office perpetrated a "falsehood and a fraud"[6] upon the jury and the public, a divided Pennsylvania Supreme Court was unable to reach a majority decision, and the motion was thus denied.[7] One justice issued a four-sentence opinion which held that the *Brady* and *Napue* errors were not the kind of errors that would taint a retrial, and he denied Hallowell's petition. Two other justices held that the motion should be dismissed on procedural grounds and did not consider the merits of Hallowell's claim.

Three justices found that Double Jeopardy should prevent a retrial, because the Office engaged in prosecutorial overreaching when it knowingly permitted Way to give false and misleading testimony about what he was (and was not) promised. These justices were also skeptical of the **ADA Robert Lawler's** argument that Way's erroneous testimony could be attributed to "administrative error."[8] They noted that Hallowell was a defendant who was well-known to the Office—he had previously been charged with the shooting deaths of two police officers—and the instant trial was similarly "sensational,"[9] and they surmised that whoever promised leniency to Way had to have known that Way had committed perjury, yet no one came forward from the Office to correct it.

Edward Bulovas (1982)[10]

Edward Bulovas was convicted of rape, kidnapping and other crimes. The prosecution's key witness was John Horan, Bulovas' co-conspirator-turned-cooperator. When he testified against Bulovas, Horan had already been convicted and sentenced for his role in the crime. Before Bulovas' trial, the prosecutor met with Horan and his defense counsel and promised to write to the Parole Board on Horan's behalf if Horan agreed to cooperate against Bulovas. This promise was never disclosed to Bulovas' defense counsel. After he was convicted, Bulovas learned about the prosecution's promise to Horan, and he filed a PCRA petition for a new trial. Despite evidence that the Office made this promise and failed to disclose it, both the PCRA court and the Superior Court denied Bulovas relief.

The Criminal Investigation and Trial

Horan and Bulovas were charged with the gunpoint kidnapping and sexual assault of a teenage girl. Horan forced the teenager into a car where Bulovas was waiting, and the two men drove her to an isolated area and sexually assaulted her before letting her go. Horan went to trial separately and was convicted and sentenced before Bulovas' trial. After he was sentenced, Horan spoke with Detective Nicholas Bratsis and identified Bulovas as his co-conspirator and agreed to testify against him.

ADA Michael Stiles tried the case. Horan was a crucial prosecution witness, because the victim was only able to make a tentative identification of Bulovas and was later unable to identify him when shown a photo array that included his picture. Horan testified that he had already been sentenced for his role in the crime, and that as such there was no benefit or other leniency that he could hope to obtain. **ADA Stiles** later emphasized this fact to highlight Horan's credibility to the jury, arguing that Horan was testifying despite having nothing to gain. Bulovas was eventually convicted.

The Undisclosed Promise to Horan

After Bulovas was convicted, he learned that **ADA Stiles** met with Horan and Horan's defense counsel before trial, and that **ADA Stiles** promised to write a letter on Horan's behalf to the Parole Board if Horan agreed to cooperate against Bulovas. Bulovas filed a PCHA petition for a new trial, arguing that the prosecution failed to disclose this promise, which could have been used to impeach Horan's credibility and highlight his bias and motive for testifying. The PCHA court granted a hearing on the petition, and **ADA Stiles** testified that he met with Horan before trial and told him that he could not help Horan with his sentence but would write to the Parole Board to inform them of Horan's cooperation against Bulovas. Horan's defense counsel also testified and recalled **ADA Stiles** as making both a promise *and* a threat. According to defense counsel,

6. *Id.*

7. Because Pennsylvania Supreme Court was unable to reach a majority decision, this meant that the lower court ruling remained in effect, and that Hallowell's petition was denied.

8. *Hallowell*, 497 Pa. at 211.

9. *Id.* at 212.

10. The information in this section is taken from *Comm. v. Bulovas*, 446 A.2d 1332 (1982).

ADA Stiles suggested that if Horan did not cooperate and did not testify against Bulovas, then he would inform the Parole Board of this, as well.

At the conclusion of the hearing, the PCHA court denied Bulovas' petition. However, it appeared that the court misunderstood Bulovas' claim. Bulovas argued that he was entitled to a new trial because the promise to write to the Parole Board was an inducement for Horan's testimony, and the prosecution was obligated to disclose this promise—which it failed to do. But in denying Bulovas relief, the PCHA court wrongly described Bulovas as alleging a *quid pro quo*, *i.e.*, Horan's testimony in exchange for a favorable sentence, which it concluded was not supported by the facts, because Horan had already been sentenced. Bulovas then appealed to the Superior Court, which upheld the PCHA court's denial of relief. The majority's cursory analysis found no evidence of any promise or threat to Horan to induce his testimony and raised the possibility that Horan himself might have notified the Parole Board of his cooperation without any assistance from the DAO.

The dissent, on the other hand, criticized the PCHA court for misunderstanding Bulova's claim and instead focused on the question whether the *quid pro quo* of Horan's testimony in exchange for a favorable Parole Board letter was an inducement that should have been disclosed. Unlike the majority, it engaged in a more detailed factual analysis, including testimony from **ADA Stiles** and Horan's defense counsel, to establish that a promise (and threat) were in fact conveyed to Horan in order to induce his testimony, and that this promise should have been disclosed.

Anthony Shands (1985)[11]

Anthony Shands was convicted of robbery and sentenced to 11 ½-to-23 months' imprisonment. After his arrest, the officers who arrested him came under scrutiny for their conduct, and several of them were indicted for conspiring to violate the federal civil rights of the people they arrested. Shands appealed his conviction and won a new trial after the Pennsylvania Superior Court held that the Office failed to disclose favorable information related to the officers who handled his case.

The Criminal Investigation and Trial

In 1981, Anthony Shands was arrested for robbery in a case investigated by a group of police officers known as the "Granny Squad." The Granny Squad consisted of a group of undercover officers who conducted sting operations as follows: one officer usually dressed as an older woman or "granny" carrying a wad of cash, while other officers served as back-up to arrest anyone who tried to rob the granny. Shands went to trial in 1981. By this time, several Granny Squad members were under investigation by federal and local authorities for civil rights violations, including false arrests, excessive force, racial bias, and giving false testimony. The Office was cooperating with these investigations, and several Granny Squad members had been removed from street duty shortly after Shands' arrest.

In advance of trial, defense counsel asked the Office to review its files for favorable information relating to (i) the Granny Squad investigation and (ii) the Office's belief that certain Granny Squad cases should be dismissed, because defense counsel wanted to cross-examine the arresting officers about these facts. The trial ADA[12] objected to these requests. He claimed that as a member of the Trial Division, he was not privy to the files that related to the Granny Squad investigation, because those files were being held by the Investigation Division. The trial ADA also argued that the Granny Squad files were not relevant to Shands' case. The trial court sided with the Office and refused to allow defense counsel to inspect the files relating to the Granny Squad investigation. It also declined to conduct its own *in camera* inspection of these files, and it prohibited defense counsel from referring to any other Granny Squad cases or cross-examining the officers about the ongoing investigation.

Shands was convicted of robbery and sentenced to 11 ½ to 23 months imprisonment.

The "Granny Squad" Indictments

Before Shands was sentenced, four officers from the Granny Squad were indicted on federal charges that they conspired to violate the civil rights of eight people. Shortly before the indictments were announced, **DA Edward Rendell** publicly stated that at least some of the people arrested by the Granny Squad were innocent, and the Office announced the dismissal of four cases tied to the Granny Squad. After the indictment was announced, a Philadelphia Court of Common Pleas judge signed an order that at least 25 open cases tied to the Granny

11. The information in this section is taken from various sources. *See,.e.g., Comm. v. Shands*, 338 Pa. Super. 296 (Pa. Sup.Ct. 1985); "4 in Philadelphia Police Decoy Squad are Indicted," New York Times, Sept. 13, 1981.

12. We were unable to identify the prosecutor who handled Shands' trial.

Squad would be dismissed unless the prosecution advised the court about the circumstances of the federal investigation and the actions taken by the Office in dismissing the four cases.

The Prosecution Failed to Disclose Favorable Information

Shands appealed his conviction, and his case was eventually heard by the Pennsylvania Superior Court, which held that Shands was entitled to a new trial, because the Office failed to comply with its obligation to disclose favorable information about the Granny Squad. The court noted that the Office had cooperated in the federal investigation, had agreed to dismiss certain cases tied to the Granny Squad, and had expressed a belief that certain Granny Squad officers made unfounded arrests, which meant that the Office had a duty to disclose information related to the credibility of these officers. The also court cited the Philadelphia Court of Common Pleas order directing the Office to disclose information about the 25 open cases tied to the Granny Squad, holding that this order also supported the conclusion that the Office should have disclosed information in Shands' case.

Separately, the court held that the trial ADA should not have been empowered to determine whether the Granny Squad files contained relevant information, and that at minimum, the trial ADA should have asked the trial court to inspect the files to determine if relevant documents existed. Lastly, the court rejected the trial ADA's assertion that they did not have access to the Granny Squad information because the case belonged to the Investigations Division. The court properly recognized that the Office is "an entity and knowledge of one member of the office must be attributed to the office as a whole."[13]

Matthew Connor (1990)[14]

Matthew Connor was tried twice for, among other things, rape and first-degree murder. His first trial ended in a mistrial, and he was convicted at his retrial and sentenced to life imprisonment. After a third-party investigation yielded evidence of Connor's innocence, the Homicide Unit agreed to examine his conviction. The Office moved to vacate Connor's conviction in 1990, and the charges against him were dismissed shortly thereafter.

The Criminal Investigation and First Trial

In August 1978, twelve-year-old Corinthia Fields was raped and murdered in a Philadelphia apartment building. Her body was discovered in the morning, after building resident Darlene Snipes, encounted a man sleeping in the stairwell with blood all over him and called police. When police responded to the call, they did not find the man but found Fields. Based on her wounds, police initially thought she had been shot, and they focused on Connor, who owned a shotgun and who resided on the floor where Fields was found. Shortly after arresting Connor, the Medical Examiner's Office concluded that the victim had been stabbed with a sharp instrument that was possibly an icepick. Police later recovered a bloody icepick in the incinerator of the housing complex.

At his first trial, a key issue was whether Connor stole an ice pick to use in the murder. Connor claimed he spent the night with his girlfriend, Laura Creer, at her house, which was roughly a thirty-minute walk from the apartment where the murder took place. However, Creer testified that Connor left her house in the late night/early morning of the murder, and she said that she did not see him again until later in the morning. Finally, Creer testified that the ice pick found in the incinerator was the same one that went missing from her home on the day of the killing, even though it was longer and did not have the same print on the handle.

13. *Shands*, 338 Pa. Super. at 306 (citing case law).

14. The information in this section is taken from various sources. *See, e.g.*, *Comm. v. Connors* [sic], 311 Pa.Super 553 (Pa. Sup. Ct. 1983); *Connor v. City of Philadelphia*, Civ. No. 90-6390, 1991 WL 102989 (E.D. Pa. June 11, 1991); Commonwealth Letter re: Pet'n in the Nature of a Pet'n for Relief Under the Post Conviction Relief Act ("PCRA Letter and Petition"), *Comm. v. Connor*, Nos. 1679-1682 (Phila. Ct. Comm. Pl. Feb. 20, 1990); DAO Trial File (on file with DAO); "Matthew Connor," National Registry of Exonerations; Martha Raffaele, "Pastor Embodies Liberty, Justice For All," Los Angeles Times, Jan. 30, 2000.

To rebut Creer's testimony, defense counsel called Irma Epps, who was Creer's neighbor. Epps testified that she saw Creer's son throw an ice pick away a few weeks after Connor was arrested, and that she retrieved the ice pick from the trash. Based in part on this testimony, the jury deadlocked.

The Retrial

Connor was retried in 1980, and **ADA Joseph McGill** prosecuted the case. The defense tried to call Epps as a witness, but she told defense counsel she had been threatened if she were to testify again, so she refused to appear. When defense counsel tried to have her testimony from the first trial read into the record, Judge Albert Sabo of the Philadelphia Court of Common Pleas denied the motion on the ground that defense counsel waited too long to tell the court about his difficulty securing Epps' testimony. Snipes testified that Connor was the man she saw sleeping in the stairwell with blood on his clothes, and she described him as wearing a striped shirt. However, Creer testitifed that Connor was wearing the same clothes both before and after Fields' death and described him as wearing an all-blue shirt. **ADA McGill** presented evidence about the discarded ice pick found in the building's incinerator.

Connor was convicted of first-degree murder and sentenced to life imprisonment.

Centurion's Investigation

After his conviction, Centurion Ministries ("Centurion"), a non-profit organization that works to free innocent people from prison, agreed to investigate Connor's conviction. Centurion noted inconsistencies in the witness testimony—such as Snipes describing Connor as wearing a striped shirt while Creer said Connor was wearing an all-blue shirt—and agreed to investigate Connor's conviction.

With the help of a lawyer, Centurion discovered favorable information that had not been disclosed to defense counsel before trial. For instance, they found information that the victim's half-brother was known to walk around the neighborhood with an ice pick, and that he had a history of sexual assault of minors, including trying to assault a family member. The day the victim was found, police learned that the half-brother had scrapes on his arms and red stains on his clothing. Police also spoke with a friend of the victim's half-brother. The friend initially said that he and the half-brother were together the night before the murder through the next morning. However, the friend later admitted to police that he and the victim's half-brother walked up the apartment's stairs together, but that he stopped on the fifth floor while the half-brother continued upstairs on his own.

Centurion also found Snipes' 911 call, which had not been disclosed. In that call, Snipes made statements that contradicted her police statements and later trial testimony. For instance, she told the 911 operator that after she found the man, he ran away, but at trial she said he remained lying on the floor. Moreover, on the 911 call she did not indicate that she recognized the man, let alone that the man was Connor. They also learned that Snipes spoke with her boyfriend, her mother, and a neighbor about what she saw, and she never mentioned that she recognized the man. In fact, Snipes never claimed to recognize the man as Connor until after she learned there was a murder in the building.

Centurion presented its investigative findings to the DA's Office, which reinvestigated the case and learned, among other things, that Snipes wore glasses, and that she could not recall if she was wearing them the day she saw the man in the stairwell.

Connor is Exonerated

Homicide Unit Chief ADA Barbara Christie filed a motion conceding that Connor was entitled to a new trial. In the motion, she stated that that the Office reinvestigated Connor's case, and that as a result of the reinvestigation, "information has come to light which might be helpful to the defendant and which might affect any eventual verdict." [15] The motion, which did not elaborate on the new evidence that was brought to light, was eventually granted and the charges against Connor were dismissed shortly thereafter.

15. *See* PCRA Letter and Petition at 2.

Edward Ryder (1996)[16]

Edward Ryder was convicted of first-degree murder while he was incarcerated at Holmesburg Prison awaiting trial on a theft charge, and he was sentenced to life imprisonment. Between 1974 and 1994, Ryder filed multiple PCHA[17] and PCRA petitions seeking a new trial. In 1993, Governor Mark Singel commuted Ryder's sentence, and he was released from prison. After Ryder was released from prison due to his commutation, an evidentiary hearing was held, the PCRA court granted Ryder's petition and vacated his conviction on the ground that the prosecution failed to disclose favorable information that tended to exculpate Ryder.

The Criminal Investigation and Trial

In 1973, Samuel Molton was stabbed to death while he was incarcerated at Holmesburg Prison. There were no eyewitnesses to the murder. Edward Ryder and two other men were charged with murder based on eyewitnesses who saw Ryder and Molton arguing before the murder and who saw Ryder leaving the area of Molton's cell after he was killed.

Ryder went to trial in 1974. During trial, defense counsel requested "all exculpatory material" and the trial ADA[18] responded, "I have nothing exculpatory."[19] Trial prosecutors presented testimony from a prison guard and two inmates that Ryder and Molton had argued about religion two days before the murder, and that Ryder threatened to assault Molton. The prison guard also testified that when he responded to the murder, he saw Ryder and another man running past him, away from Molton's cell. Two inmates testified that they saw Ryder near or exiting Molton's cell around the time of the murder, and one of them testified that he overheard Ryder and other inmates discussing their plan to harm Molton and then saw Ryder walk toward Molton's cell carrying a blue shirt that had been wrapped to conceal his right hand. This inmate testified that when Ryder and the others returned a short time later, Ryder did not have anything in his hand anymore.

Ryder testified that he had not been involved in a fight with Molton and was only trying to break up an argument between Molton and another inmate. He also testified that he did not know his co-defendants or the inmates who testified against him. He said he had been taking a shower and had returned to his cell, where he chatted with his cellmate until it was time to eat. He also called several inmate witnesses who said that Ryder was not around Molton's cell at the time of the murder.

Ryder was convicted of first-degree murder and sentenced to life imprisonment.

Ryder's Sentence is Commuted

In 1993, Governor Mark Singel commuted Ryder's sentence for the prison murder, and he was released from prison.

The Prosecution Suppressed Favorable Information

During PCRA proceedings, the court ordered the Office to produce some 142 witness statements that were taken during the investigation and that had not been disclosed before Ryder's trial. The court reviewed these statements and found that eight of them should have been disclosed, because they contained favorable information, including multiple detailed statements from two inmates identifying the men they saw outside of, or coming out of, Molton's cell—none of whom included Ryder. These witnesses had also been shown photo arrays and identified other men as being in the area. One of these witnesses also said he knew Ryder and heard him threaten Molton, but "that's all Edward did. If he had anything else to do with [Molton], I didn't see him."[20] This witness also said he saw men near Molton's cell holding a weapon and one trying to take off a bloody shirt, but he did not name Ryder as one of the men he saw. In fact, when shown a photograph of Ryder, he said he did not personally see Ryder there.

A third witness gave a statement that contradicted the prison guard who testified against Ryder. This witness told police that he was lining up to get food when he heard a whistle alerting that Molton's body had been found, and that he saw a sergeant running toward the cell, but he did not see anyone else running down the hall. Two other inmate witnesses said that Ryder was

16. The information in this section is taken from various sources. *See, e.g., Comm. v. Ryder*, No. 0017-0020, 1996 WL 1358443 (Phila Ct. Comm. Pl. Feb. 12, 1996); Howard Goodman, "First Day of Freedom Brings Sweet Surprises for Inmate," Philadelphia Inquirer, Oct. 1, 1993.

17. The Post-Conviction Hearing Act was the predecessor statute to the PCRA.

18. We were unable to identify the prosecutor who handled Ryder's trial.

19. *Ryder*, 1996 WL 1358443, at *119.

20. *Id.*, at *120.

in their cell to get shower shoes, and that Ryder and another inmate walked to the showers before returning to chat and eventually getting in line for lunch. These witnesses also said they were with Ryder and were lined up together waiting for their meal when they heard the whistle alerting to Molton's death. Based on these statements, which contained favorable information that was not dislcosed to Ryder, the court vacated his conviction.

Ah Thank "Allen" Lee (2004)[21]

Ah Thank "Allen" Lee was convicted of robbery and second-degree murder and was sentenced to life imprisonment. He was exonerated after one of his alleged co-conspirators told police that a man known as "Kwa Jai," not Lee, participated in the crimes. Based on this information, Lee filed a motion for a new trial, arguing that the prosecution did not disclose information that exculpated Lee and pointed to Kwa Jai. The PCRA court held an evidentiary hearing on the allegations and vacated Lee's conviction, and the Commonwealth immediately dismissed the charges against him.

The Criminal Investigation

In August 1983, three men tried to extort money from a restaurant in Philadelphia's Chinatown. The men wore similar green jackets, and their behavior caught the attention of waiter Phong Ngo and Charles Scanzello, an off-duty police officer who was eating at the restaurant. After the restaurant emptied out, the three men demanded money from restaurant manager Jade Wong ("Jade"). Jade refused to give them money, so one man ("First Man") tried to force open the cash register, while the second man ("Second Man") forced Jade and Ngo into the kitchen at gunpoint. Jade's sister, Janice Wong ("Janice"), was already in the kitchen and tried to run out the kitchen door to get help, but Second Man and another man ("Third Man") forced her back inside. Both Second and Third Man were armed.

Once Janice ran outside, Jade called the police and was on the phone with them when Second and Third Man forced Janice back inside. As Janice was walking back into the kitchen she heard a gunshot and turned around to see Jade bleeding from her head. She also saw Second Man backing away toward the kitchen door. Ngo did not see the shooting, but he caught a glimpse of one of the assailants, who was holding a gun when he ran out the side door.

Early in the investigation, police spoke with Kenny Kang, who said the three assailants were gang members known as "Wing," Benson, and "Aaron." Kang also said Aaron was from China. Because Kang had an accent, police apparently believed that "Aaron" was actually the name "Allen." This assumption eventually led police to identify "Aaron/Allen" as Ah Thank Lee, an alleged gang member who had recently been arrested in New York City on an unrelated case. Lee was known as Allen, but he was not from China. Once they identified Lee, police did not ask Kang to look at Lee's photograph to confirm whether their assumptions were correct. Instead, police showed Lee's photograph to Janice, who identified him as "First Man." Police took a formal statement from her and documented her identification of Lee as "First Man."

Police tried to identify the other two assailants and sought assistance from their law enforcement counterparts in New York City and Washington, D.C. NYPD passed on a tip that someone called "Kwa Jai," aka "Bad Boy," was the shooter, and that he was from D.C., and they also passed on Kwa Jai's photograph. DCPD relayed information that Kwa Jai was a hit man for a gang and was in D.C. shortly after Jade's murder. According to information from a DC informant, Kwa Jai said that he "did a case in Philadelphia, now I have to lay low for a while." Police also received information that Kwa Jai had been arrested in D.C. a week before Jade's murder for extorting another Chinese restaurant. Kwa Jai's brother also told police that Kwa Jai confessed to Jade's murder, that the two of them fled to Georgia afterward, and that Kwa Jai returned to New York City after learning of Lee's arrest.

Around the same time, NYPD interviewed alleged gang leader Wing Tsang, who identified the three assailants as Kwa Jai, Benson Luong, and Cam Ly, whom he called "Wayne." He did not mention Lee. According to Tsang, Ly confessed that he shot Jade and said that Kwa Jai was the man at the cash register. Tsang also identified photographs of Kwa Jai, Luong, and Ly. After interviewing Tsang, police reinterviewed Janice and showed her photographs of Ly and Kwa Jai. Janice identified

21. The information in this section is taken from various sources. *See, e.g., Comm. v. Ly*, 602 Pa. 268 (Pa. 2009); Br. for Appellee, *Comm. v. Cam Ly,* No. 465, 2004 WL 5215798 (Pa. Oct. 29, 2004); Reply Br. for Appellant, *Comm. v. Cam Ly,* No. 465 CAP, 2006 WL 4116655 (Pa. October 2006); Pet'n for a Writ of Habeas Corpus, *Ly v. Beard*, No. 10-1414 (E.D. Pa. Sept. 27, 2010); "Ah Lee," National Registry of Exonerations; Notes of Testimony ("Lee Trial Transcript"), *Comm. v. Lee*, June 28, 1988 (copy on file with author); Undated DAO Internal Notes ("Undated DAO Notes"), "Commonwealth v. Ah Thank Lee," DAO Trial File (copy on file with author); Ltr. from K. Brancheau, Chief, Civil Litigation Unit, to L. Sitarski, Chief Deputy City Solicitor re: Allen (Ah Thank) Lee ("Brancheau Letter"), June 12, 2006 (copy on file with author).

Ly as "Second Man"—the man who grabbed her as she tried to flee and who shot her sister. When she looked at Kwa Jai's photograph, Janice identified him as "First Man"—the man at the cash register. This contradicted her earlier identification of Lee as "First Man." Police documented Janice's identifications in a formal statement but did not clarify that Janice had made two different identifications of "First Man." Nor did they attach copies of the photographs they showed her, which meant that there was no way to tell from her statement that she had identified Kwa Jai as "First Man."

Although Tsang's statement complicated the investigation, because he did not identify Lee as one of the assailants and instead implicated Kwa Jai, it does not appear that the Commonwealth investigated these discrepancies to determine which of the four suspects—Cam Ly, Benson Luong, Kwa Jai, and Ah Thank Lee—were the three assailants. The Office ultimately charged Lee, Ly, and Luong with the robbery-murder.

Three Separate Trials

Ly, Lee, and Luong were all tried separately, and **ADA Arlene Fisk** prosecuted all the cases. Ly was tried first in 1988. **ADA Fisk** argued that Ly was "Second Man," and that Lee and Luong were the other two assailants. Janice testified that Ly shot her sister, and that she had ample opportunity to observe him while in the restaurant and when he stopped her from fleeing. Janice also testified that she was confident in all her identifications—including of Lee. Officer Brian Scanzello, who had been in the restaurant eating a meal before the crime, also testified that Ly was one of the assailants. **ADA Fisk** also tried to call Tsang as a witness to testify about Ly's admission that he killed Jade, but Tsang refused to take the stand. Ly was convicted and sentenced to death, but he later received a life sentence in exchange for agreeing to drop his appeal.

Lee also went to trial in 1988. **ADA Fisk** argued that he was "First Man," and that Ly and Luong were the other two assailants. Lee's defense was that he had been wrongly identified and that Kwa Jai was the true assailant, after Ly told his attorney that Lee was not involved, and Ly's attorney relayed this to Lee's defense counsel. Lee's counsel tried to call Tsang as a witness, because he had identified Kwa Jai as the third assailant. However, when Lee tried to call Tsang, **ADA Fisk** objected, even though she herself had tried to call him as a witness at Ly's trial.

ADA Fisk also argued that Kwa Jai's involvement did not exculpate Lee, because the three assailants could have been Ly, Lee, and Kwa Jai. This was a risky argument, because at the time of Lee's trial, the Commonwealth had an active arrest warrant for Benson Luong as the third and final assailant. In fact, defense counsel pointed to this active warrant to argue that **ADA Fisk's** statement was a "terrible misstatement of fact."[22] However, despite the warrant, **ADA Fisk** claimed that "[i]f Benson was arrested tomorrow he would be released," because "there is absolutely no current available evidence against him."[23]

After Ly and Lee were convicted, the Commonwealth arrested Luong, who had fled Philadelphia to avoid prosecution. When he was arrested, Luong told police that he, Ly, and Kwa Jai were the three assailants—he did not mention Lee. Contrary to **ADA Fisk's** argument at Lee's trial, Luong was not released after his arrest. Instead, **ADA Fisk** prosecuted Luong for third-degree murder. He was convicted and sentenced to imprisonment.

Lee Wins a New Trial

Lee challenged his conviction in multiple post-conviction petitions alleging that the prosecution did not disclose information that police identified Kwa Jai ias a suspect as early as two weeks after Jade's murder. The court granted a hearing on this claim, and counsel presented evidence that police received information early in the investigation that implicated Kwa Jai, including information that DCPD had questioned Kwa Jai as a suspect in another extortion plot involving Chinese restaurants. This information was recorded in Philadelphia police logs, and **ADA Fisk** testified at the hearing that she reviewed at least some of these logs. In addition, the DAO trial file contained **ADA Fisk's** handwritten notes, taken on her personal stationery, that referenced witness statements identifying Kwa Jai as the shooter.

The PCRA court granted Lee's petition, and the Office immediately dismissed the charges against him.

22. Lee Trial Transcript at 11.

23. *Id*.

ADA Fisk Prosecuted an "Extremely Weak Case"[24]

After Lee's conviction was vacated, he filed a lawsuit against the city seeking compensation for his wrongful conviction.[25] The City Solicitor's Office asked the DAO's civil litigation unit to assess Lee's lawsuit, and **Chief of the Civil Litigation Unit ADA Karen Brancheau** drafted a letter in June 2006 analyzing the trial evidence and the prosecution's theory of the case. In the letter, **ADA Brancheau** described the non-eyewitness evidence linking Lee to the crime as "extremely weak."[26] She noted that Kenny Kang's statement, which was the "lynchpin"[27] in the case against Lee, was based entirely on the police's assumption that "Aaron" was really Allen, because Kang "could not properly pronounce the letter 'L'"[28] since he "was a native Chinese speaker."[29] **ADA Brancheau** also noted that the police could have easily verified their assumption by asking Kang to identify a photograph of Lee—but they never followed up with Kang. Instead, she noted that NYPD provided Philadelphia PPD with photographs of different people, including Lee, and that Lee was then identified "seemingly at random."[30]

The DAO also reviewed transcripts from Lee's trial and took notes on key facts and testimony, including perceived problems and weaknesses in the trial. This document, which was undated and was created by an unknown author, was also highly critical of the prosecution. For instance, the author noted that the prosecution team was convinced that Lee was involved in a Chinese gang and was being protected by other members, despite "absolutely no hard evidence to support this position,"[31] and despite other evidence suggesting that Kwa Jai was third assailant. The author noted that this strongly held belief prevented the prosecution from reevaluating its initial conclusion that Lee was "First Man." Elsewhere, the author wrote that **ADA Fisk** "accepted the investigation as the police had developed it,"[32] and that even after Lee's exoneration, **ADA Fisk** and the police still believed Lee was a gang leader, and that it "bec[a]me an article of faith in fighting on behalf of this conviction."[33]

Both documents also criticized the **ADA Fisk's** response to Lee's "mistaken identity" defense. As noted above, by the time of Lee's trial, Ly had been convicted and there was an active arrest warrant out for Luong as the third assailant. These charging decisions thus reflected the Commonwealth's judgment that the three assailants were Ly, Lee, and Luong—and not Kwa Jai. However, at Lee's trial, **ADA Fisk** rebutted Lee's defense of mistaken identity by arguing that the three assailants could have been Ly, Lee, and Kwa Jai. When defense counsel pointed out that this argument was undercut by the active arrest warrant for Luong as the third and final participant, **ADA Fisk** claimed that Luong would be released if were arrested, because there was no evidence against him. In evaluating **ADA Fisk's** rebuttal, **ADA Brancheau** described her shifting theories of liability[34] as "unorthodox…advocacy."[35] The DAO internal notes likewise described Fisk's strategy and arguments as "shockingly disingenuous,"[36] and "wholly disingenuous"[37] when she suggested (i) it was unclear whether Benson Luong was the third assailant, and (ii) that even if Kwa Jai was an assailant, this did not exculpate Lee, because he could have committed the crime with Kwa Jai.

24. Brancheau Letter. at 2.

25. Pennsylvania is one of a minority of states that has not adopted a statute to compensate people who have been wrongfully convicted. *See* "Compensation," National Registry of Exonerations.

26. *Id*.

27. Undated DAO Notes at 5-6.

28. Brancheau Letter at 2.

29. *Id*.

30. *Id*

31. Undated DAO Notes at 5.

32. Brancheau Letter at 4.

33. Undated DAO Notes at 5.

34. This relates to a larger legal rule that permits prosecutors to offer contradictory theories across separate proceedings. *See, e.g.*, Ken Armstrong, "What Happens When Prosecutors Offer Opposing Versions of the Truth?", ProPublica, Feb. 26, 2024.

35. Brancheau Letter at 4.

36. Undated DAO Notes at 3.

37. *Id*.

Zachary Wilson (2009)[38]

Zachary Wilson[39] was convicted of first-degree murder and sentenced to death. He eventually filed a federal habeas petition seeking a new trial on the ground that the prosecution suppressed favorable information about key eyewitnesses. The federal district court granted Wilson relief, and when the Law Division appealed the habeas grant, the Third Circuit affirmed the district court's order.

Wilson subsequently moved to prevent his retrial on Double Jeopardy grounds, but he lost in state court. He was convicted and died in prison in 2018.

The Criminal Investigation and Trial

In 1981, Jamie Lamb was shot and killed in a Philadelphia bar. Eyewitnesses Jeffrey Rahming and Edward Jackson were in the bar at the time of the shooting and identified Wilson as the gunman. Based on their identifications, Wilson was arrested. However, Jackson failed to identify Wilson at a lineup, even though Rahming initially said Wilson fell on him as he fled, he did not identify Wilson at the preliminary hearing. Accordingly, the charges against Wilson were dismissed. Charges were not refiled against Wilson until 1986, after Lawrence Gainer told Philadelphia police officer John Fleming that Wilson confessed that he shot Lamb because Lamb had killed Wilson's adopted brother.

Wilson went to trial in 1988, and **ADA Arlene Fisk** prosecuted the case. At trial, Rahming and Jackson identified Wilson as the shooter, and both men said their earlier failures to identify Wilson were because he had threatened them. Gainer testified about hearing Wilson confess to the murder. On cross-examination, defense counsel interrogated Officer Fleming about his relationship with Gainer in an attempt to establish that the latter was a paid informant. Officer Fleming testified that he and Gainer were old friends and that Gainer had given him information over the years, but he denied giving Gainer anything of value or paying him for information. **ADA Fisk** also objected to defense counsel's questions as irrelevant.

During a conference with the prosecution and the court, defense counsel requested Rahming, Gainer, and Jackson's criminal records, and specifically their convictions involving dishonesty. **ADA Fisk** responded to the request as follows:

Court:	Okay. You have the convictions for Jeffrey Rahming.
Prosecutor:	R-A-H-M-I-N-G. Robbery in '80, theft in '83, and an open case on retail theft.
Counsel:	Right.
Prosecutor:	Correct?
Counsel:	Gainer had—
Prosecutor:	Theft from '79 in New Jersey.
Court:	Lawrence Gainer had—
Prosecutor:	1979 theft.
Court:	Theft in New Jersey.
Prosecutor:	That was all, *no other convictions in crimen falsi beyond that.*[40]

Thus, during the exchange about the witnesses' prior convictions involving dishonesty **ADA Fisk** specifically referred to convictions for Rahming and Gainer but was silent as to Jackson.

Wilson was convicted of first-degree murder and sentenced to death.

Wilson Loses in State Court

Wilson filed a PCRA petition alleging that the prosecution suppressed information about Jackson, Gainer, and Rahming. He alleged that Jackson had a prior conviction for impersonating a police officer that **ADA Fisk** did not disclose, even when asked at the court conference; that Gainer was a paid informant for

38. The information in this section is taken from various sources. *See, e.g., Comm. v. Wilson,* 580 Pa. 439 (Pa. 2004); *Wilson v. Beard*, No. 05-2667, 2006 WL 2346277 (E.D. Pa. Aug. 9, 2006); *Wilson v. Beard*, 589 F.3d 651 (3d Cir. 2009); Pet'r Mot. for Summ. J. with Respect to Claim I of the Pet. for Writ of Habeas Corpus and Consolidated Mem. of Law, *Wilson v. Beard,* No. 2005-2667 (E.D. Pa. Dec. 21, 2005); Resp't's Reply to Pet'r's Mot. for Summ. J., *Wilson v. Beard,* No. 2005-2667 (E.D. Pa. Feb. 17, 2006); Pet'r Mem. of Law in Reply to Resp't's Reply to Pet'rs Mot. for Summ. J., *Wilson v. Beard,* No. 2005-2667 (E.D. Pa. Feb. 28, 2006); Statement of Material Facts for Which There is no Genuine Dispute with Respect to Pet'r's Mot. for Summ. J., *Wilson v. Beard,* No. 2005-2667 (E.D. Pa. June 20, 2006); Respt's Reply to Pet'r's' "Statement of Material Facts," *Wilson v. Beard,* No. 2005-2667 (E.D. Pa. June 23, 2006); Appellant's Initial Br., *Comm. v. Wilson*, 2314 EDA 2014 (Pa. Sup.Ct. Jan. 30, 2015); Br. for Appellee, *Comm. v. Wilson*, 2314 EDA 2014 (Pa. Sup. Ct. July 13, 2015); Appellant's Reply Br., *Comm. v. Wilson*, 2314 EDA 2014 (Pa. Sup. Ct. July 28, 2015); *Comm. v. Wilson*, 147 A.3d 7 (Pa. Sup. Ct. 2016); *Comm. v. Wilson*, No. 2988 EDA 2017, 2018 WL 4402322 (Pa. Sup. Ct. Sept. 17, 2018).

39. Wilson has the distinction of winning federal habeas relief twice: he was convicted of two different murders in two separate trials, and he filed and won federal habeas petitions challenging both of his convictions. The issue in his other habeas petition, which involved prosecutorial misconduct during jury selection, will not be discussed here.

40. *Wilson,* 589 F.3d at 662 (citing notes of testimony) (emphasis supplied).

Officer Fleming; and that Rahming was diagnosed with schizophrenia after being escorted to the psychiatric ER by a DAO detective the day after he testified against Wilson.

The PCRA court held an evidentiary hearing, and both **ADA Fisk** and Officer Fleming testified. **ADA Fisk** initially testified that she could not recall if she was aware of Jackson's conviction for impersonating a police officer but that she would have disclosed it if she had known about it. Following her testimony, **ADA Evan Silverstein** found Jackson's rap sheet in the DAO trial file and disclosed it to PCRA counsel. **ADA Fisk** was then recalled to the stand, where she acknowledged that she had the rap sheet in the back of her trial binder during the trial. **ADA Fisk** also testified that she did not recall whether Rahming had been taken to the psychiatric ER. Contrary to what he said at trial, Officer Fleming admitted to making interest-free loans to Gainer during the period when Gainer gave him information.

Despite these revelations, the PCRA court denied Wilson's petition on procedural grounds, finding that Wilson had waived his claims because he had failed to properly plead them. By dismissing the petition on these grounds, the PCRA court avoided the substance of Wilson's allegations and the problematic testimony from **ADA Fisk** and Officer Fleming.

The Law Division Aggressively Defends the Conviction

When Wilson filed a federal habeas petition, the Law Division aggressively defended Wilson's conviction. **Law Division ADA David Glebe** of the Federal Litigation Unit, under supervision from **ADA Thomas Dolgenos**, argued that **ADA Fisk** was not aware of Jackson's conviction for impersonating a police officer. The district court responded by pointing to **ADA Fisk's** PCRA testimony, where she admitted that Jackson's rap sheet was in her trial binder. Separately, the court found **ADA Fisk's** personal knowledge to be legally irrelevant because the prior conviction was known to the police, and Supreme Court case law obligated prosecutors to find and disclose information in the police's possession.

Before the Third Circuit, the Law Division tried a different strategy: they "vigorously dispute[d]"[41] that **ADA Fisk** "suppressed"[42] Jackson's prior conviction. Pointing to her comments at the charging conference (see *supra*), the Law Division claimed that **ADA Fisk** was only responding to whether Gainer had convictions for dishonesty and was not referring to Jackson—which meant that she technically did not make "an affirmative misrepresentation regarding Jackson's criminal record...."[43] The Third Circuit was not persuaded by this argument. It concluded that "she failed to disclose [Jackson's criminal record] when asked by the court during a charging conference for the witnesses' criminal histories...."[44] Moreover, the Third Circuit held that the Law Division's argument was (once again) legally irrelevant, citing Third Circuit case law that obligated **ADA Fisk** to find and disclose a witness' criminal record, regardless of whether she was explicitly asked for it or not.

The federal district court was unpersuaded by the Law Division's arguments and held that **ADA Fisk** suppressed favorable information about all three trial witnesses that could have been used to impeach them and/or could have led to the discovery of other information pertaining to their credibility. The Office appealed the decision, and the Third Circuit sustained the district court's order, concluding that **ADA Fisk** failed to disclose favorable information about the prosecution's key witnesses.

The Third Circuit, like the district court, found that the prosecution did not disclose Jackson's prior conviction for impersonating a police officer, which was a crime involving dishonesty. The courts also found that, had the conviction been disclosed, it would have led to the discovery of Jackson's presentence investigation report and an accompanying mental health evaluation, which revealed that Jackson had suffered a serious head injury that led to blackouts and occasional memory loss, that he had poor long- and short-term memory, and that he had a "need to associate with and help the police."[45]

Both courts also found that the prosecution should have disclosed that Rahming had been personally escorted by a DAO detective to the psychiatric ER the day after he testified against Wilson, where he was diagnosed with schizophrenia. The courts reasoned that, had this been disclosed, defense counsel would have asked for Rahming's mental health records and his criminal records, which would have included psychiatric and presentence

41. *Id.*
42. *Id.*
43. *Id.* at 663.
44. *Id.* at 664.
45. *Wilson*, 2006 WL 2346277, at *12.

investigation reports revealing that Rahming was taking prescription medication for psychosis, and that this medication impacted his ability to perceive and recall events.

Lastly, the courts cited Officer Fleming's PCRA testimony as evidence that Gainer was acting as a paid informant. After pointing out the discrepancy between Officer Fleming's trial testimony and his PCRA testimony, both courts concluded that this was precisely the type of information that should be disclosed, because it suggested that Gainer had a monetary interest in providing Officer Fleming with information implicating Wilson. Moreover, the Third Circuit noted that there were enough facts regarding the relationship between Officer Fleming and Gainer to have "imposed an affirmative obligation on the Commonwealth to satisfy itself that no money had changed hands between the two."[46]

Wilson Loses his Double Jeopardy Motion

After Wilson was granted a new trial, the Office retried him twice more. At the second trial, the jury was unable to reach a verdict. At the third trial, a jury convicted him of first-degree murder, and Wilson challenged his conviction on Double Jeopardy grounds. Wilson's motion was eventually heard by the Pennsylvania Superior Court, which denied him relief. The court held that there was no evidence **ADA Fisk** engaged in "blatant prosecutorial misconduct,"[47] so the Double Jeopardy prohibition did not apply. In reaching this conclusion, the Superior Court did not address the fact that **ADA Fisk** had Jackson's rap sheet in her own trial binder and still failed to disclose it. In fact, the court suggested that **ADA Fisk** may not have possessed Jackson's rap sheet at all, writing "*[e]ven assuming that* the prosecution was in possession of Jackson's [criminal] history, there is nothing in the record to suggest that any failure to disclose the information was intentional rather than simply inadvertent."[48] Lastly, the court held that Jackson's criminal record was "not *Brady* material,"[49] because the "information contained in a wintess' criminal record"[50] is not within the exclusive control of the Commonwealth. The court did not elaborate on this analysis, which appeared to contradict Supreme Court and Third Circuit case law obligating prosecutors to discover and turn over favorable information, including a witness' criminal record, as well as the specific findings made by the federal courts in Wilson's habeas proceedings.

James Lambert (2013)[51]

James Lambert was convicted of first-degree murder and sentenced to death. After filing a series of failed PCRA petitions in state court, he filed a federal a habeas petition alleging that the prosecution suppressed favorable information regarding its key cooperating witness. His petition was eventually heard by the Third Circuit, which found that the prosecution suppressed favorable information and granted Lambert a new trial. The Office appealed the Third Circuit's ruling to the United States Supreme Court, which remanded the case back to the Third Circuit for further consideration. On remand, the Third Circuit again granted Lambert's petition for a new trial.

Despite harsh criticism from the Third Circuit, the Office refused to drop the charges against Lambert. Instead, the Homicide Unit offered Lambert a reduced plea to third-degree murder charges. Lambert accepted the offer and was immediately released on time served.

The Criminal Investigation

In September 1982, two men robbed a Philadelphia bar. The first assailant stood watch at the top of the stairs, while the second assailant went downstairs to rob patrons. When two patrons tried to overpower the second man, he shot and killed them both, and both assailants then fled the bar. Police received an anonymous tip that Bernard Jackson and Jackson's brother-in-law, Bruce Reese, were the assailants. Police showed employees

46. *Wilson*, 589 F.3d at 664.

47. *Wilson*, 147 A.3d at 13.

48. *Id.* at 14.

49. *Id.*

50. *Id.*

51. The information in this section is taken from various sources. *See, e.g., Comm. v. Lambert,* 584 Pa. 461 (Pa. 2005); *Lambert v. Beard*, 633 F.3d 126 (3d Cir. 2011); *Lambert v. Beard*, 537 Fed. App'x 78 (3d Cir. 2013); *Comm. v. Reese*, 239 A.3d 124 (Pa Sup. Ct. 2020); Br. for Appellant ("Lambert PCRA Brief"), *Comm. v. Lambert,* No. 427 CAP 2005, 2005 WL 6562255 (Pa. Feb. 8, 2005); Br. for Appellee and Appendices ("Law Division PCRA Brief"), *Comm. v. Lambert*, No. 427 CAP 2005, 2005 WL 2495291 (Pa. 2005); Reply Br. for Appellan, *Comm. v. Lambert*, No. 427 CAP, 2005 WL 2495289 (Pa. July 7, 2005); Step-One Br. for Appellant and App. Vol. 1, *Lambert v. Beard*, No. 07-9005 (3d Cir. May 4, 2009); Br. for Appellees, *Lambert v. Beard*, No. 07-9005 (3d Cir. Dec. 1, 2009); Step-Three Reply Br. for Appellant, *Lambert v. Beard*, No. 07-9005 (3d Cir. Mar. 17, 2010); Supplemental Br. for Appellees, *Lambert v. Beard*, No. 07-9005 (3d Cir. July 9, 2012); Supplemental Br. After Remand, *Lambert v. Beard*, No. 07-9005 (3d Cir. July 9, 2012);

a photo array that included Jackson's photo, and one of the bartenders identified Jackson as the man who stood at the top of the stairs in the bar and who later ordered her to put money in a bag he was holding. A second employee was almost certain that Jackson was the man at the top of the stairs, while a third employee could not make an identification.

Jackson was already in custody when he learned that he was a suspect in the robbery-murder, and he agreed to cooperate. Initially, Jackson said that Reese and another person whose name he could not remember committed the robbery. Jackson said that he and Reese met this person—whom Jackson later identified as Lambert—for the first time right before the three of them decided to rob the bar. Jackson said they cased and rejected one bar before deciding on the bar they robbed. Jackson also claimed that he was just the getaway driver and did not actually enter the bar—he claimed that Lambert and Reese were the ones who went inside, and that he learned about what happened in the bar based on what Reese told him. Based on Jackson's statements, police arrested and charged Lambert and Reese.

The Trial

Lambert and Reese went to trial in 1984, and **ADA Robert Myers** prosecuted the case. The primary evidence tying Lambert to the crime was Jackson, who was a less-than-credible witness. As a starting point, Jackson had denied entering the bar, but eyewitnesses identified him as one of the two assailants. Jackson also admitted that he chose to cooperate because he wanted to avoid a death sentence, and he gave four different statements to police, all of which conflicted with each other and with his eventual trial testimony. For instance, he initially told police that Reese admitted to shooting two people. Later, he said that Reese told him Lambert was the shooter. Then, he admitted those statements were lies and that he had been "feeding them a story."[52] At trial, he admitted that he had initially only told "some of the truth"[53] to police. However, on the stand Jackson insisted that he was now telling the truth—and that it was Reese who shot the victims. But even then, he still had to admit this was not wholly accurate, because "what Reese *really* said was that 'I think we killed a couple of guys in there,' not that *he* did."[54]

Despite admitting that he repeatedly lied and told half-truths to police, and "with his credibility hanging, at best, by a thread,"[55] Jackson "somewhat proudly announced"[56] that he had always been consistent about identifying Lambert and Reese as the two men who committed the robbery-murder, even if he was not always accurate about what roles the two men played. During redirect and closing arguments, **ADA Myers** seized on this aspect of Jackson's testimony to argue that Jackson was credible. For instance, during closing argument he asserted, "[a]nd in every statement he always says [Reese] tells him that Lambert's the shooter. And in every statement he says that [Reese] lays it out that [Reese] went up to the bar to talk to the bar maid and the other person, Lambert, did the shooting."[57]

Lambert was convicted of first-degree murder and sentenced to death.

The Law Division Aggressively Defends the Conviction

Lambert challenged his conviction in state court, and at some point during the proceedings, his counsel learned that the H-File contained exculpatory information in the form of notes in a PAS indicating that, roughly one month after the robbery-murder, "[Lawrence] Woodlock is named as a co-defendant by Bernard Jackson."[58] The PAS also noted that two bartenders who witnessed the robbery-murder were shown a photo array that included Woodlock's photograph, and that neither witness identified Woodlock. PCRA counsel argued that this PAS was crucial impeachment information, because it (i) supported Lambert's defense theory that he was innocent and that Jackson had falsely accused him to deflect attention from his involvement (and his own long-standing involvement with Reese in other robberies); (ii) contradicted Jackson's testimony that he had always consistently identified Lambert and Reese as the two assailants; and (iii) undermined **ADA Myers'** argument that Jackson was credible because he could have pinned the crime on any number of people, but he had always identified Lambert and Reese. After losing before the PCRA court, Lambert's appeal was eventually heard before the Pennsylvania Supreme Court.

52. *Lambert*, 633 F.3d at 131.
53. *Id.*
54. *Id.*(emphasis in original).
55. *Id.*
56. *Id.*
57. Lambert PCRA Brief at *15 (citing notes of testimony).
58. *Id.* at *21.

Law Division ADA William Young opposed relief and argued, among other things, that the PAS was not exculpatory. For instance, he argued that the PAS wasambiguous, because it did not identify the police officer who Jackson mentioned Woodlock to, nor was it a verbatim recording of what Jackson purportedly said. **ADA Young** also argued that PCRA counsel "mischaracterize[d]"[59] the nature of the PAS. He quibbled with the PAS wording, which described Woodlock as a "co-defendant" and not as the "third robber."[60] He also suggested that Jackson was referring to Woodlock's involvement in an entirely different crime, and not the "instant robbery."[61] Separately, **ADA Young** downplayed the significance of the PAS, arguing that it was cumulative of the other information that had already been used to extensively impeach and cross-examine Jackson at trial. Finally, **ADA Young** claimed that the PAS was inadmissible and thus did not need to be disclosed. However, in making this argument, he did not address *Brady*'s obligation to disclose information that would help the defense prepare for trial, regardless of whether information is admissible.

The Pennsylvania Supreme Court affirmed the denial of relief. In its opinion, it adopted several of **ADA Young's** arguments. First, it agreed that the reference to Woodlock was "purely speculative at best"[62] and did not necessarily compel the conclusion that Jackson was identifying Woodlock as a participant in the instant robbery-murder. Second, t found that because Jackson had been "extensively impeached"[63] by both Lambert and Reese, the PAS would "not have materially furthered"[64] Jackson's impeachment and was thus not material.

The Third Circuit Rejects the Law Division's Arguments

After losing in state court, Lambert filed a federal habeas petition alleging that the prosecution suppressed the PAS referencing Woodlock as a participant in the robbery-murder. Although **Law Division ADAs Joshua Goldwert** and **Thomas Dolgenos** of the Federal Litigation Unit conceded that the PAS should have been disclosed prior to trial, it nonetheless defended the conviction before the Third Circuit and once again argued that (i) the PAS was ambiguous, because Jackson was likely identifying Woodlock as a participant in a different robbery, and (ii) at any rate, the PAS was cumulative of the other impeachment material, and Jackson had been so thoroughly impeached that it would not have made any difference to the outcome of the trial.

The Third Circuit rejected the Law Division's arguments and criticized the Pennsylvania Supreme Court's ruling. As a starting point, it highlighted Jackson's importance to the case, noting that it was "undisputed that without Jackson's statements to the police, the Commonwealth could not have indicted Lambert."[65] It also found that Jackson, for all his importance, had given four "devatastatingly inconsistent"[66] statements to the police, and that he was "[p]redictably…savaged at trial."[67] The Third Circuit then posed the following rhetorical question: "[o]ne wonders how the Commonwealth could have based this case of first-degree murder on a Bernard Jackson. But we digress."[68] Then, it held that the PAS could have "destroyed what little was left of [Jackson's] credibility,"[69] because it squarely contradicted Jackson's "*only* consistent position, by his own admission,"[70] that he had always named Lambert and Reese as the participants.

Finally, it focused on how the PAS could have been used to impeach Jackson. It criticized the state high court for holding that, because Jackson had been "so thoroughly impeached"[71] on other grounds, "ipso facto, [the PAS] could not have made a

59. Law Division PCRA Brief at *33.
60. *Id.*
61. *Id.*
62. *Lambert*, 584 Pa. at 473.
63. *Id.*
64. *Id.*
65. *Lambert*, 633 F.3d at 131.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* (emphasis in original).
71. *Id.* at 133.

difference."[72] Instead, it held that it was "patently unreasonable to presume—without explanation—that whenever a witness is impeached in one manner, any other impeachment becomes immaterial."[73] In support of this conclusion, the Third Circuit cited the weight of case law across federal circuits, which recognized that additional, non-cumulative impeachment information is material, even when a witness has already been impeached. Lastly, the Third Circuit raised the possibility that Lambert was wrongfully convicted, holding that that "we cannot help but observe that the evidence is very strong that Reese, not Lambert, was the shooter, even assuming that Lambert (and not Jackson, as two of the [bartenders] testified) was in the [bar] that night."[74]

The Third Circuit Rejects the Law Division's Arguments Again

The Office appealed the Third Circuit's decision to the United States Supreme Court, which remanded the case and ordered the Third Circuit to consider whether, because the PAS was "ambiguous, and any connection to the [bar] robbery [was] speculative,"[75] this was an alternate basis for denying Lambert habeas relief.

On remand, **ADA Thomas Dolgenos** argued that the PAS was ambiguous, because it was entirely possible that Jackson was naming Woodlock as a participant in a different crime—and not the instant robbery-murder that involved Lambert. Once again, the Third Circuit rejected the Law Division's argument. It found that this interpretation of the PAS was an "unreasonable determination of the facts,"[76] because the PAS notations "clearly refer to the [instant] robbery and shooting, and not some unrelated crime."[77] For instance, the PAS file number corresponded to the instant robbery-murder, and the document also listed the investigators of this crime, the victims of the murders, and the witnesses to the robbery-murder, including the fact that two witnesses were asked to look at a photo array with Woodlock's photo. Thus, the "only plausible explanation"[78] was that Jackson's statement referred to the instant robbery, and not some other crime.

Lambert Pleads Guilty

Despite the Third Circuit's pointed criticism of the Commonwealth's case and their speculation that Lambert was not even present during the crime, the Office did not dismiss the charges against Lambert. The case continued for six more years until Lambert accepted a plea offer from the Commonwealth to the lesser offense of third-degree murder. Lambert was resentenced to 34 to 68 years with time served, leading to his immediate release.

Anthony Washington (2015)[79]

In 1994, Anthony Washington was convicted of first-degree murder and robbery and sentenced to death. In 2008, he filed a federal habeas petition seeking a new trial on the ground that the prosecution suppressed favorable information suggesting that his co-defendant, Derrick Teagle, shot the victim. The federal district court held an evidentiary hearing on Washington's claim and granted his petition.

After winning his petition, Washington filed and lost a petition to prohibit retrial on double jeopardy grounds. In July 2019, he entered a negotiated plea to third-degree murder and related charges. He remains incarcerated on other charges.

The Criminal Investigation and Trial

In January 1993, two men robbed a store in Philadelphia. One assailant pulled out a gun at the cash register and ordered an employee to open it and hand over the cash. The second assailant took the assistant store manager to open the store safe, but witnesses could not tell if he was armed. The two assailants then fled the store and were chased through a parking lot by store security guard Tracy Lawson. As they were being chased,

72. *Id.*

73. *Id.* at 134.

74. *Id.* at 135.

75. *Lambert*, 537 Fed. App'x at 80.

76. *Id.* at 85.

77. *Id.*

78. *Id.*

79. The information in this section is taken from various sources. *See, e.g., Comm. v. Washington*, 198 A.3d 381 (Pa. Sup. Ct. 2018); *Washington v. Beard*, No. 07-3462, 2015 WL 234719 (E.D. Pa. Jan. 16, 2015); *Comm. v. Washington*, 198 A.3d 381 (Pa. Sup. Ct. 2018); Pet. for Writ of Habeas Corpus, *Washington v. Beard*, No. 07-3462 (E.D. Pa. May 5, 2008); Mem. of Law in Supp. of a Pet. for a Writ of Habeas Corpus, *Washington v. Beard*, No. 07-3462 (E.D. Pa. July 25, 2008); Mem. of Law, *Washington v. Beard*, No. 07-3462 (E.D. Pa. April 6, 2009); Reply Mem. of Law in Supp. of Pet. for a Writ of Habeas Corpus, *Washington v. Beard*, No. 07-3462 (E.D. Pa. July 27, 2009); Sur-Reply to Petr's Reply Br., *Washington v. Beard*, No. 07-3462 (E.D. Pa. Oct. 28, 2009); Hearing Tr., *Washington v. Beard*, No. 07-3462 (E.D. Pa., May 24, 2012).

one assailant fired a shot at Lawson, who was struck and killed. Witnesses to the shooting gave conflicting descriptions of who fired the shot.

Derrick Teagle and Anthony Washington were charged with the robbery-murder. They went to trial in 1994, and **ADA Mark Gilson** prosecuted the case. Two key issues at trial were whether both Teagle and Washington were armed, and which of them shot and killed Lawson. The evidence gathered during the investigation suggested that only one robber was armed, and witnesses gave conflicting accounts of whether it was Washington or Teagle. For instance, one witness identified Teagle as the man with the gun at the cash register, and another witness gave a description of the robber with the gun that matched Teagle. She also testified that this man left behind an empty bag of potato chips on the counter—and Teagle's fingerprint was later found on the bag. In contrast, Officer Gerald Smith, who responded to the robbery and saw Lawson's shooting, identified Washington as the shooter. A second man in the parking lot who saw the robbers fleeing said that the taller of the two men had a gun—and Washington was the taller of the two men. Finally, a store witness identified Washington at trial as the man who pointed a gun at her, even thought she had previously failed to identify him at a line-up.

ADA Gilson relied on Teagle's police statement to argue that Washington was the shooter. In that statement, Teagle admitted his involvement and said he and Washington were armed, but he also claimed his gun was not working correctly, thus implying that Washington was the shooter. Although he did not testify at trial, Teagle's statement was introduced, with Washington's name redacted.

Washington was convicted of first-degree murder and sentenced to death.

Washington Wins His Habeas Petition

Washington filed a federal habeas petition alleging that the prosecution suppressed information that inculpated Teagle as the shooter. In the immediate aftermath of the shooting, police received contemporaneous descriptions of the shooter from various sources, including 911 callers and other police officers. Information from these sources all said that the assailant brandishing the gun was shorter and wearing a brown leather jacket—which matched Teagle—while the other assailant was taller and wearing a green leather jacket—which matched Washington. The district court found this undisclosed information to be material for two reasons. First, because none of the witnesses saw *both* men brandishing weapons, the logical inference was that only the suspect with the gun was also the shooter. Second, the court noted that this suppressed information could have been used to undermine Teagle's self-serving statement in which he claimed that both men were armed, and that only Washington had the working gun. Finally, the district court observed that the suppressed information uniformly implicated Teagle as the gunman, while the information produced by the prosecution uniformly implicated Washington.

The court also found that the prosecution suppressed a PAS indicating that several witnesses failed to identify Washington from a photo array. Two of these witnesses testified at trial and offered evidence implicating Washington. One witness, who was in the parking lot and saw the chase and shooting, said that the shooter was the taller man (Washington). The second witness, who was in the store, identified Washington as the man who pointed a gun at her. This witness had also previously failed to identify Washington at a line-up held several months after the crime, and she was impeached on this failure.

The district court found the PAS to be material, because defense counsel could have impeached the parking lot witness. With respect to the store witness, the court noted that the photo array was show to her only a few weeks after the incident, and this would have had even greater impeachment value given its timing. The court also noted that **ADA Gilson** had tried to rehabilitate the store witness during closing argument when he said that line-ups can be intimidating, and she might have been nervous. However, the court noted that her failure to identify Washington from a photo array could have been used to counter **ADA Gilson's** claim that the witness was just suffering from nerves.

Washington Loses His Double Jeopardy Motion

After winning a new trial, Washington filed a motion to prohibit his retrial on Double Jeopardy grounds. After losing before the trial court, he appealed to the Superior Court, which upheld the denial, because there was no evidence that **ADA Gilson** intentionally violated *Brady* with the goal of depriving Washington of a fair trial. Washington later pleaded guilty to third-degree murder and related charges and remains incarcerated on other charges.

Rod Matthews (2015)[80]

Rod Matthews was tried twice for felony drug distribution. After the jury hung at the first trial, he was retried and convicted and sentenced to three years' probation. He filed a post-sentence petition for a new trial alleging that the prosecution suppressed favorable information about the Philadelphia police officers who arrested him. The Pennsylvania Superior Court eventually heard the motion and granted it, and the Office subsequently agreed to dismiss the felony distribution charges, allowing Matthews to be resentenced to drug possession.

The Criminal Investigation

In May 2010, Matthews was arrested by Philadelphia Police Detective John Palmiero and Philadelphia Police Officer Confesor Nieves after they allegedly saw him engage in a drug transaction with another woman. Before he was arrested, Matthews had been riding a city bus, where he struck up a conversation with this woman, who told him she was on her way back from a job interview at a nearby casino. When the bus stopped, both Matthews and the woman got off, and he waved goodbye to her. Almost immediately after deboarding, a police car drove up, and Detective Palmiero and Officer Nieves got out and detained and searched Matthews, whereupon they recovered a pill bottle with crack cocaine. Matthews thought his rights were being violated, so he yelled to the woman to remember what she was seeing. Detective Palmiero handcuffed Matthews and then punched him twice. Matthews later filed a complaint about his arrest, which triggered an IA investigation.

Matthews moved to suppress the search as an illegal search and seizure, but he was unable to call the woman as a witness at the suppression hearing, because the Commonwealth had misplaced a police record that identified her. Matthews testified that he met the woman for the first time that night while riding the city bus, and he described their conversation about her job interview. He said that when he got off the bus, police drove up to him and ordered him to freeze. Matthews said that when he complied, Palmiero reached into Matthews' pocket and pulled out a pill bottle. Matthews claimed he shouted to the woman to remember what she was seeing, because he believed his rights were being violated.

Matthews lost the suppression hearing and proceeded to trial in 2011. At his first trial, the jury hung on the issue of whether Matthews intended to distribute the crack cocaine or use it himself, so the Commonwealth retried him.

The Retrial

Matthews was retried in 2012, and **ADA Sara Guccini** prosecuted the case. At his retrial, the key issue was whether the drugs were for distribution, as the prosecution claimed, or for personal use, as Matthews claimed. Matthews testified that he became addicted to crack cocaine after serving in the military overseas. On the night he was arrested, he had broken up with his girlfriend and was looking to find drugs. He testified that police stopped him for no reason after he got off the bus and said goodbye to the woman, and he reiterated his testimony from the suppression hearing that he called out to her to remember what she saw. Matthews also testified that Detective Palmiero hit him twice.

By the time of the retrial, defense counsel had identified the woman on the bus and called her as a witness. Although she could not identify Matthews as the man she met on the bus, she corroborated his memory of the conversation, testifying that they discussed her job interview at the nearby casino. She also testified that she did not and had never used crack cocaine, and that she was not trying to buy crack cocaine from Matthews on the night in question.

Detective Palmiero and Officer Nieves testified that they saw Matthews and the woman attempt to engage in a drug sale and drove up to stop it. They said that they ordered Matthews to stop and take his hands out of his pocket, but he raised his hand and then quickly jammed it back into his pocket. Both men claimed they were worried that Matthews had a weapon, so Detective Palmiero forcibly removed Matthews' hand from his pocket, at which time he found him holding an orange, unmarked pill bottle that contained crack cocaine. Officer Nieves testified that the pill bottle was recovered in his presence.[81] The two

80. The information in this section is taken from various sources. *See, e.g., Comm. v. Matthews*, No. 415 EDA 2013, 2015 WL 7260349 (Pa. Sup. Ct. May 26, 2015); Defense Post-Verdict Mot. for Extraordinary Relief ("Matthews Post-Verdict Motion"), *Comm. v. Matthews*, CP-61-CR00009582-2010, (Phila. Ct. Comm. Pl. Sept. 11, 2012); Br. for Appellant, *Comm. v. Matthews*, No. 415 EDA 2013 (Pa. Sup. Ct. May 2, 2014); Br. for Commonwealth as Appellee, *Comm. v. Matthews*, No. 415 EDA 2013, (Pa. Sup. Ct. Nov. 18, 2014); Reply Br. for Appellant, *Comm. v. Matthews*, No. 415 EDA 2013, (Pa. Sup. Ct. Nov. 18, 2014).

81. Officer Nieves' testimony at the retrial differed from his testimony at both the suppression hearing and the first trial. In those instances, Officer Nieves said Detective Palmiero recovered the pill bottle from Matthews' hand. *See* Matthews Post-Verdict Motion at 12 (citing notes of testimony).

men also stopped the woman and searched her, but she was permitted to leave the area after they found no drugs or other contraband in her possession.

To rebut Matthews' claim that the drugs were for his own personal use, **ADA Guccini** elicited testimony from Palmiero and Nieves about Matthews' appearance on the night of his arrest. The two men testified that Matthews looked "stocky and healthy"[82] and not like a "typical drug user."[83] **ADA Guccini** also called expert witness Officer Peggy McGrory, who testified that in her experience the drugs recovered were intended for sale to others and not for personal use, because no drug paraphernalia was recovered and because Matthews did not look like someone addicted to crack cocaine.

During closing arguments, **ADA Guccini** continued to attack Matthews' claimed drug addiction, arguing that he "ha[d] to say"[84] he was a crack addict in order to avoid a conviction for drug distribution. She also argued that the jury should believe Detective Palmiero and Officer Nieves, because they had said "the same thing that they've said in the other times they've testified about this case,"[85] and that defense counsel would have pointed out any discrepancies in their accounts of the arrest, but he did not. Matthews was convicted of possession with intent to distribute crack cocaine.

Before Matthews was sentenced, defense counsel received documents from IA's investigation into Matthews' arrest. These documents included Detective Palmiero and Officer Nieves' written statements about the arrest, which described Matthews as being under the influence of something, and which contradicted their trial testimony that he did not "look" like a drug addict, as well as the prosecution's theory of the case. Defense counsel filed a petition for extraordinary relief seeking to vacate the conviction on the ground that the prosecution suppressed favorable information, but the petition was denied. Matthews was then sentenced to three years' probation.

The Prosecution Failed to Disclose Favorable Information

Defense counsel then filed an appeal from the judgment of sentence, which was heard by the Pennsylvania Superior Court. The court evaluated the IA statements and found that the statements conflicted with Palmiero and Nieves' trial testimony and the prosecution's theory of the case, and that it also constituted favorable information that should have been disclosed.

Specifically, the court found that Palmiero and Nieves' statements could have been used to impeach both men and to support Matthews' claim that he was addicted to drugs. As an example, Detective Palmiero's IA statement contained his belief that Matthews was "so intoxicated on the night of this incident, that he doesn't recall what transpired, or who he actually interacted with,"[86] while Officer Nieves' IA statement indicated that "it seemed like [Matthews] may have been under the influence of something."[87] Separately, the court also found that this undisclosed information undercut the opinion offered by expert witness Officer McGrory, because she had not reviewed the IA materials when she offered her opinion.

Office Discovery Policy: (Not) Searching Internal Affairs Records

It appears that the prosecution did not disclose the IA materials because its policy at the time of Matthews' trial was not to search for information in officer IA files. When the Office provided discovery to Matthews' defense counsel, it included a cover sheet advising that "documents relating to complaints against the police officers involved in this case, if any complaints have been made, may be found in either the Internal Affairs Divison, the Ethics Accountability Division, or the Headquarters Inspection Unit of the Philadelphia Police Department…The [DAO] does not concede that any such documents are either subject to disclosure or admissible in any criminal proceeding."[88] This policy, which is no longer in place, meant that **ADA Guccini** likely did not review any IA files to determine whether they contained favorable information that should have been disclosed.[89]

82. *Matthews*, 2015 WL 7260349, at *5.

83. *Id*.

84. Matthews Post-Verdict Motion at 10 (citing notes of testimony).

85. *Id*. at 16 (citing notes of testimony).

86. *Matthews*, 2015 WL 7260349 at *5.

87. *Id*.

88. Matthews Post-Verdict Motion at 24 (quoting DAO discovery policy).

89. It is unclear how the DAO squared this now-defunct policy with their constitutional obligation to find and disclose favorable information known to, or in the possession of, the police.

James "Jimmy" Dennis (2016)[90]

In 1992, Jimmy Dennis was convicted of first-degree murder and sentenced to death. He challenged his conviction in state and federal court, alleging that the prosecution suppressed a host of favorable information. After losing in state court, the federal district court vacated Dennis' conviction. The Office appealed this ruling to the Third Circuit, which initially vacated the district court's order and reinstated Dennis's conviction and death sentence. Dennis' counsel then filed a motion asking for a rehearing before the entire Third Circuit, which was granted. On rehearing, the Third Circuit found that the prosecution withheld favorable information, and it vacated Dennis' conviction.

After the Third Circuit vacated his conviction, the Office refused to drop the charges against Dennis. Instead, the Office offered to let Dennis plead "no contest" to third-degree murder, in exchange for the Commonwealth not appealing the ruling to the Supreme Court. Faced with the prospect of spending more time on death row, Dennis took the offert. He was released in 2017.

The Criminal Investigation

In 1991, Zahra Howard and Chedell Williams were walking near a Philadelphia train station when two men held them up at gunpoint. Howard ran into the street and the two men chased her, ripped off her earrings, and then shot her before fleeing in a nearby getaway car. Howard later died from her injuries. Williams saw the shooter and said he was wearing a black sweatshirt and red sweatsuit and was roughly 5'9" or 5'10".

Philadelphia police heard a rumor that "Jimmy from Abbottsford" was the shooter, and they focused almost immediately on Jimmy Dennis, even though the eyewitness evidence did not match up. For instance, Dennis was roughly 5'5" and between 125 to 132 pounds, whereas multiple witnesses said the gunman was much bigger—roughly between 5'9" and 5'10" and between 170 to 180 pounds. Moreover, none of the eyewitnesses who saw Dennis' photo in a photo array confidently selected him right away. Only three witnesses were able to say that Dennis looked like the shooter, while four other witnesses did not pick Dennis' photo at all.

Police interviewed Dennis' bandmate, Charles Thompson, aka "Pop," after he was arrested for assaulting his pregnant girlfriend and putting her in the hospital. Pop told police that on the day of the murder, Dennis had showed him a gun while they were at band practice together. Six months after giving this statement to police, Pop's assault charges were dropped. None of Dennis' other bandmates corroborated Pop's statement about seeing Dennis with a gun, and they all said Dennis was not wearing any red clothing at band practice.

Dennis began hearing rumors that the police thought he was involved in Howard's murder, so he went to the police station to try to clear his name. However, police initially declined to speak with him. When Detectives Frank Jastrezembski and Manuel Santiago later asked to interview him, he waived his right to a lawyer and gave them a statement. He told police that he left his father's apartment and boarded a bus to go to band practice. On the bus, he saw Latonya Cason, a neighborhood acquaintance, and waved to her. Dennis said he then hung out with his band mates and went to practice. He also told police where he lived and kept his belongings, which enabled them to obtain search warrants for the homes of his mother, father, and girlfriend. Police supposedly seized black clothing and a pair of red pants and white sneakers from Dennis' room at his father's house, but Detective Jastrzembski, who was responsible for bagging and itemizing the clothing, apparently lost the clothing before it could be photographed or inspected by the prosecution or defense.

Dennis also participated in a line-up. Although defense counsel requested that *all* witnesses to the shooting be present, the Commonwealth only invited the witnesses who initially identified Dennis from photo arrays. Defense counsel was not aware of this, because discovery had not yet been provided and he did not know the identity of all the witnesses. At the lineup,

90. The information in this section is taken from various sources. *See, e.g., Comm. v. Dennis,* 552 Pa. 331 (Pa. 1998); *Comm. v. Dennis,* 597 Pa. 159 (Pa. 2008); *Comm. v. Dennis*, 609 Pa. 442 (Pa. 2011); *Dennis v. Wetzel,* 966 F. Supp. 2d 489 (E.D. Pa. 2013); *Dennis v. Secretary,* 777 F.3d 642 (3d Cir. 2015); *Dennis v. Secretary*, 834 F.3d 263 (3d Cir. 2016); *Dennis v. City of Philadelphia*, 379 F. Supp. 3d 420 (E.D. Pa. 2019); Consolidated Mem. of Law for a Writ of Habeas Corpus and Mem. of Law in Support, *Dennis v. Wetzel*, No. 11-cv-1660 (E.D. Pa. Jan. 13, 2012); Resp. to the Pet'n for Writ of Habeas Corpus, ("Law Division Response") *Dennis v. Wetzel*, No. 11-cv-01660 (E.D. Pa. Dec. 20, 2012); Br. for Appellants and J.A., *Dennis v. Secretary,* No. 13-9003 (3d Cir. Feb. 7, 2014); Br. for Appellee, *Dennis v. Secretary,* No. 13-9003 (3d Cir. Apr. 11, 2014); Reply Br. for Appellants, *Dennis v. Secretary,* No. 13-9003 (3d Cir. May 28, 2014); Compl., *Dennis v. City of Philadelphia,* Civ. No. 18-2689, June 27, 2018; Joel Mathis, "James Dennis Murder Conviction Overturned After 21 Years; Read the Judge's Ruling Here," *Philadelphia Magazine*, Aug. 22, 2013; John Schuppe, "To End Decades on Death Row, Inmate Makes an Agonizing Choice," NBC News, Dec. 24, 2016; Elisabeth Garber-Paul, "How to Survive Death Row," Rolling Stone, Nov. 20, 2019; Queen Muse, "For 25 Years, Jimmy Dennis was on Death Row. They One Day, He Wasn't.", Philadelphia Magazine, Feb. 6, 2021; Stephanie Clifford, "Wrongly Convicted, They Had to Choose: Freedom or Restitution," New York Times, Mar. 5, 2021;.

three witnesses identified Dennis as the shooter, and a fourth witness who initially identified him from the photo array failed to make an identification.

The Trial

Dennis went to trial in 1992, and **ADA Roger King** prosecuted the case. Because of the lack of physical evidence, King emphasized the importance of eyewitness testimony to the case, arguing that "if you believe Zahra Howard, that's enough to convict James Dennis."[91] He also presented testimony from the three witnesses who identified Dennis, as well as Pop. When Pop recanted his police statement, **ADA King** relied on *Brady-Lively* to admit Pop's statement as substantive evidence for the jury to consider.

Detective Jastrzembski was also permitted to testify in detail about the black and red clothing he seized from Dennis' room, even though he lost the clothing before it had been logged into evidence. He testified that the clothing matched the description of the clothing worn by the shooter, and that they were Dennis' size. Jastrzembski also claimed that Dennis' father identified the clothing as belonging to his son—which Dennis' father later denied.

The Commonwealth also called Latonya Cason, whom Dennis saw on the bus. Dennis had told police he saw her at 2:00 p.m., but when Latonya testified, she said she did not see him until 4:00 or 4:30 p.m., and she claimed she knew this because she had worked until 2:00 p.m. and then picked up her government benefits check before boarding the bus, and the check had been time-stamped at 3:00 p.m. **ADA King** emphasized Cason's testimony, because unlike Dennis and his father, she was a "neutral" witness who debunked his alibi and thus ultimately ended up as a powerful prosecution witness.

Dennis was found guilty of first-degree murder and sentenced to death.

Dennis Loses in State Court

Dennis challenged his conviction in a variety of state court petitions. First, he alleged that the police took Cason's only copy of her check receipt when Detective Jastrzembski interviewed her. Dennis alleged that the receipt constituted favorable information, because it contained a time stamp of "13:03 p.m." showing when Cason picked up her check. In support of his claim, Cason submitted an affidavit attesting to this and stating that she read "13:03 p.m." as 3:03 p.m. and was thus mistaken as to when she saw Dennis on the bus. In other words, she conceded that she must have seen Dennis earlier in the day, as he claimed.

Despite this new evidence, the Pennsylvania Supreme Court rejected the Cason receipt as "not exculpatory"[92] because it had "no bearing on [Dennis'] alibi,"[93] and because there was "no evidence that the Commonwealth withheld the receipt from the defense."[94] It is unclear how the court reached these conclusions, given that (i) the time stamp indicated that Cason misremembered when she picked up her check, and this bore directly on Dennis' alibi and tended to corroborate his claim that he saw Cason on the bus at 2:00 p.m., (ii) Cason attested to the fact that police took her only copy of the check receipt, and (iii) Supreme Court case law obligated the prosecution to find and disclose favorable information, even when it is known only to the police.

Dennis later filed a PCRA petition alleging that the Commonwealth suppressed Howard's inconsistent statement about the shooting and a tip from James Frazier that named alternate suspects to the murder. During the initial investigation, a PAS contained a summary of a statement Howard made to Williams' relatives, the Pughs. According to the PAS, Howard told the Pughs that she recognized the assailants from her and Williams' high school (which Dennis did not attend). Howard also mentioned that "Kim" and "Quinton" were there, and PCRA counsel later determined that Quinton was the Pughs' nephew. At trial, however, Howard had denied recognizing or knowing the assailants.

Police also received a tip from William Frazier, who said that while he was incarcerated, he spoke on the phone with his friend, Tony Brown. Brown said that he and Frazier's cousin, Ricky Walker, "fucked up"[95] and killed a girl. Frazier's statements contained credible information about the murder, such as describing where Williams was shot and referring to her as "Kev's…girl"[96] (Williams dated a man named Kevin). Brown also told Frazier that he and Walker hid out in Frazier's apartment

91. *Dennis*, 834 F.3d at 274.
92. *Dennis*, 552 Pa. at 341.
93. *Id.*
94. *Id.*
95. *Dennis*, 834 F.3d at 305.
96. *Id.*

after the murder. Frazier gave police information about Brown and the other assailants, and he let police search his apartment. Police interviewed Walker, who denied knowledge of the crime and claimed he was with his mother on the day of the murder. After Walker's denial, police did not further investigate Walker's alibi and appeared to disregard the tip.

The PCRA court rejected Dennis' *Brady* claims. On appeal, the Pennsylvania Supreme Court partially affirmed the ruling. It held that the Frazier tip was not *Brady* material because the information was not admissible and was merely a "fruitless lead"[97] based on "hearsay and speculation,"[98] and this was not the type of information the prosecution was obligated to disclose. However, it remanded the case for further fact-finding on Howard's PAS statement because it found that the PAS might have enabled defense counsel to discover "new investigative avenues that had the potential to materially undermine the prosecution's case" [99] and could have also served to impeach Howard's testimony.

On remand, the PCRA court again rejected the *Brady* claim regarding Howard's statement. The Pennsylvania Supreme Court affirmed the ruling on appeal, holding that because Howard had been extensively cross-examined at trial, and because other eyewitnesses had independently identified Dennis, the PAS would not have undermined confidence in the outcome of the trial.

Dennis Challenges His Conviction in Federal Court

After losing in state court, Dennis filed a federal habeas petition alleging *Brady* violations based on suppression of the Cason check receipt; Howard's PAS statement; and Frazier's tip. With respect to the Cason check receipt, counsel highlighted its importance, both because it corroborated Dennis' alibi and because it would have impeached Cason's testimony that she saw Dennis on the bus much later than he claimed. With respect to Howard's PAS statement, counsel drew a sharp contrast between her trial testimony, where she unequivocally denied having ever seen the assailant before, and her statements in the PAS, where she told the victim's aunt and uncle that she recognized the assailants from the high school she and Williams attended. Lastly, with respect to the Frazier tip, counsel noted that it was detailed and was consistent with aspects of the murder and with Williams' unique characteristics—yet police did little to corroborate or run down the information Frazier provided.

Federal habeas counsel also highlighted red flags with the police investigation and the quality of the trial evidence. For instance, they noted that Dennis was much shorter and smaller in stature (5'5" and between 125 to 132 pounds) than eyewitness descriptions of the assailant (between 5'9" and 5'10" and between 170 to 180 pounds), and they criticized Detective Jastrzembski's failure to properly log the clothing he supposedly seized from Dennis' room, pointing out that although defense counsel, nor the jury, was ever able to inspect the clothing because he lost it, Detective Jastrzembski was somehow permitted to testify in detail about the clothing and to link the clothing to Dennis.

The Law Division Aggressively Defends the Conviction

Law Division ADA Ryan Dunlavey, with supervision from **Federal Litigation Chief ADA Thomas Dolgenos,** opposed the petition. **ADA Dunlavey** argued that the Cason check receipt was not suppressed, because there was no evidence that the Commonwealth ever possessed the receipt in the first place. He also argued that even assuming the Commonwealth had the check receipt, because Dennis' counsel had been able to obtain a copy of the receipt on his own, there was no suppression by the prosecution. Finally, **ADA Dunlavey** argued that the receipt was not exculpatory because even if the receipt corroborated the time Dennis claimed he was on the bus, this did not make it impossible for Dennis to have committed the crime and then gotten onto the bus. Next, **ADA Dunlavey** argued that the Howard PAS statement was cumulative of information that was already disclosed, because Howard had already been extensively cross-examined about her identification of Dennis, and that even if the information had been disclosed, it would not have affected the trial, given that other eyewitnesses independently identified Dennis as the shooter. Finally, **ADA Dunlavey** dismissed the Frazier tip as inadmissible, calling it a "fruitless lead"[100] premised on an "incredible story,"[101] and aruged that the Pennsylvania Supreme Court correctly held that this type of information did not need to be disclosed as a matter of law.

97. *Dennis*, 597 Pa. at 197.
98. *Id*.
99. *Id.* at 199.
100. Law Division Response at 52.
101. *Id*.

The District Court Finds Dennis Was "Wrongly Convicted"[102]

The district court rejected the Law Division's arguments and vacated Dennis' conviction. In its opinion, the court concluded that Dennis had been "wrongly convicted of murder and sentenced to die for a crime in all probability he did not commit."[103] It also criticized the Commonwealth for its "underhanded and illegal tactics,"[104] and the Pennsylvania Supreme Court for unreasonably applying the law when it denied Dennis relief.

Turning to the specific *Brady* claims, the district court was because criticial of the Law Division's argument that, because the Commonwealth's "file [did] not contain a copy of"[105] the Cason check receipt, the prosecution never had possession of it had thus could not have suppressed it. The court called this a "most brazen argument,"[106] given that the Law Division had separately admitted that the entire H-File had gone missing shortly after trial, so there was no way to review its contents to see if the check receipt had at one point been in the file. In light of this admission, the district court criticized the Law Division for "point[ing] to a missing file and declar[ing] it [Dennis'] burden to prove that the receipt was, at one point, contained inside."[107] The district court found that this argument "border[ed] on bad faith."[108] Separately, the court rejected the the claim that there was no suppression if Dennis' counsel was able to obtain a copy of the Cason check receipt on his own, because this argument had "no basis in law."[109]

The district court next held that the Pennsylvania Supreme Court had unreasonably misapplied federal law when it discounted the impeachment value of the Howard PAS statement as cumulative of Howard's extensive cross-examination. The district court distinguished between Howard being *cross-examined* and Howard being *impeached* with her prior inconsistent statement in the PAS. It also observed that the Howard PAS statement could have affected defense counsel's pre-trial preparation and investigation—a factor that the Pennsylvania Supreme Court did not consider in its ruling. Lastly, the district court noted that it was improper for the Pennsylvania Supreme Court to weigh the Howard PAS statement against testimony from other eyewitnesses who identified Dennis, because this was a variant of the "sufficiency of the evidence" test that the Supreme Court had expressly rejected.

The district court also "quickly rejected"[110] the argument that, because the Frazier tip was inadmissible, it was also not material: it cited a host of Third Circuit case law that reached exactly the opposite conclusion. It also rejected **ADA Dunlavey's** characterization of the tip as a fruitless lead, noting that the Frazier tip contained information with "internal markers of credibility,"[111] and observing that if the tip was fruitless, it was only because the police conducted a "paltry investigation"[112] that saw them ignore promising, credible leads. It also pointed out that the prosecution disclosed other alternate suspect statements, but not the Frazier tip, which added "further weight"[113] to the fact that the police saw a "risk"[114] in disclosing the Frazier tip.

Separately, the court cited "numerous flaws with the investigation and prosecution"[115] of the case that "significantly diminish[ed] confidence"[116] in the verdict. The court noted the disparity between eyewitness descriptions of the shooter and Dennis' physical stature, and the fact that none of the eyewitnesses confidently selected Dennis' photograph. The court also chastised the police for "arguably conducting misleading line-ups and identifications,"[117] by only inviting the witnesses who had tentatively identified Dennis from a photo array. The court

102. *Dennis*, 966 F. Supp. at 490.
103. *Id.*
104. *Id.* at 506.
105. *Id.* at 509.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 503.
111. *Id.* at 504.
112. *Id.* at 505.
113. *Id.* at 506.
114. *Id.*
115. *Id.* at 492.
116. *Id.*
117. *Id.* at 493.

further noted the police's failure to follow up on "important leads,"[118] such as Williams' statement to the Pughs that she knew the assailants from high school, as well as Frazier's statement detailed credible information about Howard's murder. Lastly, the court criticized the "improper police work"[119] surrounding the seizure of the clothing and expressed disbelief that Detective Jastrzembski was still allowed to testify in detail about that clothing, given that there was no way to rebut his claims because he had lost the evidence. In short, the court assailed the quality of the investigation and the evidence used to sentence Dennis to death, observing that the case rested on "scant evidence at best,"[120] and that Dennis was convicted "based solely on shaky eyewitness identifications,"[121] as well as clothing that was seized from Dennis' father's house and that was "subsequently lost before police photographed or catalogued it."[122]

The Third Circuit Vacates Dennis' Conviction

The Office appealed the district court's order. In briefing before the Third Circuit, **ADA Dunlavey** largely repeated arguments made before the district court, and he was initially successful in convincing a three-judge panel of the Third Circuit to vacate the district court order and reinstate Dennis' conviction and death sentence. However, Dennis' counsel filed "one last Hail Mary"[123]—a request for the entire Third Circuit to reconsider its earlier decision. The Third Circuit granted the request and after rehearing the appeal, it vacated its earlier ruling, finding that the prosecution violated *Brady* by suppressing the Cason check receipt, the Howard PAS statement, and the Frazier tip.

The Third Circuit held that the prosecution suppressed the Cason receipt, because police took it from Cason after they interviewed her, and under well-established Supreme Court case law, this meant the prosecution had both constructive knowledge of the receipt and a duty to find and disclose it to the defense.[124] It was not persuaded by the Law Division's claim that, because it was not found in the Commonwealth's files, there prosecution could not have suppressed it. Like the district court, it also described this argument as bordering "on bad faith,"[125] and it refused to permit the prosecution to evade its *Brady* obligations "based on failure to adequately search or maintain its own files."[126]

The Third Circuit also held that the receipt was favorable and material, because it could have been used to impeach testimony from a key prosecution witness to show she was wrong about what time she saw Dennis, and to corroborate Dennis' alibi. **ADA King** repeatedly invoked Cason's testimony, describing her as a neutral witness who was transformed into a prosecution witness once Dennis' alibi fell apart. Of course, the reason why Cason appeared to have "transformed" into a prosecution witness was because the Commonwealth had suppressed the check receipt, thereby denying defense counsel the opportunity to impeach Cason with the receipt. Given the prosecution's own acknowledgment that Cason was important, the court found that the impeachment value of the receipt could have undermined Cason's testimony, if not caused her to correct it altogether. Or, as the court noted, had the receipt been disclosed, it is likely that the prosecution would not have called her as a witness at all, because she would have recanted her statement *before* trial started.[127] Lastly, in reaching this conclusion, the court again rejected the Law Division's argument that, because the receipt did not make it impossible for Dennis to have been the shooter and still boarded the bus as he claimed, it was not *Brady* material. It noted that *Brady* was not that exacting of a standard and instead mandated disclosure of information that could alter the jury's judgment of the credibility of a crucial prosecution witness, as was the case here.

The Third Circuit held that the Howard PAS statement was also *Brady* information that should have been disclosed, because it could have been used to impeach Howard, who was, by **ADA King's** own account, another crucial prosecution witness. The information was also material, because it would have opened a valuable avenue of impeachment about whether she in fact

118. *Id.*

119. *Id.* at 494.

120. *Id.* at 491.

121. *Id.*

122. *Id.*

123. Queen Muse, "For 25 Years, Jimmy Dennis was on Death Row."

124. In reaching this conclusion, the Third Circuit also criticized the Pennsylvania Supreme Court for finding "no evidence" that the prosecution withheld the receipt, because Supreme Court case law imputed police knowledge to the prosecution and placed a burden on the prosecution to find and disclose favorable information known to the police. *See Dennis*, 834 F.3d at 288-89.

125. *Id.* at 289.

126. *Id.*

127. The Third Circuit observed that the prosecution had evidence that Cason's testimony was false, and that it would violate *Brady* to allow her testimony to stand. *Id.* at 295.

recognized the assailants and whether she was lying to either the Pughs or the police. Moreover, the information could also have been used to challenge the adequacy of the police investigation, because the police knew about Howard's inconsistent statement but never followed up with her about it.

Separately, the Third Circuit attacked the Pennsylvania Supreme Court's conclusion that the Howard PAS statement was not material. It found that the state court incorrectly applied Supreme Court case law when it held that other remaining trial evidence was sufficient to convict Dennis, because this was a variant of the "sufficiency of the evidence" test that had long been rejected by the Supreme Court in favor of a holistic inquiry that asked whether, considering the suppressed evidence, there was a reasonable probability of a different outcome.

Finally, the Third Circuit held that the prosecution should have disclosed William Frazier's tip implicating his cousin because the information was favorable and material. Defense counsel could have used the information to present an "alternate shooter" defense, or could have used the Frazier tip to cross-examine law enforcement witnesses about their investigation, noting that the police did not determine that the lead was "fruitless"[128]—they simply did "rigorously pursue[]" it.[129]. For instance, they did not interview other participants on the phone call, and they did not investigate Walker's alibi once he denied involvement. Nor did they investigate the pawn shop where Frazier said Brown allegedly pawned Williams' earrings. Detectives also failed to visit many of the addresses Frazier provided until ten years after the murder.

The Third Circuit also took issue with the state high court's analysis of the Frazier tip because it "grafted an admissibility requirement"[130] onto the *Brady* inquiry when it required Dennis to show that the Frazier tip would have been admissible at trial. This was contrary to *Brady*, which focused on the benefit of disclosure to the defense, and not on trial admissibility. It also criticized the Pennsylvania Supreme Court for dismissing the Frazier tip as a "fruitless lead,"[131] because there was no legal requirement that leads be "fruitful to trigger disclosure under *Brady*."[132]

Like the district court, the Third Circuit was also critical of the Commonwealth's investigation, noting that police initially focused on Dennis because of rumors of his involvement, despite being unable to identify the source of those rumors. The court also focused on the disparity between eyewitness descriptions of the shooter and Dennis' physical profile, and the fact that the witnesses who did initially identified Dennis were not confident in their identifications. The quality of the eyewitness evidence was especially noteworthy, because of the importance of eyewitness testimony to the prosecution's case.

The Office Leverages a Plea

Despite the district court's concerns that Dennis had been wrongfully convicted, and despite losing before the Third Circuit, **DA Seth Williams** issued a statement dismissing Dennis' federal habeas petition as containing "slanted factual allegations,"[133] and he refused to drop the charges. Using what leverage it had, the Office offered Dennis a "no contest" plea to third-degree murder, which meant he would be released from prison immediately. In the alternative, the Office signaled its intent to appeal the Third Circuit ruling, which would have kept Dennis on death row while proceedings continued.[134] In 2017, Dennis took the plea and was released after serving 25 years in prison.[135]

Dennis Fights for Compensation

After entering the "no-contest" plea, Dennis filed a lawsuit against Detectives Jastrzembski and Santiago and the City of Philadelphia seeking damages for their violations of Dennis' constitutional rights. The city moved to dismiss Dennis' lawsuit, arguing that his plea to third-degree murder precluded him from bringing any claims for violations of his rights. The federal district court disagreed and permitted the lawsuit to continue. His civil lawsuit remains pending.

128. *Id*. at 307.
129. *Id*
130. *Id*.
131. *Id*. at 306.
132. *Id*.
133. Mathis, "James Dennis Murder Conviction."
134. Clifford, "Wrongly Convicted, They Had to Choose."
135. Garber-Paul, "How to Survive Death Row."

Anthony Wright (2016)[136]

Anthony Wright was convicted of, among other things, rape and first-degree murder and sentenced to life imprisonment. After he was convicted, DNA testing was performed on the evidence in his case, and it excluded him as the rapist and pointed to a man named Ronnie Byrd. The Office then opted to retry Wright on the theory that he and Byrd committed the crime together. At the conclusion of the second trial, the jury deliberated for less than an hour before voting to acquit Wright of all charges.

Wright then sued the City of Philadelphia and Detectives James Devlin, Frank Jastrzembski, and Manuel Santiago, who investigated his case. His lawyers deposed the detectives under oath, and they gave deposition testimony that squarely contradicted their testimony from both of Wright's criminal trials. The Office later charged Santiago, Jastrzembski, and Devlin with perjury and false-swearing charges.

The Criminal Investigation

In 1991, Louise Talley was raped and murdered in her apartment. Police spoke with Roland Saint James and John Richardson, who lived near Talley's apartment, and who were in possession of a television that belonged to Talley. James and Richardson told police that Anthony Wright confessed to stabbing Talley, and that Wright gave them the television to sell. Police then approached Wright, who voluntarily accompanied them to the police station to answer questions. According to Detectives Manuel Santiago and James Devlin, Wright voluntarily confessed to the crime. In his statement, Wright supposedly described the clothing he wore during the crime and told detectives where they could find it. Detective Devlin also claimed that he handwrote a word-for-word transcription of Santiago's questions and Wright's answers. Detective Frank Jastrzembski then executed a search warrant at Wright's home and claimed to have recovered blood-stained clothing that supposedly matched the clothing Wright said he was wearing during the crime, including a Chicago Bulls sweatshirt, jeans, and sneakers. Jastrzembski said he found the items in Wright's bedroom and that some items were hidden under Wright's mattress.

The First Trial

Wright went to trial in 1993. James and Richardson testified against Wright, and teenage witnesses Greg Alston and Shawn Nixon also testified that they saw Wright entering Talley's apartment on the night of the murder. Wright testified that he did not commit the crime, and that he did not know James or Richardson. He also testified that the clothing and shoes seized from his bedroom did not belong to him and were too big to be his. Wright's mother also testified that she was present during the search, and detectives only took one article of clothing and did not remove a Chicago Bulls sweatshirt, jeans, or shoes. She also said the clothing detectives claimed to have seized did not belong to Wright.

Wright was convicted in 1993 and sentenced to life in prison without the possibility of parole.

DNA Testing Excludes Wright

After Wright's conviction, the Pennsylvania state legislature passed a statute permitting post-conviction DNA testing, and in 2005 Wright moved for DNA testing in his case. The PCRA court initially denied Wright's request, holding that he could not assert "actual innocence" because he had voluntarily confessed to the crime. When Wright appealed the PCRA court's decision, **Law Division ADA Peter Carr** argued that Wright was not entitled to DNA testing, both because he confessed to the crime and because there was other "overwhelming evidence of guilt,"[137] which meant there was no "reasonable possibility"[138] that further DNA testing would likely exculpate Wright. Wright appealed his request all the way to the Pennsylvania

136. The information in this section is taken from various sources. *See, e.g.,* Letter Br. for Appellee re: PCRA Appeal ("Law Division Letter Brief"), *Comm. v. Wright*, No. 1393 EDA 2006 (Phila. Ct. Comm. Pl. May 29, 2007); Br. for Appellee, 21 EAP 2008, 2008 WL 6693995, at *11 (Pa. Jan. 1, 2008); *Comm. v. Wright*, 609 Pa. 22, 25-32 (Pa. 2011); Compl. ("Wright Civil Complaint"), *Wright v. City of Philadelphia, et al.*, Sept. 20, 2016, No. 16-cv-5020-GEKP; Innocence Project, News Release, "With New DNA Testing Proving Innocence, Philly Man Acquitted of Murder in Less Than An Hour After Retrial," Aug. 23, 2016; Joseph A, Slobodzian, "After Wright Acquittal, D.A.'s Office Pledges to Investigate 'Specific' Evidence of Police Misconduct," Philadelphia Inquirer, Aug. 24, 2016; Innocence Project, *In re: Bridget L. Kirn, Esq.*, Aug. 30, 2018; "Anthony Wright," National Registry of Exonerations; Mensah M. Dean, and Mark Fazlollah, "Philly Man, Wrongly Imprisoned for 25 Years, Gets Nearly $10 Million From City," Philadelphia Inquirer, June 16, 2018; Mensah M. Dean, "Complaint: Prosecutor Knew Witnesses Were Lying During Retrial of Innocent Man," Philadelphia Inquirer, Aug. 23, 2018; Akela Lacy, "Police Want Larry Krasner Gone, So They're Backing His Opponent," The Intercept, Feb. 24, 2021; Innocence Staff, "Innocence Project Responds to Recent Factual Misstatements in Anthony Wright Case," Apr. 14, 2021; Samantha Melamed and Chris Palmer, "Three Ex-Philly Homicide Detectives Charged with Perjury For Their Testimony During the Retrial of an Innocent Man," Philadelphia Inquirer, Aug. 13, 2021; Philadelphia District Attorney's Office, "PPD Detectives Involved in Wrongful Rape & Murder Conviction, Retrial of Anthony Wright Charged Following Grand Jury Investigation," Philadelphia DAO, Aug. 13, 2021; Samantha Melamed, "The Case That Collapsed," Philadelphia Inquirer, Oct. 14, 2021.

137. Law Division Letter Brief at 15.

138. *Id.*

Supreme Court—and **ADA Carr** continued to oppose Wright's request. In 2011, the Pennsylvania Supreme Court rejected the Law Division's argument that a "voluntary" confession was a *per se* bar to seeking DNA testing under the statute, and it granted Wright's request.

In 2013, two years after the state high court authorized Wright's request, DNA testing was conducted on the evidence recovered, and the results excluded Wright as the assailant and pointed to a man named Ronnie Byrd. By this time, Byrd was deceased, but at the time of Talley's murder, he had been squatting in the building next door. The test results also revealed that the clothing that Jastrzembski claimed he seized from Wright's bedroom, and that the prosecution argued belonged to Wright, did not have any of his DNA on it. Instead, test results showed that the clothing had Talley's DNA on it. This was known as "wearer DNA" and suggested that the clothing belonged to Talley. These test results thus undermined the accuracy of Wright's confession, in which he supposedly described the clothing he was wearing during the crime, as well as the accuracy of Detective Jastrzembski's search, in which he claimed he found the clothing in Wright's bedroom.

The Retrial

Although the Office agreed to vacate Wright's conviction after the DNA test results came back, they did not drop the charges against him and decided to retry him based on a new theory—that he and Byrd worked together to commit the crimes. This theory was undercut by the DNA evidence, as well as Wright's alleged confession, which never mentioned Byrd. Wright went to trial in 2016, and **ADAs Bridget Kirn** and **Carlos Vega**[139] prosecuted the case. James and Richardson were deceased by this time, so their testimony from the first trial was read to the jury. But Alston and Nixon recanted their original trial testimony and said police coerced them into identifying Wright. Wright again testified and denied involvement in the crime. He also described being physically and verbal abused by detectives during his interrogation.

When defense counsel cross-examined the detectives about the DNA test results, they all denied knowledge of the results and what it showed. For instance, Detective Jastrzembski testified that no one from the prosecution notified him about the DNA testing performed on the clothing he seized, and that prior to trial, he had never heard the term "wearer DNA." He also testified that he was unaware of the DNA test results that inculpated Ronnie Byrd. Detective Santiago likewise testified that he did not know what the DNA test results showed, and that no one from the prosecution had briefed him about it. When asked if he knew or heard of Ronnie Byrd, Santiago testified that he read about Byrd in a newspaper article, and not from any conversations with prosecutors.

The jury acquitted Wright in under an hour. The jury foreperson gave a public statement that the evidence showed that Wright did not commit the crime, and that she was "angry,"[140] because the city "should never have brought this case."[141] Following the acquittal, the Office issued a statement reaffirming its belief that Wright was guilty, saying, "[w]e believe that the evidence was sufficient to prove Anthony Wright participated in the murder of Louise Talley."[142] In the same statement, the Office also invited Wright's attorneys to provide "evidence of specific misconduct"[143] by the Philadelphia police for further investigation.

The Detectives Face Criminal Charges

Following his acquittal, Wright filed a civil lawsuit against the city of Philadelphia, which enabled him to depose Detectives Santiago, Jastrzembski, and Devlin. During their depositions, which were taken while the detective were under oath, they gave testimony that squarely contradicted their testimony from the criminal trials. For instance, at his deposition, Detective Santiago testified that he met with **ADA Kirn** before the second trial, and she briefed him on the DNA test results, explaining that they excluded Wright and pointed to Ronnie Byrd. Santiago similarly testified that he and **ADA Kirn** discussed the DNA testing done on the seized clothing, which showing that only Talley's DNA was found. When Detective Jastrzembski was deposed, he testified that he met with **ADA Kirn** and other detectives before the second trial, and that **ADA Kirn** told him that DNA test results inculpated another man as the assailant and suggested that the clothing seized in the search belonged to Talley. Detective Devlin's deposition testimony corroborated

139. In public statements, Vega characterized his trial role as limited to calling certain witnesses, saying that "[w]ith respect to the rest of the case, I was not involved at all. It was not my case." Lacy, "Police Want Larry Krasner Gone." In response to Vega's statement, The Innocence Project issued a statement detailing Vega's involvement in trial and post-conviction proceedings and claiming that Vega's statement was "false." *See* Innocence Staff, "Innocence Project Responds."

140. Dean and Fazlollah, "Philly Man, Wrongly Imprisoned."

141. *Id.*

142. Slobodzian, "After Wright Acquittal."

143. *Id.*

Detectives Santiago and Jastrzembski: he recalled meeting with **ADA Kirn** prior to the second trial, and he also recalled that she told him about the DNA test results prior to the second trial.

Wright also deposed **ADA Kirn** during his civil case. She testified that she did not have a specific recollection of what she told Detectives Santiago and Jastrzembski, but that she did not challenge or dispute their deposition testimony. **ADA Kirn** also testified that she had no reason to doubt their recollections that she informed them about the DNA test results that implicated Byrd and that suggested Talley was the owner of the clothing. When she was asked about the stark contradiction between the detectives' deposition testimony and their testimony from the second trial, **ADA Kirn** did not directly address the contradictions. Instead, she stated that the "purpose" of her meeting with the detectives was not to discuss DNA testing.

In August 2021, the Office filed perjury and false-swearing charges against Detectives Santiago, Jastrzembski, and Devlin. The grand jury indictment accused them of lying under oath during Wright's trials when they testified about (i) Wright's supposed confession, (ii) recovering clothing from Wright's bedroom, and (iii) their denials about having been briefed about the DNA test results done on the seminal fluid recovered from the victim and the clothing supposedly seized from Wright's bedroom. The criminal case against them is currently pending, although the defendants are seeking to dismiss the criminal indictment due to what they claim is prosecutorial misconduct.[144]

ADA Kirn Was Not Disciplined

In 2018, the Innocence Project filed a bar complaint against **ADA Kirn**, alleging that she knowingly permitted the detectives to give false testimony at Wright's retrial and did not correct them. The complaint juxtaposed the detectives' deposition testimony with their testimony from the criminal trial to highlight the obvious contradictions. The complaint also highlighted **ADA Kirn's** deposition testimony, where she conceded that she had no reason to doubt or challenge the detectives' recollection of what they discussed before the second trial. Despite the clearly contradictory testimony, the bar complaint was dismissed and no discipline was imposed on **ADA Kirn**.

Shaurn Thomas (2017) and Clayton "Mustafa" Thomas (2019)[145]

Shaurn Thomas and Clayton "Mustafa" Thomas were convicted of second-degree murder and sentenced to life imprisonment. The CRU agreed to investigate Shaurn's claim that he had an alibi and was innocent. The investigation revealed that Shaurn had been detained at a juvenile facility when the crime occurred, and that detectives who investigated Shaurn failed to follow up on information suggesting his innocence. The investigation also revealed that the Office suppressed information that pointed to Shaurn's innocence. Based on the CRU's investigation, the Office conceded Shaurn's right to a new trial and then moved to dismiss the charges against him in June 2017.

144. Chris Palmer, "A Philly Judge is Weighing Whether to Throw Out a Landmark Perjury Case Against Three Former Homicide Detectives," Philadelphia Inquirer, Jan. 10, 2024.

145. The information in this section is taken from various sources. *See, e.g.*, *Thomas v. City of Philadelphia*, 290 F. Supp. 3d 371 (E.D. Pa. 2018); *Thomas v. City of Philadelphia,* No. 17-cv-4196, 2019 WL 4039575 (E.D. Pa. Aug. 23, 2019); Br. for Appellant Shaurn Thomas, *Comm. v. Thomas,* No. 1943 EDA 2014, 2014 WL 11380976 (Pa. Sup. Ct. 2014); Br. for the Commonwealth as Appellee, *Comm. v. Thomas,* No. 1943 EDA 2014, 2016 WL 2995392 (Pa. Sup. Ct. Feb. 26, 2016); Reply Br. for Appellant, Shaurn Thomas, *Comm. v. Thomas*, No. 1943 EDA 2014, 2016 WL 2995393 (Pa. Sup. Ct. Mar. 11, 2016); Br. for Appellant Mustafa Thomas, *Comm. v. Thomas*, No. 2436 EDA 2014 (Pa. Sup. Ct. Oct. 1, 2015); Br. for Commonwealth as Appellee, *Comm. v. Thomas*, No. 2436 EDA 2014, 2016 WL 2995394 (Pa. Sup. Ct. Mar. 1, 2016); Memorandum fr. BJ Graham Rubin re: Commonwealth v. Shaurn Thomas, CP-51-CR-0916842-1993, Mar. 22, 2017 (on file with author); Memorandum fr. A. Wellbrock to K. Martin re: Commonwealth v. Shaurn Thomas, CP-51-CR-0916842-1993 ("Wellbrock CIU Memo"), May 11, 2017 (on file with author); Hearing Transcript, *Comm. v. Thomas*, CP-51-CR-0916842-1993 (Phila. Ct. Comm. Pl. May 23, 2017); Compl. ("Shaurn Civil Complaint"), *Thomas v. City of Philadelphia,* No. 17-cv-4196 (E.D. Pa. Sept. 20, 2017); "Shaurn Thomas," National Registry of Exonerations; Chris Palmer and Craig R. McCoy, "Shaurn Thomas Officially Free After DA's Office Declines Retrial," Philadelphia Inquirer, June 13, 2017; Chris Palmer, "Philly Pays $4 Million to Settle Lawsuit Brought by Man Cleared of Murder Conviction in 2017," Jan. 2, 2020; Chris Palmer, "A Philly Man Got $4 Million After His Murder Case Was Overturned. He's Now Accused of Killing Someone Over $1,200," Philadelphia Inquirer, May 22, 2023.

In 2018, Clayton filed a PCRA petition based on the facts that led to Shaurn's exoneration, and his petition was granted that year. In 2019, the Office moved to dismiss the charges against Clayton. Clayton remains incarcerated for an unrelated conviction.

The Criminal Investigation

In 1990, Domingo Martinez withdrew a large of amount of cash from the bank and was driving with it in his car when he was robbed and murdered. Eyewitnesses said that another car rammed into Martinez's, and that at least one person got out of that car and shot Martinez, then then threw him out of his car and used it to flee the scene, while the other assailants followed in the car that initially hit Martinez's car. Eyewitnesses described the assailants' car as either a red and white or gray Chevrolet or Buick. Police later found Martinez's car and collected white paint samples from where it was hit. They also collected evidence from the crime scene, including broken taillight pieces.

Detectives Martin Devlin and Paul Worrell investigated the murder, with assistance from Officer James Gist. They heard a rumor that two sets of brothers—Shaurn and Clayton Thomas and John and William Stallworth—killed Martinez. Officer Gist knew Shaurn and had seen him driving a blue car, so police seized a blue Caprice from the neighborhood and had it processed for evidence. There was no indication who owned the blue Caprice or where it was found when it was seized. Police recovered a facemask from the Caprice, as well as blue-gray paint transfer from the exterior of the car. Police photographed the blue Caprice and gave the photographs to **ADA Randolph Williams**, telling him that the photographs showed the car used in the robbery-murder. Around the same time, Officer Gist also took Polaroid photographs of a different car—a blue Chevrolet that had been stripped and abandoned in the courtyard of the housing complex where the Thomas brothers lived.

The case then went cold until October 1992, when detectives interrogated John Stallworth ("John"), who confessed to the murder. John said he committed the crime with his brother, William, Shaurn and Clayton Thomas, "Nasir", and Louis Gay. John said they committed the crime in two different cars—a blue car and a gray car—and that he was in the car with Clayton, while Shaurn was in a different car. John was then charged with Martinez's murder. After John confessed, police learned that Gay was in prison at the time Martinez was killed and could not have been involved, so police reinterviewed John, who changed his statement and replaced Gay with an unknown man.

Detectives then interrogated John's brother, William. William had been questioned by police earlier in the investigation, and he had initially denied involvement in the crime. However, after Detectives Devlin and Worrell threatened to charge John with the death penalty and revoke John's favorable plea agreement, William confessed to the crime. In his statement, William said he was in the second car with Shaurn. William was then charged and agreed to cooperate with the prosecution in exchange for a lesser charge and sentence.

The Thomas Brothers' Trial

Shaurn and Clayton went to trial in 1994, and **ADA Williams** prosecuted the case. He relied exclusively on testimony from the Stallworth brothers to link Shaurn and Clayton to the crime, even though they had credibility problems. First, their account of the murder, which included six assailants driving two different cars, contradicted the accounts of four neutral eyewitnesses, none of whom saw two cars or a blue Chevrolet, and all of whom said they only saw three assailants. The Stallworths' account also contradicted physical evidence taken from the Martinez's car, which contained only white paint traces—not blue paint traces.

At the start of trial, **ADA Williams** also introduced fourteen photographs of the blue Caprice (taken by police) to the jury. When defense counsel objected, **ADA Williams** represented that these photographs showed the car Clayton was driving during the crime, and that the Stallworths were going to testify and identify the blue Caprice from these photographs. **ADA Williams** also presented testimony from a police criminalist about evidence recovered from the blue Caprice, including a face mask and "blue, gray paint transfer" that was found on the blue Caprice, which matched the color of Martinez's gray car, which had been damaged on the driver's side door and fender.

However, after introducing the fourteen photographs and presenting criminalist testimony, **ADA Williams** did not mention the blue Caprice again. When the Stallworth brothers testified, **ADA Williams** did not show them photographs of the blue Caprice. Instead, on the last day of trial, **ADA Williams** called Detective Worrell to testify that he showed the Stallworths Polaroid photographs (taken by Officer Gist) showing a blue Chevrolet. **ADA Williams** then recalled John and William to the stand, and both men testified that the Polaroids showed the car used in the crime. At no time did **ADA Williams** correct his earlier representations about the fourteen photographs showing the blue Caprice. Nor did he clarify that the Polaroids he showed the Stallworths were of a different blue car. Instead, **ADA Williams** sought to admit the Polaroids and the fourteen photographs of the blue Caprice without further clarification.

The defense presented alibi evidence that Shaurn could not have committed the crime because he had been arrested for stealing a bike the night before the murder and was in custody when the murder occurred. To support his alibi, he presented evidence that his mother picked him up after his arrest and took him directly to a juvenile court facility, where he had to sign a subpoena for his next court date before he could be released. **ADA Williams** aggressively attacked Shaurn's alibi, arguing that Shaurn's signature on the subpoena could have been forged, although he did not present any testimony about whether this was likely. Nor did **ADA Williams** acknowledge the police's failure to further investigate the circumstances or timing of Shaurn's arrest and detention, even though they learned about Shaurn's arrest during the investigation of Martinez's murder.

Despite his alibi, Shaurn was convicted of second-degree murder and sentenced to life imprisonment. Clayton was also convicted of second-degree murder and sentenced to life imprisonment.

The Law Division Aggressively Defends the Conviction

After Shaurn was convicted, PCRA counsel discovered a criminalistics report that summarized testing done on the blue Caprice. The report found that the blue Caprice could not have been used in the crime—the broken taillight found at the crime scene did not match the Caprice's broken taillight, and the paint removed from the blue Caprice was not gray. This report, which had been completed during Shaurn and Clayton's trial, had not been disclosed to defense counsel. It also contradicted the Stallworths' police statements, given that they supposedly identified the blue Caprice as the car used in the crime. The report likewise contradicted **ADA Williams'** representation at the start of trial that the blue Caprice was the car used in the crime, and that he knew this because the Stallworths were going to identify it as such.

PCRA counsel posited that, at some point after he introduced evidence about the blue Caprice, **ADA Williams** learned that it could not have been involved in the crime. However, instead of correcting his earlier representation, he amended his trial theory by swapping out one blue car (the blue Caprice) for another (the blue Chevrolet) and did not clarify or otherwise correct his earlier representations. In support of this theory, counsel pointed to the date of the criminalistics report, which was dated late in the trial, and the fact that **ADA Williams** recalled Detective Worrell and the Stallworth brothers to the stand to testify about the blue Chevrolet on the last day of trial.

Law Division ADA Anthony Carissimi opposed Shaurn's PCRA petition. While he conceded that the criminalistics report was not disclosed, he argued that this was harmless, in part because **ADA Williams** had never argued that the blue Caprice was used in the murder. This argument failed to confront the fact that at the outset of the trial, (i) **ADA Williams** introduced the fourteen photographs of the blue Caprice to the jury, (ii) **ADA Williams** proffered to the court and counsel that one of the Stallworths would eventually testify that the Caprice photographs showed the car used in the crime, and (iii) **ADA Williams** called a criminalist to testify about the evidence recovered from the blue Caprice and how this evidence compared to evidence recovered from the crime scene.

Despite the failure to disclose the criminalistics report, Shaurn's PCRA petition was denied.

The CRU Investigation

When the CRU agreed to investigate Shaurn's conviction, it tried to verify his alibi. Although many of the documents from Shaurn's juvenile case were destroyed, CRU prosecutors spoke with people involved in his case and who were knowledgeable about the juvenile court system and its policies and practices. Based on these conversations, the CRU concluded that Shaurn was likely still in custody on the morning of the murder and thus could not have been involved. The CRU also investigated **ADA Williams'** argument that Shaurn's signature on the subpoena could have been forged. They compared Shaurn's signature on his juvenile court subpoena to his signature on other legal documents and determined that his signature did not appear forged. To the contrary, it appeared he signed the subpoena himself.

The CRU was also able to locate the police H-File, which had been missing for nearly three years, and found information that did not appear to have been shared with the prosecution or disclosed to the Thomases' defense counsel. This information related to two sets of alternate suspects who police interviewed in connection with the murder. The first set of suspects was identified just three days after the murder, when police stopped a gray Chevrolet Nova because it fit the description of the car seen by eyewitnesses. Police interviewed the occupants of the car, and all of them admitted that they knew the victim. One occupant, Oliver Walthour, said the gray Chevrolet belonged to Lloyd Hicks, but that Hicks' cousin, John Lewis, often drove it. Walthour told police he saw Lewis at a bar the day after the murder, and Lewis was showing off a lot of money. Walthour asked Lewis where he got the cash, and Lewis said he robbed

"this old Puerto Rican guy,"[146] after "they"[147] followed him and then hit his car. When asked about his own whereabouts on the day of the murder, Walthour said he slept in and then went to a house at Broad and Erie. Notably, an unknown person called 911 call eight days after the murder and said the people who murdered Martinez were hiding in a house at Broad and Erie.

The second suspect was Martinez's daughter, Sara Negron. Police received a tip that the murder was an inside job, so Detective Devlin interviewed Negron on two occasions and learned that Negron knew her father was going to the bank the morning he was killed. At the time of the murder, Negron and her father were fighting over Negron's affair with a man who ran an illegal gambling business. Her father did not like this man and was worried Negron would leave her husband for him, so he told Negron that if she got divorced and married her boyfriend, he would disinherit her. Negron was also stealing money from her father's business around the time of his death, and she was eventually charged and convicted for this theft. After Martinez was murdered, Negron took over her father's business, divorced her husband, and transferred the business to her boyfriend for the sum of one dollar.

Shaurn and Clayton are Exonerated

Based on the undisclosed documents pertaining to alternate suspects, the CRU conceded that Shaurn was entitled to a new trial. Shortly thereafter, they dismissed the charges against him. Shaurn later filed a civil rights lawsuit against the city of Philadelphia and received a $4 million settlement. Clayton then filed a PCRA petition for a new trial based on the same underlying facts that led to Shaurn's exoneration. The petition was granted, and, after consultation amongst the Homicide Unit, the Law Division, and the CIU, the Office dropped the charges against Clayton, who remains incarcerated on a separate offense.

Shaurn is Arrested and Charged with Murder

In May 2023, Shaurn was charged with first-degree murder and other crimes, including witness intimidation. The DAO accused him of shooting Akeem Edwards over a $1200 drug debt. His case remains pending.

Marshall Hale (2017)[148]

Marshall Hale was convicted of rape and sentenced to 23 ½-to-47 years' imprisonment. He spent decades challenging his conviction and seeking information from the Commonwealth about his case. Some twenty years after his trial, the Commonwealth produced written reports pertaining to forensic testing that had been completed during Hale's trial. Hale eventually sought assistance from the Pennsylvania Innocence Project, which engaged an expert to interpret the report findings. After the expert concluded that the written reports excluded Hale as the rapist, the Project filed a PCRA petition seeking to vacate Hale's conviction. The Project also wrote a letter to DA Seth Williams requesting that he authorize an investigation into Hale's conviction. DA Williams did not respond to the request, and the Law Division continued to oppose Hale's PCRA petition. Only after the Law Division llost did the Conviction Review Unit agree to vacate Hale's conviction and dismiss the charges against him.

The Criminal Investigation and Trial

In November 1983, a man raped fourteen-year-old NA at gunpoint. Police recovered blood and semen samples from clothing and administered a rape kit. NA was able to describe her attacker as being 30 to 35 years old, a "chubby" 190 pounds, and 5'11". Roughly one month later, police showed NA photographs of potential suspects, and she selected two photographs, one of which was a photograph of Marshall Hale. Police also worked with NA to create a composite sketch of her attacker, at which time she described him as being 25 to 30 years old and about 5'9". During this meeting, NA again selected Hale's photograph. However, at a live lineup roughly one month later, NA failed to identify Hale, who was the sixth man in the lineup. NA later told her mother she thought her assailant was the sixth man, but that she did not identify him out of fear.

Hale went to trial in 1984, and **ADA Petrese Tucker** prosecuted the case. Serologist Maryann Scafidi testified about the forensic evidence recovered in the investigation. Scafidi told the jury that Hale had blood type A, while NA had blood type O. Scafidi also said NA was a secretor, which meant that her blood type

146. Wellbrock CIU Memo at 4.

147. *Id.*

148. The information in this section is taken from various sources. *See, e.g.*, *Comm. v. Hale*, No. 2940 EDA 2014, 2016 WL 5347880 (Pa. Sup. Ct., Sept. 23, 2016); Br. for Pet'r-Appellant Marshall Hale ("Hale Brief"), May 7, 2015, *Comm. v. Hale*, No. 2940 EDA 2014 (Pa. Sup. Ct.); Comm. Br. for Appellee ("Law Division Brief"), Mar. 8, 2016, *Comm. v. Hale*, No. 2940 EDA 2014 (Pa. Sup. Ct.); Reply Br. for Pet'r-Appellant Marshall Hale, Sept. 21, 2015, *Comm. v. Hale*, No. 2940 EDA 2014 (Pa. Sup. Ct.); "Marshall Hale," Pennsylvania Innocence Project; "Marshall Hale," National Registry of Exonerations.

was present in all her bodily fluids. Scafidi did not tell the jury whether Hale was a secretor, because the test results were not yet known when she testified.

Scafidi also testified that blood and semen were recovered from NA's clothing and rape kit. Regarding the blood, Scafidi testified that (i) the lab was unable to identify a blood type for the blood found in the vaginal and vulvular samples; (ii) the victim's blood type O was the only blood found in the cervical sample; (iii) the victim's socks had a small amount of type A blood—the same blood type as Hale; and (iv) the victim's blouse and underwear had blood type B. Scafidi testified that Hale could not have contributed to the blood found on NA's blouse and underwear. She also testified that semen was found in the vaginal and vulvular samples and on the victim's underwear and blouse, but she did not testify about the possible source of the semen, including whether Hale could have been the source.

During closing arguments, **ADA Tucker** called the blood evidence "confusing,"[149] because blood type B was found on NA's underwear and blouse, and this did not belong to either NA or Hale. However, she argued that based on the blood evidence, Hale was "not excluded, he is included in the group of possible people who could have committed this offense."[150]

Hale was convicted and sentenced to 23 ½ to 47 years' imprisonment. Following Hale's conviction, the evidence related to the case was retained by the trial court and likely destroyed. After the trial ended, the Office also lost the trial file.

The Prosecution Failed to Disclose Favorable Information

Unbeknownst to Hale, while trial was ongoing, the Commonwealth was still conducting tests on Hale's blood. On the last day of trial before Hale was convicted, the Commonwealth concluded its "inhibition studies" test, which determined that Hale was a "Type A Secretor"[151]—meaning, his blood type A "will be in all of his bodily fluids, including his semen."[152] This finding was important, because the Commonwealth had already concluded that no blood type A was found in any of the evidence that contained semen—NA's blouse and underwear, showed type B blood. The inhibition studies also contradicted **ADA Tucker's** closing argument. As noted previously, she had argued that based on the evidence presented, Hale could not be excluded from the group of people who could have committed the offense—but the result of the inhibition study eliminated Hale. These test results were not disclosed to defense counsel prior to trial ending, and they were never presented to the jury.

Hale challenged his conviction in a series of direct appeals and state PCRA petitions, but he did not receive the inhibition studies until 1998, when he filed a federal habeas petition and the Commonwealth provided him with the test results when it turned over 25 pages of discovery. Moreover, when Hale received these test results, there was no accompanying "statement, summary, or explanation"[153] that would have alerted Hale to the significance of the material. As such, he did not immediately understand the importance of the test results. Nor did the PCRA court who adjudicated his third post-conviction petition: when Hale amended his third petition to include the inhibition test results, the PCRA court erroneously concluded that these test results had previously been introduced at trial and dismissed the amended petition as untimely.

The Philadelphia Innocence Project Agrees to Help Hale

Hale reached out to various organizations in an attempt to prove his innocence. However, because the physical evidence in his case had been destroyed and thus could not be tested for DNA, several organizations turned him down. Hale eventually contacted the Philadelphia Innocence Project. The Project engaged an expert to assist in interpreting the inhibition studies test results from Hale's case. The expert concluded that (i) the inhibitions studies was completed on the last day of trial; (ii) the studies showed that Hale was a Type A Secretor; (iii) if Hale was the assailant, his semen would have shown up as blood type A; and (iv) because no blood type A was found, Hale was excluded as a "contributor to the semen found on the physical evidence."[154] The expert also concluded that the blood found on NA's blouse and underwear belonged to a Blood Type B secretor.

149. Hale Brief, 2016 WL 5347880, at *8.
150. *Id.*
151. *Id.* at *9.
152. *Id.*
153. *Id.* at *11.
154. *Id.* at *15.

The Law Division Aggressively Defends the Conviction

After receiving the expert's conclusions, the Project filed a PCRA petition arguing that the inhibition test results demonstrated Hale's innocence. Instead of addressing the merits of the test results, the Law Division moved to dismiss Hale's petition, arguing that it was not filed in time and that any further requests for DNA testing should be denied because there was no physical evidence left to test. The PCRA court eventually asked the Law Division to submit an official letter apprising the court of the search undertaken for additional physical evidence that might still exist for testing—but no letter was ever submitted. The PCRA court ultimately denied Hale's petition as untimely.

The Project appealed the dismissal, arguing that Hale was entitled to know what evidence remained available for testing. They also criticized the Commonwealth's evolving responses throughout the litigation. For instance, the Law Division initially argued that the evidence could not be located before ultimately arguing that the evidence was destroyed—although they did not submit supporting information to the PCRA court. In response, **ADA James Gibbons** argued in part that Hale's motion was untimely, because Hale could have discovered his own status as a secretor at any time before, during, or after trial by having his own fluids tested. In blaming Hale for this failure, **ADA Gibbons** did not address the fact that the Commonwealth performed this exact test during Hale's trial in the form of the inhibition studies and did not disclose it, even though the test results were favorable because they excluded Hale as the source of the semen. Separately, **ADA Gibbons** attacked the Project's expert analysis as "self-contradictory and bizarre"[155] and dismissed it as "flawed scientific evidence."[156] **ADA Gibbons** also argued that the Project's expert "mispresent[ed]…the Commonwealth's expert's report."[157]

The Pennsylvania Superior Court vacated the dismissal and ordered the PCRA court to conduct a hearing on Hale's claims. It found that Hale had raised genuine questions about the inhibition studies report, given the sophisticated nature of the test results and Hale's status as an incarcerated and unrepresented person without scientific training and experience. It also ordered the Commonwealth to certify in writing what efforts it took to locate evidence that was no longer available and what evidence remained available for testing. In its opinion, the Superior Court also criticized the Law Division's arguments about the expert findings as "confusing at best"[158] and "misleading at worst…"[159] It also found the Law Division's arguments to be self-contradictory: on the one hand, the Office criticized Hale for failing to test his own fluids but on the other hand the Office argued that any failure to test the fluids was meaningless because the test would have been irrelevant. In pointing out this glaring inconsistency, the Pennsylvania Superior Court held that it "wholly agree[d] with the Commonwealth's refutation of its own position…."[160]

The CRU "Investigation"

After the Superior Court vacated the dismissal of Hale's PCRA petition and ordered a hearing, the Project took Hale's case to the CRU, which agreed to vacate Hale's conviction and dismiss the charges against him. Although the CRU ultimately agreed to dismissal, it did not become involved in Hale's case until *after* the Law Division lost its bid to defend Hale's conviction. The CRU also did not respond to the Project's initial request to DA Williams that the Office investigate Hale's conviction. In sum, Hale was still forced to litigate his claim of innocence in an adversarial proceeding, and he had to wait until the Law Division lost before the CRU agreed to investigate his case.

155. Law Division Brief, 2016 WL 3036856, at *14 n. 3.
156. *Id*.
157. *Id*.
158. *Hale*, 2016 WL 5347880, at *10, n. 16.
159. *Id*.
160. *Id*. at *12.

Terrance "Terry" Williams (2017)[161]

Terrance "Terry" Williams was convicted of third-degree murder for the death of Herbert Hamilton and sentenced to 13½-to-27 years' imprisonment. He was then convicted of first-degree murder for the death of Amos Norwood and sentenced to death. Williams filed a PCRA petition challenging his death sentence in the Norwood case after learning that the prosecution suppressed favorable information that bore on his death sentence. The PCRA court ordered a hearing and heard testimony from the prosecutor who handled both the Hamilton and Norwood trials, as well as from Williams' co-conspirator-turned-cooperator. The PCRA court also conducted its own independent review of the DAO trial files for both the Hamilton and Norwood cases.

At the conclusion of the hearing, the PCRA court found that the prosecution failed to disclose favorable information relating to the sentencing phase of the Norwood trial, when the jury heard arguments about whether to sentence Williams to death. Specifically, the court found that the trial prosecutor withheld mitigating information about Norwood's sexual history—and that the trial prosecutor more broadly engaged in gamesmanship in both the Hamilton and Norwood trials. The PCRA court vacated Williams' death sentence and ordered that he be resentenced.

The Office appealed, and the case was eventually heard by the Pennsylvania Supreme Court, which vacated the order and reinstated the death sentence. Chief Justice Ronald Castille participated in the case, even though he had previously been the Philadelphia District Attorney and had personally approved the request to seek the death penalty against Williams for Norwood's murder. Williams appealed the Pennsylvania Supreme Court's decision to the United States Supreme Court, arguing that Chief Justice Castille should have recused himself because of his earlier participation in Williams' case. The United States Supreme Court agreed, holding that Chief Justice Castille's participation created a conflict that violated Williams' constitutional rights. The case was remanded back to the state high court, which upheld the PCRA court's order vacating Williams' death sentence. Williams was subsequently resentenced to life in prison.

Williams then challenged his conviction in the Hamilton case, filing a PCRA petition seeking a new trial, and the Office eventually dropped the charges against him. He remains incarcerated for Norwood's murder.

The Hamilton Murder Trial

Williams was charged with first-degree murder for the death of Herbert Hamilton, and he went to trial in 1985. **ADA Andrea Foulkes** prosecuted the case, and she sought the death penalty. At trial, she presented evidence about Williams' relationship with the much-older Hamilton, as well as Williams' secret life "hustling homosexuals"[162] for money and favors, and his sexual involvement with multiple older men. She also presented testimony from Williams' friend, Marc Draper, who described Williams' relationships with these men in exchange for money or other benefits. Although the evidence could have supported a first-degree murder conviction, the jury returned a lesser verdict of third-degree murder, which shocked the trial court.

The Norwood Murder Trial

After the Hamilton trial, Williams and Draper were charged with first-degree murder for the death of Amos Norwood. Draper cooperated with the prosecution and was not tried with Williams, who went to trial in 1986. **ADA Foulkes** also prosecuted this case, and she again sought the death penalty. At the outset of the case, the trial court instructed Foulkes to construe her constitutional disclosure obligations "liberally, even peripherally so...."[163] The court emphasized that when **ADA Foulkes** considered what might be exculpatory, she should not limit her focus to admissible evidence but should think broadly about whether it was something defense counsel would want to see, because it was important that he had all the information.

161. The information in this section is taken from various sources. *See, e.g.*, Hearing Tr. ("Williams PCRA Hearing Transcript"), *Comm. v. Williams*, CP-51-CR-0823621-1984 (Phila. Ct. Comm. Pl. Sept. 28, 2012); Op. and App. ("PCRA Opinion" and "PCRA Opinion Appendix"), *Comm. v. Williams*, CP-51-CR-0823621-1984 (Phila. Ct. Comm. Pl. Nov. 27, 2012); Commonwealth's Br. as Appellant at Nos. 668 & 669 CAP, *Comm. v. Williams*, Nos. 668, 669, & 673 CAP (Pa. Mar. 13, 2013); *Comm. v. Williams*, 629 Pa. 533 (2014); *Williams v. Pennsylvania*, 579 U.S. 1 (2016); *Comm. v. Williams*, 641 Pa 283 (Pa. 2017); Statement by District Attorney Seth Williams on Ruling in Terrance Williams Homicide Case ("DAO Press Release"), Sept. 28, 2012, Philadelphia District Attorney's Office; "Terrance Williams," National Registry of Exonerations; John Rudo, "Terry Williams Death Penalty Case Rocked by New Evidence Days Before Planned Execution," Huff Post, Sept. 24, 2012; Marc Bookman, "When a Kid Kills his Longtime Abuser, Who's the Victim?" Mother Jones, Nov. 30, 2015; Katie Halper, "This Man is on Death Row for Killing his Alleged Rapist," Vice, Feb. 29, 2016; Michael Mechanic, "This Supreme Court Case Shows the Perils of Appointing Prosecutors as Judges," Mother Jones, Mar. 8, 2016; Jessica Pishko, "Terry Williams Finally Gets a Chance," The Appeal, Aug. 28, 2017.

162. PCRA Opinion Appendix at 4.

163. PCRA Opinion Appendix at 1.

Draper testified against Williams and described the murder as a robbery gone wrong. He said that Norwood picked him and Williams up and then drove them to a deserted location, where Draper and Williams robbed and murdered him. Draper testified that on the night of the murder, Williams had run out of money, so he told Draper he was going to extort money from Norwood by threatening to tell Norwood's wife he was gay. In exchange for his testimony, the Office offered to let Draper plead to second-degree murder, for which he was eventually sentenced to life in prison without the possibility of parole. Other than the offer of a reduced charge, he denied receiving or being promised any other benefits.

When she prosecuted the Norwood case, **ADA Foulkes** employed a different strategy: she did not mention Williams' sexual history or his sexual relationships with older men. Nor did she present evidence that Norwood and Williams knew each other or were sexually involved. Instead, she cast Norwood as a Good Samaritan who offered Draper and Williams a ride home and was repaid for his good deed by being brutally murdered. During the sentencing phase of the trial, **ADA Foulkes** painted Williams as a "cold, calculating killer"[164] who murdered Norwood "*for no other reason* but that a kind man offered him a ride home… ."[165]

The jury convicted Williams of first-degree murder and sentenced him to death.

Draper Alleges Misconduct

As Williams' execution date neared, his counsel spoke with Draper about his testimony in the Norwood trial. For the first time, Draper claimed that he tried to tell detectives that Williams and Norwood were in a sexual relationship, but that the detectives pushed him to testify that the motive for the crime was robbery. Counsel used Draper's allegations to file a PCRA petition. The Honorable M. Teresa Sarmina granted the request for a hearing and ordered that Draper and **ADA Foulkes** testify. She also barred the parties from communicating with either witness and directed the prosecution to produce to her chambers the H-Files and DAO files for the Hamilton and Norwood murders. Judge Sarmina then conducted her own, independent review of the files.

The PCRA Court Finds Misconduct

After the hearing was held and after she inspected the files, Judge Sarmina concluded that Williams was entitled to a new sentencing hearing, because **ADA Foulkes** withheld favorable information about Norwood's sexual history, including allegations that he sexually abused minor parishioners at the church he attended. Specifically, Judge Sarmina found that **ADA Foulkes** either withheld statements entirely or produced "sanitized"[166] statements that omitted allegations of Norwood's sexual misconduct, which then enabled her to paint a misleading and incomplete picture of both Williams and Norwood during the sentencing phase of the trial.

The first item of information that **ADA Foulkes** withheld was her own handwritten notes documenting a witness statement about Norwood behaving improperly with "RH," who Norwood allegedly groped "on privates."[167] **ADA Foulkes'** notes also mentioned other "possible incidents."[168] The second pieces of information were found in a PAS documenting interviews with Norwood's widow, Mamie Norwood ("Mamie"), and his reverend, Charles Poindexter. Mamie told police about a "bizarre"[169] robbery incident where she woke early in the morning to find a "young male, slim"[170] standing in her home, while her husband woke her to ask her for money. Her husband then loaded stereo equipment into his car and drove away with the young man. The next morning when he returned, her husband told her a "rambling"[171] story about getting "abducted"[172] and that he used "psychology"[173] on his captors "until they fell asleep"[174] and he escaped. He also begged her not to call the police. Reverend Poindexter told police that he thought Norwood might have been gay, and that he "received a complaint…from the mother of a 17-year-old parishioner that [Norwood] had propositioned the

164. PCRA Opinion at 33.
165. *Id*. at 47 (citing trial transcript) (emphasis supplied).
166. *Id*. at 12.
167. *Id*. at 12, n. 30.
168. *Id*.
169. *Id*. at 20, n. 41.
170. *Id*.at 12, n. 31.
171. *Id*.
172. *Id*.
173. *Id*.
174. *Id*.

17 year old for sex, (male)."[175] The Reverend also noted Norwood's work with "juvenile males in the parish,"[176] including counseling them.

ADA Foulkes did not disclose the PAS containing details about Norwood's sexual history and possible sexual involvement and improprieties with young men. Instead, she produced a sanitized statement from Mamie Norwood that omitted the entirety of the "kidnapping" account involving the young man and referred only to Norwood driving young men home from church. Likewise, she produced a statement from Reverend Poindexter that did not refer to Norwood's sexuality or the complaint Reverend Poindexter received about Norwood propositioning a younger male parishioner.

The PCRA court found that by withholding one statement and producing "sanitized" versions of two others, **ADA Foulkes** created a "false impression"[177] that she had disclosed the full account of what these witnesses said. The court also found that **ADA Foulkes** capitalized on these incomplete disclosures during trial. For instance, Mamie and Reverend Poindexter gave testimony about Norwood's good acts at his church and his desire to help others that went unchallenged, because defense counsel was unaware of the allegations of his sexual impropriety. During her closing argument at the sentencing phase of trial, **ADA Foulkes** was also able to portray Norwood as the ultimate Good Samaritan who was murdered in a senseless act of violence that was committed "for no other reason"[178] than Norwood offering Williams a ride home.

Finally, Judge Sarmina criticized the Office for continually denying the existence of favorable information. For instance, she noted that at an evidentiary hearing on Williams' earlier PCRA petition, **ADA Evan Silverstein** told the PCRA court there was no evidence that Norwood was sexually abusing young boys, and that the evidence only suggested that Norwood was gay and that Williams was trying to use that to exort him. Judge Sarmina noted that, because of **ADA Silverstein's** "affirmative misrepresentation,"[179] the PCRA court barred further testimony on the issue of Norwood's sexual improprieties. Elsewhere, she admonished **ADA Ronald Eisenberg** for making arguments "about the scope of the evidence"[180] that were "not entirely true."[181] **ADA Eisenberg** had argued that there was only "one piece"[182] of the case relating to Norwood's sexuality—the fact that that Norwood was gay and that Williams tried to extort him. However, Judge Sarmina noted that this statement was inaccurate, because **ADA Eisenberg** had ignored the other pieces of evidence, such as **ADA Foulkes'** "multiple handwritten notes"[183] referencing homosexuality, including Wiliams and Norwood's possible relationship; and the report to Reverend Poindexter that Norwood groped a teen parishioner.

ADA Foulkes' Gamesmanship

Judge Sarmina also scrutinized **ADA Foulkes'** behavior as the "architect"[184] of the Hamilton and Norwood trials. First, she noted that the "common thread tying together"[185] all the suppressed evidence was that almost all of it pertained to Norwood's sexual improprieties with teenage boys, and his "semblance of a relationship"[186] with Williams. This pattern of suppression led her to conclude that **ADA Foulkes** was motivated to obtain a death sentence in the Norwood trial, after she had tried and failed to obtain one in the Hamilton trial. Judge Sarmina found that **ADA Foulkes** identified the likely reason for the "'compromised' verdict"[187] in the Hamilton trial—the sexual relationship between Williams and the much older Hamilton—and then deliberately tried to eliminate this issue from similarly compromising the Norwood verdict. Judge Sarmina found that **ADA Foulkes** not only ignored the Norwood trial court's instructions to interpret her disclosure obligations liberally, but she also engaged in "gamesmanship"[188] during both trials. She found that

175. *Id.* at 12-13, n. 31.
176. *Id.*
177. *Id.* at 15.
178. *Id.* at 47 (citing trial transcript).
179. *Id.* at 17.
180. *Id.* at 19, n. 38.
181. *Id.*
182. *Id.*
183. *Id.*
184. PCRA Opinion Appendix at 2.
185. *Id.*
186. *Id.*
187. *Id.* at 3 (citing PCRA hearing transcript).
188. *Id.* at 2.

ADA Foulkes "play[ed] a little fast and loose"[189] with respect to her disclosure obligations, that she "play[ed] games and took unfair measures to win,"[190] and that **ADA Foulkes'** suppression of evidence "was closer to willful than to inadvertent."[191]

Judge Sarmina also took the unusual step of drafting a separate Appendix that detailed multiple instances **ADA Foulkes'** gamesmanship across both the Norwood and Hamilton trials. As a starting point, she described **ADA Foulkes'** PCRA hearing testimony as "less than candid."[192] Although **ADA Foulkes** had testified that she was unbothered by the Hamilton verdict and would not have cared if the Norwood jury reached the same conclusion, "as long as the jury considered all the evidence,"[193] Judge Sarmina noted that **ADA Foulkes'** suppressed multiple pieces of information, which meant that the jury *could not* consider all the evidence.

Elsewhere, Judge Sarmina noted inconsistencies with **ADA Foulkes**' testimony. For instance, **ADA Foulkes** acknowledged that there were "a lot of issues"[194] with the Hamilton trial, including "sexual overtones and relationships and what have-you,"[195] and she admitted that her knowledge of Williams' sexual history from the Hamilton trial led her to "suspect there was a sexual connection between"[196] Williams and Norwood. However, when confronted with the evidence "supporting *her own* suspicion"[197] that Williams and Norwood were sexually involved, Judge Sarmina found that **ADA Foulkes** "grossly misrepresented"[198] the evidence in the DAO's files when she claimed that she did not have a "scintilla of evidence that [] Williams had any sexual relationship with [] Norwood."[199] **ADA Foulkes** also claimed that the witnesses who were asked about Norwood's sexual orientation "all said no,"[200] and that she "had no information from Reverend Poindexter at the time there was anything untoward about any conduct in the church."[201] Judge Sarmina found this testimony to be "absolutely contrary to the evidence which Ms. Foulkes had in hand"[202] and instead concluded that "[h]ard evidence during the review of the government's trial files *directly* contradicted Ms. Foulkes' assertions."[203]

Elsewhere in the Appendix, Judge Sarmina detailed other instances where **ADA Foulkes** engaged in gamesmanship during the Norwood trial. In one example, **ADA Foulkes**' handwritten notes indicated that she knew before trial that Mamie would identify Williams as the person on her porch the day her husband went missing. Pennsylvania criminal procedure rules required **ADA Foulkes** to disclose witness identification(s) to defense counsel, but she did not do so. Instead, at trial she asked Mamie to make an in-court identification of Williams. When defense counsel objected and moved for a mistrial, **ADA Foulkes** claimed Ms. Norwood's earlier statement was an oral one that did not need to be disclosed. Judge Sarmina found this "indicative"[204] of **ADA Foulkes'** state of mind and noted that it undermined her testimony that she wanted the jury to have all the evidence.

In another example, Judge Sarmina cited **ADA Foulkes'** failure to disclose a criminal complaint and arrest warrant that had been issued for a man who tried to use Norwood's credit cards at a jewelry store after the murder. The jewelry store employee was interviewed by police, and he did not identify Williams as the man who tried to use Norwood's credit cards. However, at trial **ADA Foulkes** called this employee to testify that it *was* Williams who tried to purchase jewelry. Judge Sarmina noted that this was yet another indication of **ADA Foulkes'** statement of mind: she erred on the side of *not disclosing* evidence that could have been favorable to Williams.

189. PCRA Hearing Transcript at 37
190. *Id.* at 39.
191. *Id.* at 37.
192. PCRA Opinion at 9, n. 23.
193. PCRA Opinion Appendix at 3.
194. *Id.*
195. *Id.*
196. *Id.* at 4-5 (citing PCRA hearing transcript).
197. *Id.* at 5 (emphasis in original).
198. *Id.*
199. *Id.* (citing PCRA hearing transcript).
200. *Id.* (citing PCRA hearing transcript).
201. *Id.* (citing PCRA hearing transcript).
202. *Id.*
203. *Id.* (emphasis in original).
204. *Id.* at 13.

Lastly, Judge Sarmina found that **ADA Foulkes** failed to correct false and misleading testimony given by Draper when he testified that his only "deal" with the Commonwealth was a written agreement he signed. During cross-examination, Draper denied that there was any additional agreement or understanding between him and the Commonwealth other than this written agreement, and **ADA Foulkes** did not ask him to clarify this testimony. However, Judge Sarmina found this "testimony was false."[205] She noted that **ADA Foulkes** personally wrote to the Parole Board on Draper's behalf, and that in her letter she referred to "*another agreement* between Draper and the Commonwealth—an agreement she never disclosed to anyone else."[206]

ADA Foulkes Played "Fast and Loose"[207] in the Hamilton Trial

Judge Sarmina separately criticized **ADA Foulkes** for "play[ing] 'fast and loose'"[208] in the Hamilton trial, as well. In that trial, **ADA Foulkes** tried to introduce letters Williams wrote to Draper as evidence of Williams' guilt. Defense counsel objected to the letters because he had requested all of Williams' statements in pretrial discovery and none of the letters had been disclosed. In an "attempt to soften the blow of having failed to disclose the letters,"[209] **ADA Foulkes** represented that she had only received the letters earlier that week. However, Judge Sarmina called this a "shade of the truth,"[210] because she had found **ADA Foulkes'** handwritten notes from a trial preparation session approximately two months earlier, which indicated that Draper had told her about Williams' letters and had agreed to give the letters to detectives "next Fri."[211] Judge Sarmina found that even if Draper had delayed turning over the letters until right before trial, **ADA Foulkes** was not forthcoming about when she learned about the letters.

The Office Issues a Combative Response

After Judge Sarmina granted Williams a new sentencing hearing, **DA Seth Williams** issued a scathing statement insisting that **ADA Foulkes** had turned over all the information in the DAO's possession regarding a possible sex-for-hire relationship between Norwood and Williams. However, "sex-for-hire" was not the issue before the PCRA court—the issue was whether the prosecution had turned over evidence that could have mitigated Williams' death sentence, which included Norwood's own sexual history and any allegations of impropriety against him. Elsewhere, **DA Williams** dismissed the undisclosed information that Judge Sarmina found as "a few handwritten notes and scraps of paper" that contained "unsubstantiated rumor"[212] about Norwood. Lastly, he complained that **ADA Foulkes** was being "unfairly victimized,"[213] and that the court had made "villains"[214] out of the victim and **ADA Foulkes**, while it was Williams who was a "brutal murderer[]"[215] who did not deserve a new sentencing hearing.

The United States Supreme Court Intervenes in Williams' Case

The Office appealed Judge Sarmina's ruling to the Pennsylvania Supreme Court, which was at the time led by Chief Justice Ronald Castille. The state high court vacated her ruling and reinstated the death sentence, holding in part that Williams' PCRA petition was untimely, and that he failed to plead any *Brady* violations that would fall within the "governmental interference" exception that would have excused his untimeliness. In finding that Williams failed to plead a valid *Brady* violation, the majority focused on the fact that Williams was already aware of Norwood's sexual orientation; it did not address the separate allegations about Norwood's own sexual improprieties with other young men. Chief Justice Castille also wrote a concurrence that criticized Judge Sarmina's "extraordinary, and unauthorized, measures undertaken…in this case."[216]

205. *Id.* at 10.
206. *Id.* (emphasis in original).
207. *Id.* at 14, n. 24.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. DAO Press Release.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Williams*, 629 Pa. at 551.

Williams appealed the Pennsylvania Supreme Court ruling to the United States Supreme Court, arguing that Chief Justice Castille should not have participated in the case, because he served as Philadelphia District Attorney when Williams was tried for Norwood's murder, and he personally approved the prosecution's request to seek the death penalty. The Supreme Court agreed, holding that Chief Justice Castille should have recused himself, and that his failure to do so created an impermissible risk of actual bias under the Due Process Clause, given his "significant, personal involvement as a prosecutor in a critical decision regarding [Williams'] case."[217]

Williams is Resentenced and The Hamilton Murder Charges Are Dismissed

In 2017, Williams received a new sentencing hearing, where he was resentenced to life imprisonment for Norwood's murder. He then filed a PCRA petition seeking a new trial in the Hamilton case, based in part on evidence uncovered by the PCRA court regarding **ADA Foulkes'** suppression of evidence. In 2019, the court vacated Williams' conviction for Hamilton's murder, and the Office dismissed the charges against him in 2020. He remains incarcerated for Norwood's murder.

Dontia Patterson (2018)[218]

Dontia Patterson was tried twice for murder. After his first trial ended in a hung jury, he was retried and convicted of first-degree murder and sentenced to life imprisonment. He then successfully challenged his conviction in a PCRA petition alleging ineffective assistance of counsel. While awaiting a decision as to whether he would be tried for a third time, the CIU and the Homicide Unit agreed to investigate his claim of actual innocence. The investigation focused on whether the Office should re-file charges against him, and during the investigation, they discovered that homicide prosecutors did not disclose favorable impeachment information relating to a key prosecution witness.

Based on these findings, the Office dismissed the charges against Patterson.

The Criminal Investigation and First Trial

In 2007, Antwine Jackson was shot and killed outside a grocery store. Within minutes of the shooting, Dontia Patterson arrived at the scene. Patterson and Jackson were friends, and witnesses saw Patterson screaming and asking what happened to Jackson. Within hours of the killing, police interviewed Patterson, and he told them that Jackson sold drugs and had recently been threatened by one of the people Patterson had seen on the street around the time of the murder.

Despite his behavior at the scene and his lack of motive, police arrested and charged Patterson with Jackson's murder. Patterson went to trial in 2008, and **ADA Beth McCaffery** prosecuted the case. She argued that Patterson shot Jackson and fled back to his house, where he changed clothes and then returned to the scene. Two witnesses to the shooting identified Patterson as the shooter, although they were both over 40 yards away from the shooting and only briefly saw the shooter. Both witnesses also saw Patterson at the scene, and on cross-examination they admitted that Patterson was wearing different clothing than the shooter. Patterson's sister testified that they were home together, and she saw him sleeping in bed before she went to the bathroom. When she was showering, she heard three bangs and saw her brother getting dressed and running out of the house. Based on the house layout, she said there was no way for him to have snuck out without being seen. Another witness testified that she exited her house after hearing gunshots and ran into Patterson, and they both went to the scene together.

The prosecution did not offer a motive for why Patterson wanted to kill his friend, or why he would have chosen to return to the scene when he could have stayed home, but they did argue that Patterson was only pretending to be upset to escape scrutiny. The prosecution also told the jury that motive was not necessary, and that they could convict Patterson without one.

The jury was not able to reach a verdict, and the judge declared a mistrial.

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217. *Williams*, 579 U.S. at 8.

218. The information in this section is taken from various sources. *See, e.g.*, Comm. Mot. to Enter Nolle Prosequi ("CIU Motion to Dismiss"), *Comm. v. Patterson*, CP-51-CR-0012287-2007 (Phila Ct. Comm. Pl. May 15, 2018); "Dontia Patterson," Pennsylvania Innocence Project; "Dontia Patterson," National Registry of Exonerations; Christine Hauser, "Philadelphia Man Freed After Serving 11 Years for Murder He Did Not Commit," New York Times, May 16, 2018; Chris Palmer, "Philly DA's Office: Ex-Prosecutors Committed 'Egregious' Misconduct in 2007 Murder Case," Philadelphia Inquirer, May 15, 2018; Chris Palmer, "Judge Approves Philly DA's Request, Clears Man of Murder After 11 Years Behind Bars," Philadelphia Inquirer, May 16, 2018.

The Retrial

The Office opted to retry Patterson in 2009. **ADA Richard Sax** prosecuted the case, and he called a new witness at trial: Philadelphia Police Officer Eyvette Chandler. Officer Chandler had been interviewed prior to Patterson's first trial, but **ADA McCaffery** had not used her as a witness. At the second trial, Officer Chandler was a key prosecution witness. She was shown security footage of the victim and another man, who was dressed in dark clothing, shortly before the shooting. Although the man's face was not visible, Officer Chandler testified that she recognized the man as Patterson based on the way he moved. Notably, her trial testimony differed from her initial statement to police: when she first watched the video, Officer Chandler only said that the man reminded her of Patterson.

The jury convicted Patterson of first-degree murder, and he was sentenced to life imprisonment.

The CIU-Homicide Unit Investigation

When prosecutors reviewed the H-File, they discovered alternate suspect information that had not been disclosed prior to either of Patterson's trials. In the days after the murder, police spoke with a confidential informant who said that Jackson was killed over a drug dispute. Police documented this information in a memorandum (the "Informant Memo"), which also contained detailed information about the two groups involved in the drug dispute, as well as the names of three people who were potentially involved in the murder—including the possible shooter. The Informant Memo also detailed where the alleged shooter lived, how the murder was set up, and where the shooter fled following the murder.

The H-File also contained notes from witness interviews conducted by Detective George Fetters, which corroborated the Informant Memo. The witnesses named a known drug dealer as the potential suspect, and he was a member of one the groups identified in the Informant Memo and was acquainted with at least one of the three people identified in the Informant Memo as being involved in the murder. Detective Fetters used this information to create two photo arrays with the known drug dealer's photograph, although the H-File does not indicate whether police showed these arrays to anyone. The Informant Memo and the witness interviews were also consistent with information obtained by a Philadelphia police lieutenant in the Homicide Unit. The lieutenant drafted a memorandum that certain unidentified people from a nearby housing complex may have been responsible for the victim's death. The housing complex was in the same neighborhood that witnesses identified in their interviews with Detective Fetters.

Lastly, CIU prosecutors also discovered impeachment information about Officer Chandler that was not disclosed prior to the second trial. At the same time the Office was prosecuting Patterson, it was also prosecuting Officer Chandler's granddaughter for an arson that killed Officer Chandler's son and that incidentally involved Patterson. Her granddaughter allegedly set the fire because she angry with her father, who had told her to stop contacting Patterson after he learned that she and Patterson had met and exchanged phone numbers. CIU prosecutors attempted to speak with Officer Chandler on multiple occasions, but she declined to be interviewed.

Patterson is Exonerated

Based on the CIU's findings, ADA Anthony Voci, then-Chief of Homicide, filed a motion to dismiss the charges against Patterson. In the motion, ADA Voci noted that two different prosecutors failed to find and disclose this favorable information, even though homicide prosecutors were "trained to review the police homicide file and ask questions"[219] about the investigation. The motion also described Patterson's two trials as "egregious example[s] of police and prosecutorial misconduct,"[220] and it also noted that some of the information should have caught prosecutors' attention, because it was obviously favorable to the defense. For instance, the Informant Memo and related witness interviews did not mention Patterson as a suspect, and police created two different photo arrays that did not contain Patterson's photograph, which ostensibly should have raised questions for the prosecution.

Separately, the motion criticized the prosecution's case as "illogical,"[221] given that Patterson returned to the crime scene, where witnesses saw him distraught and crying on the street immediately after the murder. It also raised the possibility that, without suppressing the favorable information, "the prosecution could not win" [222] the case against Patterson, and it noted that favorable information tends to be suppressed in "weak cases."[223]

219. CIU Motion to Dismiss at 3.
220. *Id*. at 2.
221. *Id*. at 3.
222. *Id*.
223. *Id*.

Finally, it criticized the prosecution for being unduly influenced by the "pressure to win"[224] "serious cases,"[225] and observed that "[s]ome [prosecutors] feel the end justifies the means."[226]

Former ADA Sax gave a statement to the media that the dismissal of charges was politically motivated because he was a vocal critic of DA Krasner, and he criticized the Office for reviewing the case in the light "most favorable to the defense,"[227] which is not "what prosecutors are supposed to do."[228] **Sax** also said the exoneration was a "horrific travesty of justice,"[229] because the jury had decided Patterson was guilty. Sax also denied withholding information that would have helped Patterson and said that "[e]verything that was either exculpatory or arguably exculpatory was turned over. That's without any question."[230] **Sax** did not specifically address the favorable, undisclosed information detailed in the CIU's memorandum. Nor did **ADA Sax** discuss why he opted to call Officer Chandler as a witness in Patterson's second trial.

William Lynn (June 2018)[231]

Monsignor William Lynn was charged with failing to supervise two priests who sexually abused juvenile parishioners in the Catholic church. Lynn was initially convicted of endangering the welfare of a child and sentenced to prison, but he won a new trial after the Superior Court held that a large amount of unduly prejudicial "other bad acts" evidence was introduced at his trial. When the Office announced its intent to retry Lynn, defense counsel filed a motion to prohibit retrial on Double Jeopardy grounds, alleging in part that the prosecution committed misconduct when it failed to disclose impeachment information about their key witness, DG, who claimed to have been abused by one of the priests Lynn supervised. The trial court denied the motion, and Lynn appealed to the Pennsylvania Superior Court, which upheld the denial in 2018. After initially deciding to retry him, in December 2022 the Office offered Lynn a reduced misdemeanor plea, which he accepted.

The Criminal Investigation and Trial

Monsignor Lynn served as Secretary for Clergy for the Archdiocese of Philadelphia from June 1992 to June 2004 and was responsible for handling clergy sexual abuse issues, including supervising two priests who eventually pleaded guilty to molesting juvenile parishioners. Lynn was aware of the allegations against both priests because of prior complaints made against them. Despite this knowledge, Lynn permitted one priest to be assigned to a rectory with an attached grade school. Several years after the priest was assigned there, a student at the school, DG, claimed he was sexually abused by the priest. DG was a key prosecution witness, testifying in multiple trials about being abused by priests and a schoolteacher, all of which resulted in convictions.

ADA Mariana Sorensen prosecuted the case against Monsignor Lynn. She presented testimony from DG that he first met the priest in fifth grade, when he was a member of the bell crew and choir, and that the priest molested him on two separate occasions following an early morning mass. DG testified that the abuse caused him to withdraw and to begin using drugs, culminating in a heroin addiction by the time he turned seventeen. DAO Detective Joseph Walsh also testified about "other acts" evidence pertaining to how the Archdiocese mishandled abuse allegations raised against twenty-one other priests.

Lynn was convicted and sentenced to three to six year's imprisonment. However, he successfuly appealed his conviction, arguing that prosecution improperly utilized Detective Walsh's testimony to introduce "other acts" evidence of the Archdiocese's handling of sex abuse allegations. The Commonwealth then announced its intent to retry Lynn, which prompted defense counsel to file a Double Jeopardy motion to prohibit a retrial based on the prosecution's failure to disclose favorable information about DG.

224. *Id.*

225. *Id.*

226. *Id.*

227. Palmer, "Philly DA's Office."

228. *Id.*

229. *Id.*

230. *Id.*

231. The information in this section is taken from various sources. *See, e.g.*, *Comm. v. Lynn*, No. 2171 EDA 2012, 2015 WL 9320082 (Pa. Sup. Ct. Dec. 22, 2015); *Comm. v. Lynn*, 192 A.3d 194 (Pa. Sup. Ct. 2018); Joseph Slobodzian, "Detective Testified He Warned Prosecutor of 'Great Inconsistencies' in Story of Key Witness in Trial of Msgr. Lynn," Philadelphia Inquirer, Jan. 3, 2017; Joseph Slobodzian, "Philly Judge Rejects Move to Block Retrial of Msgr. Lynn in Church Sex-Abuse Scandal," Philadelphia Inquirer, Mar. 24, 2017; Chris Palmer, "Philadelphia DA's Office Says It Won't Call Controversial Witness in Clergy Sex-Abuse Retrial," Philadelphia Inquirer, Feb. 19, 2020; Associated Press, "20 Year Church Abuse Probe Ends With Monsignor William Lynn's Quiet Plea," Philadelphia Inquirer, Dec. 21, 2022.

Inconsistencies in DG's Testimony

Lynn's counsel filed a motion alleging that the prosecution failed to disclose favorable impeachment information that its own detective discovered about DG, which suggested that his testimony was not truthful. Specifically, the motion alleged that the DAO hired Detective Walsh to investigate DG's claims; that Walsh found evidence that conflicted with DG's testimony and suggested he was not being truthful; and that when Walsh presented this information to **ADA Sorenson**, she responded by reaffirming her belief in DG and complained that Walsh was hurting her case.

The trial court scheduled a series of hearings on the Double Jeopardy motion, where Detective Walsh testified that he interviewed DG's family members and staff at the school DG attended and uncovered details that were inconsistent with DG's account of being sexually abused. For instance, DG had said he was sexually abused when he participated in early morning mass, and when he served as a member of the bell crew and choir. However, Detective Walsh was unable to find any records of DG serving at early morning mass, including when he asked DG's mother to check her home calendar where she recorded her sons' various church duties. Detective Walsh also spoke with teachers who helped with mass and bell crew and choir, and none of them recalled DG participating.

Detective Walsh testified that he confronted DG with these inconsistencies and that DG either did not respond or said he was high when he gave his initial police statement. When he told **ADA Sorenson** that he did not believe DG because "[t]he inconsistencies in my mind were just so great,"[232] she reiterated her belief in DG and, on one occasion, told Walsh "you're killing my case."[233] However, he could not recall if he warned **ADA Sorenson** before Lynn's trial began. The Office said that **ADA Sorenson** (who left the Office after Lynn's trial) denied making those comments to Detective Walsh. The trial court concluded that the prosecution failed to disclose certain aspects of Walsh's investigation to defense counsel. However, it denied the Double Jeopardy motion because Walsh had failed to show "intentional prosecutorial misconduct in withholding this information."[234]

Lynn appealed the ruling, and the Superior Court upheld the trial court's decision. It reviewed the hearing testimony and found no evidence of bad intent on the part of the prosecutor. For instance, the Superior Court noted that Detective Walsh could not recall if he even briefed **ADA Sorensen** about the trial preparation session he had with DG and concluded that **ADA Sorensen's** lack of knowledge about this session undercut the assertion that the prosecution intentionally withheld DG's inconsistent statements. The court also rejected the argument that **ADA Sorenson** called DG as a witness despite her own personal knowledge that he was not telling the truth. The Superior Court noted that while aspects of DG's testimony were inconsistent with the facts uncovered by Detective Walsh, it did not find that these inconsistencies, standing alone, automatically rendered DG's testimony false. Finally, the court credited **ADA Sorensen's** repeated statements that she believed DG, which they believed undercut a finding that she knowingly presented false testimony.

Lynn Pleads Guilty

After Lynn lost his Double Jeopardy motion, the Office announced its intent to retry him—without DG as a witness. In February 2020, ADAs Robert Listenbee and Patrick Blessington represented that they did not want to "retraumatize" DG by asking him to testify again.[235] Lynn's trial ultimately did not go forward: in December 2022, he pled guilty to a misdemeanor charge of failing to turn over records to the grand jury.[236]

232. Slobodzian, "Detective Testified."

233. *Lynn*, 192 A.3d at 198 (citing hearing transcript).

234. *Id*. at 200.

235. Palmer, "Philly DA's Office."

236. Dale, "20-Year Church Abuse Probe."

Esheem Haskins (2018)[237]

Esheem Haskins was convicted of first-degree murder and sentenced to life imprisonment. He filed a federal habeas petition alleging that the prosecution suppressed favorable information pointing to a different suspect. After losing before the district court, Haskins appealed to the Third Circuit, which held that Haskins was entitled to a new trial because of the prosecution's failure to disclose *Brady* information. Haskins then filed a Double Jeopardy motion in state court seeking to prohibit a retrial. His motion was granted, but after the Office appealed the ruling, and the Pennsylvania Superior Court reversed and ruled that Haskins could be tried again. He is presently incarcerated awaiting a retrial.

The Criminal Investigation and Trial

In February 2005, Nathaniel Giles was shot to death outside a Philadelphia restaurant. Before he was shot, Giles had been talking to another man outside the restaurant when a car drove up and two men got out and began walking toward Giles. One man shouted, "shoot him," and the other man shot Giles in the head. Both assailants then fled, while the man Giles had been talking to ran away. Two teenage witnesses[238] ("Teen 1" and "Teen 2") saw the shooting from inside the restaurant, and both ran back to Teen 1's house. As they were running home, they were almost hit by the assailants' car. Both teens later identified Jerome King as the shooter, Esheem Haskins as the man who shouted, "shoot him," and Khalief Alston as the man who was talking to Giles before he was shot.

The teenage witnesses did not give consistent descriptions of the crime. For instance, Teen 1 testified that she saw Haskins hand King a gun but then later testified that she did not see Haskins holding a firearm. She also testified that Haskins yelled, "shoot him" right before Gils was shot but then later testified that she could not recall what Haskins said and that she could not hear what was being said outside the restaurant. When Teen 2 first spoke with police, she did not mention an accomplice and described the shooter as between 6'0" and 6'3", while King was 5'7". Then, when Teen 2 testified at trial, she denied giving any height estimates to the police. The teenagers also contradicted each other's accounts. Teen 1 testified to hearing four or five gunshots, while Teen 2 said she only heard two. When the assailants fled after the shooting, Teen 1 could not recall if they fled on foot or in a car, while Teen 2 testified that they fled on foot.

Haskins and King went to trial in 2006, and **ADA Jason Bologna** prosecuted the case. At trial, the defense impeached Teens 1 and 2 with their prior statements and called Alston as a witness. Alston testified that he and his friend, Ernest Cannon, were walking near the restaurant when Cannon saw Giles, crossed the street, and shot him because of Giles' reputation as a snitch. **ADA Bologna** cross-examined Alston about his claim that Cannon shot the witness and the timing of Alston's statement to police. He sought to portray Alston as a biased witness, because he was in a gang with King and Haskins and had been lifelong friends with them. He also argued, during cross-examination and closing argument, that Alston only accused Cannon of murder once he learned that Cannon had accused him of a separate murder.

Haskins was convicted of first-degree murder and sentenced to life imprisonment.

The Law Division Aggressively Defends the Conviction

After he was convicted, Haskins learned that Alston had written a letter stating that Cannon shot Giles. Importantly, Alston had written this letter (which was never sent) *before* he learned that Cannon had accused him of murder. Thus, the letter tended to corroborate and rehabilitate Alston's trial testimony, because at the time he wrote it, he had no motive to falsely accuse Cannon. Haskins also learned that police took possession of this letter when they executed a search warrant at Alston's residence in connection with a separate investigation, and that **ADA Bologna** had a copy of the letter in his file at the time he prosecuted Haskins. In other words, at the time he cross-examined Alston and sought to paint him as a biased witness who had made up his allegation against Cannon, **ADA Bologna** had Alston's letter in his file, and failed to disclose it to defense counsel.

237. The information in this section is taken from various sources. *See, e.g.*, *Comm. v. King*, 271 A.3d 437 (Pa. Sup. Ct. 2021); *Haskins v. Superintendent Greene SCI*, 755 Fed. App'x 185 (3d Cir. 2018); *Haskins v. Folino*, Civ. No. 13-6901, 2017 WL 397261 (E.D. Pa. Apr. 19, 2017); *Comm. v.* Haskins, 60 A.3d 538 (Pa. Sup. Ct. 2012); Op. ("PCRA Court Opinion"), *Comm. v. Haskins*, CP-51-CR-0706192-2005 (Phila. Ct. Comm. Pl. Nov. 8, 2011); Corrected Br. for Appellant and Joint App'x Vol. 1, *Haskins v. Superintendent Greene SCI*, No. 17-2118 (3d Cir. Feb. 21, 2018); Br. for Appellees ("Law Division Brief"), *Haskins v. Superintendent Greene SCI,* No. 17-2118, (3d Cir. May 22, 2018); Reply Br. for Appellant, *Haskins v. Superintendent Greene SCI,* No. 17-2118, (3d. Cir. June 8, 2018); Br. for Appellant, *Comm. v. Haskins*, No. 1963 EDA 2011, 2011 WL 8492802 (Pa. Sup. Ct. 2011); Br. for the Appellee, *Comm. v. Haskins*, No. 1963 EDA 2011, 2011 WL 8492803 (Pa. Sup. Ct. 2011); Br. for Appellee ("King Brief"), *Comm. v. King*, No. 1964 EDA 2011, 2012 WL 3136650 (Pa. Sup. Ct. Apr. 26, 2012); Reply Br. for Appellant, *Comm. v. King*, 2012 WL 3235892 (Pa. Sup. Ct. May 10, 2012).

238. Because the witnesses were minors, the court identified them by their initials, ST, and FJ. We refer to ST as Teen 1 and FJ as Teen 2.

Haskins (and King) filed PCRA petitions arguing that the letter was favorable information, because it contradicted the prosecution's argument that Alston was a biased witness with a motive to lie about Cannon and would have bolstered Alston's testimony and the defense theory that another man shot Giles. During a hearing before the PCRA court, the Law Division stated that the trial prosecutor "clearly recognizes that he messed up big time."[239] However, despite conceding that "of course"[240] the letter "should have been turned over,"[241] that "we're not saying he was right in any way,"[242] and that it was an "oversight"[243] not to disclose it, the Law Division nonetheless argued that there was no *Brady* violation.

The PCRA court agreed with Haskins. It found that the Office violated *Brady* by failing to disclose Alston's letter. It found the letter to be of singular importance, because it was the "best evidence of Alston's unwavering contention"[244] that Cannon was the killer. The court also noted that the writing itself was powerful because it would have "*prevented* the Commonwealth from alleging that Alston was fabricating his testimony or the statement he gave"[245] to police, because if this line of cross-examination was pursued, defense counsel could have introduced Alston's letter.

The Law Division appealed the PCRA court ruling. In briefing, **Law Division ADA Mary Huber** argued that there was no suppression of the letter because defense counsel could have found it through their own due diligence. She did not explain how counsel should have known of the letter's existence to have begun searching for it, or how counsel could have found it when the letter was in the exclusive possession of the Commonwealth. (Nor did **ADA Huber** explain why defense counsel had to show "due diligence" when *Brady* placed the burden on the prosecution to find and disclose favorable information in the first instance.) **ADA Huber** also argued that the letter was not material, because it would not have changed the outcome of the trial. In making this claim, **ADA Huber** appeared to make a "sufficiency of the evidence" argument by pointing to other evidence that still supported Haskins' guilt, even when considering the exculpatory information.

The Pennsylvania Superior Court reversed the PCRA court, holding that while Alston's letter was suppressed, it was not material. Notably, although the Superior Court ruled for the Commonwealth, it criticized both **ADA Bologna** and **ADA Huber**. For instance, it found there was "no doubt"[246] that **ADA Bologna** failed to disclose favorable evidence, and it refused to "excuse[]"[247] this "dereliction"[248] by blaming defense counsel for somehow failing to discover the existence of the letter. The court also noted that, in suppressing the letter, **ADA Bologna** was able to create the false impression that Alston was a liar, and it criticized him for being "deceitful"[249] and "careless."[250] With respect to **ADA Huber**, it found her arguments "unpersuasive"[251] and criticized her for arguing that defense counsel could have found the letter through due diligence, finding that this would have required defense counsel to engage in a "fishing expedition"[252] and to "mind read[]"[253] defense witnesses to know whether such a letter existed.

The Third Circuit Grants Relief

Haskins filed a federal habeas petition making the same *Brady* arguments regarding Alston's letter. The petition was eventually heard by the Third Circuit, which vacated his conviction and granted him a new trial. It held that Alston's letter was material because it touched on a central question in the case—who killed Giles. At trial, the prosecution had presented one scenario, while Haskins presented another through Alston's testimony. As such, Alston's letter could have been powerful corroborating evidence of Haskins' defense. This corroboration was especially

239. King Brief, 2012 WL 3136650, at *9, 11 (citing PCRA hearing transcript).
240. *Id.* at *11 (citing PCRA hearing transcript).
241. *Id.*
242. *Id.*
243. *Id.*
244. PCRA Court Opinion at 10.
245. *Id.* at 9 (emphasis in original).
246. *Haskins*, 60 A.3d at 549.
247. *Id.* at 550.
248. *Id.*
249. *Id.*
250. *Id.* at 550.
251. *Id.* at 548.
252. *Id.*
253. *Id.*

important because the prosecution's case was far from airtight, given that the prosecution's key witnesses, Teens 1 and 2, gave inconsistent police statements and testimony about the murder.

In concluding that Haskins was entitled to relief, the Third Circuit criticized the Pennsylvania Superior Court for its unreasonable application of Supreme Court case law regarding *Brady* materiality. The Third Circuit cited Supreme Court precedent holding that evidence was material so long as there was a reasonable probability that, had the evidence been disclosed, the result of the trial could have been *different*. In contrast, the Pennsylvania Superior Court had wrongly required Haskins to prove that, had Alston's letter been disclosed, he would have been *acquitted*. This was not the correct standard, because a "different" result could include not just an acquittal, but also a hung jury or a verdict on a lesser offense.

Lastly, the Third Circuit's criticism of the Pennsylvania Superior Court was also, by extension, a criticism of the Law Division. In briefing before the Third Circuit, **ADAs Catherine Kiefer, Max Kaufman, Nancy Winkelman, First Assistant Judge Carolyn Temin,** and **DA Krasner**,[254] endorsed the Pennsylvania Superior Court's legal analysis as the correct application of the law.

Haskins Loses His Double Jeopardy Motion

After he won a new trial, Haskins (and King) filed a Double Jeopardy motion to prevent the Commonwealth from retrying them. The state court held a hearing on the motion, where **ADA Bologna** testified that he understood the Alston letter as saying that Cannon, and not King or Haskins, shot and killed Giles. **ADA Bologna** also testified that he understood the letter was significant, and he explained that he made a deliberate decision not to turn it over on the assumption that the letter was merely cumulative of the statement that Alston gave to police implicating Cannon. **ADA Bologna** also testified that the letter was undated and did not contain a postmark, so he believed that the letter had been written after Alston's arrest. He testified that he only learned that it predated Alston's arrest during Haskins' PCRA proceedings.

At the conclusion of the hearing, the trial court granted the Double Jeopardy motion, based in part on **ADA Bologna's** decision to withhold a crucial piece of evidence—a decision that the trial found was reckless. The trial court then applied relevant Double Jeopardy case law and found that **ADA Bologna** engaged in "prosecutorial overreaching"[255] when he argued that Alston's statement to police was a recent fabrication, because he should have known that was not the case, given the existence of the letter.

The Commonwealth appealed, and the Pennsylvania Superior Court reversed and vacated the trial court's ruling. In doing so, the Superior Court largely adopted the Law Division's argument, *i.e.*, that while **ADA Bologna** violated *Brady*, he did not engage prosecutorial overreaching that would violate the Double Jeopardy clause and prevent re-prosecution. The Superior Court described **ADA Bologna's** error as a "serious *Brady* violation"[256] but declined to prohibit retrial, because the "countervailing societal interests regarding the need for effective law enforcement"[257] must be balanced against a defendant's Double Jeopardy rights. It also found that the record did not support the trial court's conclusion that **ADA Bologna** recognized the significance of the letter and deliberately decided to withhold it. Instead, it pointed to **ADA Bologna's** testimony that he believed the letter was written after Alston spoke with police, as well as the fact that "[o]n its face,"[258] the letter did not raise any obvious red flags.

As of 2021, Haskins' case has been continued multiple times and remains pending.

254. The briefing filed before the Pennsylvania Superior Court was filed by the current DAO Administration and endorsed the Pennsylvania Superior Court's application of the *Brady* materiality requirement. *See* Law Division Brief at 1.

255. *King*, 271 A.3d at 445.

256. *Id*. at 448.

257. *Id*. at 449.

258. *Id*. at 450.

Jamaal Simmons (2018)[259]

Jamaal Simmons was convicted of third-degree murder and sentenced to 15-to-30 years' imprisonment. After Simmons was sentenced, the lead detective on his case, Detective Philip Nordo, was accused of using illegal interrogation tactics with witnesses and suspects, including sexually coercing or assaulting them in police interrogation rooms, and giving benefits to informant and witnesses with whom he may have had intimate relationships, including by, among other things, putting money into their prison commissary accounts. The Office investigated the allegations against Detective Nordo, and the CIU later confirmed that the Office had knowledge of the allegations against Detective Nordo as early as 2005, when IA investigators referred a complaint to the Office regarding Nordo's alleged sexual assault of a witness in an interrogation room.

The CIU agreed to investigate Simmons' conviction because of Detective Nordo's involvement in the investigation and trial. The CIU confirmed that the prosecution did not inform defense counsel of Nordo's pattern of misconduct, including the 2005 allegation of sexual assault. In 2018, the CIU moved to vacate Simmons' conviction and dismiss the murder charge against him.

The Criminal Investigation and Trial

In 2009, Rodney Barnes was murdered. Roughly two months later, police arrested local rapper Jamaal Simmons for the murder. Simmons went to trial in 2012, and **ADA Mark Gilson** prosecuted the case, and he called Detective Nordo as a witness. Detective Nordo testified that he spoke with a rival rapper, Richard Taylor, who claimed that he was the intended shooting target, and that Barnes was killed by mistake. According to Detective Nordo, Taylor told him that Simmons was driving a van and parked near where Barnes was working, and that a masked gunman exited the passenger side of the van and shot Barnes. **ADA Gilson** also called Taylor as a witness, but he recanted his earlier police statement and claimed that Detective Nordo intimidated and threatened him into making it. According to Taylor, he did not provide any of the information in the statement and only signed it so he could go home. After Taylor recanted, the prosecution relied on *Brady-Lively* to successfully admit Taylor's police statement as substantive evidence for the jury to consider.

Simmons was convicted of third-degree murder and was sentenced to 15 to 30 years in prison.

Detective Nordo's Misconduct

The CIU agreed to investigate Simmons' conviction upon learning that Detective Nordo was involved in the underlying investigation and trial. By this time, the Office was aware that Detective Nordo had committed misconduct during a separate criminal investigation involving Gerald Camp. In that case, Camp was charged with illegal firearms possession and was convicted based on testimony from informant Rhaheem Friend. Before Camp's sentencing, his defense counsel discovered that Friend and Detective Nordo were communicating with each other while Friend was incarcerated, and that Detective Nordo promised to help Friend with his criminal case. The detective also deposited money into Friend's prison commissary account and made statements suggesting they may have had a sexual relationship. None of this information had been disclosed to Camp or his defense counsel. When his defense counsel presented this information to the Office, it agreed to vacate Camp's conviction. Shortly thereafter, Detective Nordo was suspended with intent to dismiss after an investigation found that he paid a witness in another case.

Simmons is Exonerated

Philadelphia Court of Common Pleas Judge Steven Geroff granted the Office's motion to vacate Simmons' conviction and dismiss the charges against him, but he sealed the proceedings and has yet to unseal them as of the date of publication, even after Detective Nordo was charged and convicted of sexual assault and other crimes related to his work as a homicide detective.

Although the proceedings remain sealed, Taylor, the witness who recanted at Simmons' trial, told local media that he spoke with CIU prosecutors and told them that Nordo detained him at the Homicide Unit for over 24 hours and then began showing up to Taylor's court appearances to coerce him into falsely implicating Simmons.

259. The information in this section is taken from various sources. *See, e.g.*, "Jamaal Simmons," National Registry of Exonerations, available at (last visited Sept. 6, 2022); Chris Palmer, "Under Secrecy, Another Philly Murder Case Tied to Ex-Detective is Tossed. Will More Follow?" Philadelphia Inquirer, Jan. 21, 2019.

Dwayne Thorpe (2019)[260]

Dwayne Thorpe was convicted of first-degree murder and sentenced to life imprisonment. He challenged his conviction in a PCRA petition alleging that Detective James Pitts coerced him into a false confession. The Law Division opposed Thorpe's PCRA petition, but after the court granted Thorpe a new trial, the CIU asked the Law Division not to appeal the grant of relief because the CIU wanted to investigate Detective Pitts' involvement in the case.

The Law Division agreed, and the CIU investigated whether the Office should retry Thorpe. The CIU's investigation revealed that Detective Pitts had engaged in a pattern of abusive conduct with respect to other defendants, and this pattern of misconduct tended to corroborate Thorpe's allegations against Pitts. At the conclusion of the investigation, the CIU moved to dismiss the charges against Thorpe.

The Criminal Investigation and Trial

In 2008, Nyfeese Robinson and his half-brother, Hamin Span, were running errands when Span got into a dispute with an unknown teenager, who was wearing a baseball cap and had biked up to Span and Robinson while the two were walking on the street. The teenager eventually went into a nearby house, and Span and Robinson continued their errands and were walking back home when they passed the house and saw the teenager and another man on the steps. Span and the teenager again exchanged words. When Span and Robinson were almost home, Robinson saw the teenager biking toward them with his hand under his shirt. The teenager got off his bike and pulled out a gun and shot Span. Police interviewed eyewitnesses, but no one recognized the teenager. They also executed a search warrant at the house where the teenager was seen, and they seized a photograph of Dwayne Thorpe but did not find a bicycle or the murder weapon.

Detective James Pitts investigated the murder, and five days after it occurred, he showed Robinson a photo array that included Thorpe's photo. The photo array contained "filler" photos of people who had darker skin color and who were older than Thorpe. Detective Pitts also suggested that the killer's photo was in the array by asking Robinson to circle the person who killed Span. The detective also took a statement from Allan Chamberlain, whose girlfriend once lived at the house where the teenager was seen. According to Chamberlain's statement, he was at the house and heard Thorpe say he was fighting with someone about drugs and that he was going to use a gun to resolve the dispute and protect his drug business.

Thorpe went to trial in 2009, and **ADA Eileen Hurley** prosecuted the case. Her primary evidence consisted of Chamberlain's statement. At trial, Chamberlain recanted and testified that he only signed the statement after Detective Pitts physically assaulted him and threatened to take his son away from him. After Chamberlain recanted, **ADA Hurley** relied on *Brady-Lively* to successfully admit Chamberlain's police statement as substantive evidence for the jury to consider.

Thorpe testified that he had an alibi for the time Span was shot—he was at a block party near his grandmother's house, which was roughly three miles away. Thorpe called four witnesses who testified that they saw Thorpe at the party helping to set up tables and chairs.

Despite his alibi, Thorpe was convicted of first-degree murder and sentenced to life imprisonment.

Thorpe Wins his PCRA Petition

Thorpe filed a PCRA petition seeking a new trial based on Detective Pitts' pattern of misconduct in other cases. By this time, Detective Pitts' interrogation tactics had drawn public scrutiny: the Philadelphia Inquirer reported on allegations of abuse by Detectives Pitts and his partner in three other homicide investigations that fell apart at trial. This included Unique Drayton's case, where Judge Teresa Sarmina of the Philadelphia Court of Common Pleas suppressed Drayton's confession after finding that Detective Pitts had detained Drayton without probable cause for 41 hours, and that her confession was the product of psychological coercion. In reaching her decision, Judge Sarmina heard testimony from Detective Pitts about Drayton's

260. The information in this section is taken from various sources. *See, e.g.*, Comm. Mot. to Dismiss ("Law Division Motion to Dismiss"), *Comm. v. Thorpe*, CP-51-CR-0011433-2008 (Phila. Ct. Comm. Pl. Feb. 25, 2016); Op. ("PCRA Opinion"), *Comm. v. Thorpe*, CP-51-CR-0011433-2008, (Phila. Ct. Comm. Pleas June 7, 2018); "Dwayne Thorpe," National Registry of Exonerations; Mensah M. Dean, "Same 2 Cops Built 3 Murder Cases That Fell Apart," Philadelphia Inquirer, Nov. 5, 2013; Mensah M. Dean, "Philly Judge Tosses Murder Conviction, Says Detective Fabricated Evidence," Philadelphia Inquirer, Nov. 3, 2017; Mensah M. Dean, "Man Who Accused Philly Cop of Framing Him is Freed After Serving 10 Years of a Life Sentence for Murder," Philadelphia Inquirer, Mar. 27, 2019.

interrogation and concluded that she believed Drayton, calling her testimony "credible"[261] while finding that Detective Pitts' testimony was "incredible."[262]

Coincidentally, Thorpe's PCRA petition was assigned to Judge Sarmina. **Law Division ADA Cari Mahler** moved to dismiss the petition, arguing in part that Detective Pitts' conduct in other investigations was not admissible in Thorpe's case. She also attacked Thorpe's intent to subpoena Detective Pitts' file as a speculative "fishing expedition,"[263] because Thorpe "provide[d] *nothing* to substantiate that there even exists an internal affairs investigation with regard to Detective Pitts."[264] In her briefing, **ADA Mahler** did not address the prosecution's constitutional and ethical obligation to find and disclose favorable information, including information known only to police. It is unclear whether **ADA Mahler** reviewed Detectives Pitts' IA file, but at the time she attacked Thorpe's request as a fishing expedition, Detective Pitts had three sustained disciplinary findings in his IA file (which are discussed *supra* in Obina Onyiah's case). The existence of these findings raises questions about whether **ADA Mahler** had a good faith basis for arguing that there was no evidence of any IA investigation with respect to Pitts, and that Thorpe was engaged in a fishing expedition.

Judge Sarmina declined to dismiss the PCRA petition and instead ordered an evidentiary hearing, where PCRA counsel offered testimony from ten witnesses concerning "incidents of distinct, repeated, and systematic conduct spread across several years of Detective Pitts' career...."[265] Judge Sarmina found these witnesses credible and found that Detective Pitts' "testimony to the contrary was not credible."[266] She concluded that the "distinct patterns of behavior"[267] described by these witnesses "throughout the arc of Detective Pitts' career rose to the level of habit evidence,"[268] and that Pitts "habitually"[269] made "unreasonable threats,"[270] employed "physical abuse,"[271] and "prolong[ed] detention of interrogation subjects to an unreasonable degree and without probable cause"[272] whenever he believed that the person he was interrogating was not being truthful or was withholding information. Based on Pitts' habits, Judge Sarmina found that this cast doubt on the trustworthiness of Chamberlain's written statement; and that, had the detective's practices been known to the defense and raised at trial, Chamberlain's written statement would not have been admissible. Judge Sarmina granted Thorpe's petition for a new trial.

Thorpe is Exonerated

The CIU investigated Thorpe's conviction and, based in part on Detective Pitts' suggestive photo arrays shown to Robinson and Judge Sarmina's finding that Chamberlain's statement would likely be suppressed, prosecutors moved to dismiss the charges against Thorpe in March 2019.

James Frazier (2019)[273]

James Frazier was convicted of third-degree murder and sentenced to life imprisonment. After Frazier was convicted and sentenced, Detective Philip Nordo was accused of illegal interrogation tactics with witnesses and suspects, including sexually coercing or assaulting them in police interrogation rooms, and giving benefits to informant and witnesses with whom he may have had intimate relationships, by, among other things, putting money into their prison commissary accounts. The CIU later confirmed that the Office had knowledge of the allegations against Detective Nordo as early as 2005, when IA investigators referred a complaint to the Office regarding Nordo's alleged sexual assault of a witness in an interrogation room.

261. Dean, "Same Two Cops."
262. *Id.*
263. Law Division Motion to Dismiss at 42.
264. *Id.* (emphasis in original).
265. PCRA opinion at 23.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. The information in this section is taken from various sources. *See, e.g.*, "James Frazier," National Registry of Exonerations; CIU investigation and materials (on file with CIU); Todd Shepherd, "Man Exonerated By Krasner Pleads Guilty to Gun Crime and Assault From 2021 Incident," Broad and Liberty, Nov. 1, 2022.

The CIU agreed to investigate his conviction because of Detective Nordo's involvement in the investigation. They confirmed that the prosecution did not inform defense counsel of Nordo's pattern of misconduct, including the 2005 allegation of sexual assault. They also found evidence that Detective Nordo engaged in illegal interrogation tactics when he questioned Frazier, and that a law enforcement prosecution witness gave false and misleading testimony at Frazier's trial. The Office moved to vacate Frazier's conviction and dismiss the charges against him in 2019.

The Criminal Investigation and Trial

In 2012, Rodney Ramseur and Latia Jones were murdered while sitting outside Ramseur's house. Police believed Ramseur was targeted because he had recently been a prosecution witness in a murder trial.[274] Police focused on James Frazier after Detective Philip Nordo claimed to have spoken to an informant known as "Nubile," who implicated Frazier. Detective Nordo then brought Frazier in for questioning and supposedly obtained a confession from him. However, instead of taking Frazier's statement himself, Detective Nordo asked Detective John Verrecchio to take it down.

According to Frazier's statement, he was with Taunzelle Garner and Tevon Robison, both of whom thought Ramseur was a "snitch." Frazier drove Garner and Robison to Ramseur's house, and Robison called an unknown person to ask if Ramseur was there. Robison then got out of the car and walked to Ramseur's house, shooting both Ramseur and Jones before returning and telling Frazier to drive away. Frazier's confession largely mirrored facts that were already known to police—the only new details were that one of the men made a phone call to ask where Ramseur was, and that Frazier was driving a car he borrowed from someone named "Rich."

Frazier went to trial in 2013, and **ADA Gail Fairman** prosecuted the case. Before trial, she emailed the Medical Examiner's Office and asked them to "mark up a body chart" that would "emphasize the horror of the killing,"[275] because "*I do not have much evidence and need to emphasize the good stuff.*"[276] Her primary evidence was Frazier's confession, which was contradicted by other information. For instance, Frazier said one of the men made a phone call before the murder, but neither Garner nor Robison's cell phone records showed them making a call during that period. Nor did cell phone records show any links between Garner, Robison, and Frazier, or Nubile, the informant who Detective Nordo claimed to have spoken with about the murders. At trial, the prosecution suggested that the lack of cell phone communications was because the men could have had second cell phones that law enforcement did not discover, although the prosecution did not offer any specific proof to support this assertion.

Defense counsel attacked Frazier's confession, claiming it was obtained due to trickery and coercion. In response, Philadelphia Police Officer Vincent Strain testified about the circumstances leading up to Frazier's confession. Officer Strain said he approached Frazier in public at the courthouse, where Frazier had appeared for a separate drug case, and asked him to voluntarily come to the police station. Officer Strain said Frazier was given an opportunity to consult with defense counsel from his drug case before he agreed to go to the police station. During closing argument, the prosecution relied on Officer Strain's testimony to argue that Frazier was not coerced, threatened, or tricked, and that he even consulted with counsel before deciding to leave with Officer Strain.

Frazier was convicted of third-degree murder and sentenced to life imprisonment.

The CIU Investigation

CIU prosecutors investigated the circumstances of Frazier's confession and concluded that Detective Nordo's interrogation was improper and illegal. First, Nordo questioned Frazier alone for an unknown length of time and did not properly document the interrogation—which meant that CIU prosecutors were unable to determine how long the interrogation lasted or whether Frazier was given *Miranda* warnings. Second, CIU prosecutors found documents in the H-File suggesting that when Detective Verrecchio took down Frazier's statement, this was not actually his first statement—it appeared that Frazier gave police a statement fourteen days earlier, but there was no paperwork documenting this earlier statement, either. When CIU prosecutors asked Detective Verrecchio about whether Frazier gave an earlier statement, he speculated that Detective Nordo might have questioned Frazier earlier but then declined to memorialize it because Frazier had been in custody for too long.

Third, the CIU reviewed H-File documents suggesting that Frazier had been in police custody for at least three-and-a-half days, and possibly as much as five-and-a-half days, by the time

274. The suspect in that case eventually guilty to voluntary manslaughter.

275. Email from ADA G. Fairman (on file with CIU)

276. *Id.* (emphasis added).

he gave his statement. The CIU's findings tended to corroborate Frazier's statement in his Presentence Investigation and Report ("PSI"), which was prepared in advance of his sentencing. In the PSI, Frazier said he had been detained for several days and had fecal matter smeared all over him, because when he was at the police station, he defecated on himself, but police would not let him leave to clean up. Frazier's PSI also raised the possibility that Detective Nordo sexually coerced or assaulted him during the interrogation: Frazier said he was so nervous during questioning that he kept moving his legs back and forth, which caused him to ejaculate, and that he wanted to go home to clean himself.

CIU prosecutors also investigated Officer Strain's testimony and found information that contradicted his account of his interactions with Frazier. First, contrary to his testimony that he asked Frazier to voluntarily accompany him to the station, contemporaneous internal DAO documents suggested that Officer Strain arrested Frazier at the courthouse before the preliminary hearing on his drug case. **ADA Jacob Sand** was in court on Frazier's drug case, and notes from his case file indicate that Frazier was arrested on a double homicide before the hearing occurred. The case file also contained an email between **ADAs Sand, Fairman,** and **Ed Cameron.** When **ADA Sand** wrote that Frazier was arrested in the courtroom for a double homicide"[277] before the hearing, **ADA Cameron** objected to this description and stated that Frazier was "invited down to homicide,"[278] where he later confessed.

The CIU also spoke with the public defender who represented Frazier in his drug case. The public defender's recollection was generally consistent with **ADA Sand's** notes: their case file notes also indicated that **ADA Sand** told him that Frazier was in court but was arrested, and that **ADA Sand** did not have information on who picked him up or on what charges. The public defender also reviewed Officer Strain's trial testimony and disputed his account of the interaction. First, the public defender did not believe he was present for any "consultation" with Frazier about whether to go to the police station, because this encounter would have been highly unusual, and he would have remembered it. Second, the public defender also told CIU prosecutors that, had he been there, he would have advised Frazier not to speak with anyone and would have told Officer Strain that he did not have permission to speak with Frazier.

Frazier is Exonerated

In 2019, Detective Nordo was indicted for, among other things, sexually assaulting and coercing statements from witnesses and suspects. Shortly thereafter, the CIU moved to vacate Frazier's conviction and dismiss the charges against him.

Later that same year, Frazier filed a federal civil rights lawsuit against the city and Detective Nordo where he alleged that Detective Nordo made sexual advances toward him during his interrogation.

Frazier is Arrested and Charged with Gun Crimes

In 2022, Frazier pleaded guilty to aggravated assault and illegal possession of firearm, stemming from an incident where he shot someone twice in the leg.

Hassan Bennett (2019)[279]

Between 2008 and 2019, the Office tried Hassan Bennett for murder four times. At some point before the start of the third trial, Detective James Pitts, the lead detective on the case, was accused of physically abusing and coercing witnesses and suspects during interrogations, and the Office had three other murder cases fall apart after allegations about Pitts' interrogation tactics came to light. Despite the allegations against Pitts, the Office pushed forward with Bennett's third trial—which ended in a mistrial after the jury could not reach a verdict. By the time Bennett's fourth and final trial began in 2019, the allegations against Pitts were the subject of media reporting, and a Philadelphia judge had vacated Dwayne Thorpe's conviction[280] after finding that Pitts engaged in "habitually coercive

277. Email from ADA Sands to ADA Cameron, June 20, 2012 (on file with CIU).

278. Email from ADA Cameron to ADA Sands, June 20, 2012 (on file with CIU).

279. The information in this section is taken from various sources. *See, e.g.*, "Hassan Bennett," National Registry of Exonerations;" Mensah M. Dean, "Same 2 Cops Built 3 Murder Cases That Fell Apart," Philadelphia Inquirer, Nov. 4, 2013; Mensah M. Dean, "Jurors: West Philly Man Representing Himself in Murder Retrial Came Close to Acquittal," Philadelphia Inquirer, Sept. 26, 2018; Mensah M. Dean, "After 13 years in Prison and Four Trials, Inmate who Defended Himself Acquitted in 2006 West Philly Murder," Philadelphia Inquirer, May 6, 2019; Meagan Flynn, "Acting As His Own Attorney, Philly Man is Acquitted of Murder After Nearly 13 Years in Prison," Washington Post, May 9, 2019.

280. The CIU was involved in the Office's decision to drop charges against Thorpe after his conviction was vacated. However, it does not appear that the Homicide Unit consulted the CIU before deciding to continue with Bennett's prosecution.

conduct"[281] toward witnesses in custodial interrogations. At the conclusion of his fourth trial, Bennett, who served as his own lawyer, was acquitted.

The Criminal Investigation

In September 2006, two gunman shot Corey Ford and Devon English. English died from his wounds, while Ford suffered gunshot wounds but survived. Despite his injuries, police brought Ford to the police department, where he was questioned by Detective Pitts. Ford signed a statement saying that Hassan Bennett and Lamont Dade were the assailants. Police then questioned Dade, who initially denied involvement before telling police that Bennett had lost money to English in a dice game and as a result wanted to kill English.

Police then arrested Bennett and held him in a cell with Kharis Brown, who was on probation and had been charged with weapons possession. Brown later told police that Bennett said he was about to be charged with murder for killing someone over a dice game, and that he had a plan to get rid of witnesses. Police used this information to obtain and execute a search warrant at Bennett's house, but they did not find weapons or any other evidence that Bennett was involved. Bennett was subsequently charged with murder.

Nearly a year after the murder, police arrested Dade for English's murder. Dade was interrogated by Detective Pitts, and he gave a statement that contradicted his initial statement to police. In his statement to Pitts, Dade said that he was the one who lost money to English in a dice game, and that he shot English after prompting from Bennett. Dade agreed to cooperate with the prosecution and testify against Bennett.

The First Trial

Bennett went to trial in February 2008. Brown testified that Bennett confessed to him while they were in the holding cell, and Dade testified about how the shooting unfolded. When the Office called Ford, he recanted his police statement and testified that Detective Pitts coerced him into signing it and told him what to say. To bolster Ford's testimony, defense counsel called Ford's friends and mother to testify that Ford told them that Bennett was not involved in the shooting. Bennett himself also testified to this effect.

The first trial ended in a mistrial after it was revealed that a witness had contacted a juror.

The Second Trial

Bennett went to trial again in December 2008. This time, he was convicted of second-degree murder and sentenced to life imprisonment. Bennett was sent to state prison, where he was incarcerated with other people from the Philadelphia area. By this time, Dade had pleaded guilty to third-degree murder and was also serving his sentence. Several people incarcerated with Bennett told him that Dade was telling people that Bennett was not involved in the murder. In fact, at one point Dade was living in the cell directly below Bennett, and Bennett heard him say that it was a set-up. Based on this information, Bennett filed a PCRA petition for a new trial. Judge Teresa Sarmina of the Philadelphia Court of Common Pleas held a hearing on the petition, and Dade testified that he made up the allegations against Bennett because he did not like him. Dade also admitted to doing the shooting alone. However, parts of Dade's testimony were not credible, so Judge Sarmina denied the petition.

In 2014, Bennett filed a second PCRA petition. This time, Bennett offered evidence that he was on the phone at the time of the shooting. He called two witnesses—one who was on the phone with him, and one who was present during the call and overheard parts of the conversation. Bennett also argued that defense counsel was ineffective for failing to introduce cell phone evidence showing that he was on the phone, and that the call lasted for 31 minutes, during which time the shooting occurred.

Bennett also argued that Detective Pitts coerced Ford's statement. He presented evidence that (i) Ford was interrogated just three hours after being shot; (ii) Ford was still on medication and wearing a hospital gown during questioning; and (iii) Ford was held for nearly 10 hours before signing his statement. He also presented a statement Ford gave to a defense investigator, wherein Ford said he had to hire an attorney to keep Detective Pitts from harassing him, and that during questioning, the detective hit him in the leg where he had been shot.

Finally, Bennett argued that the Office suppressed alternate suspect information. At some point after he was shot, Ford was arrested on a weapons charge. At the time of the arrest, Ford's friends told police they were out looking for "Cooge" to get revenge for Ford's shooting. Ford also told a defense investigator that Dade and Cooge were the assailants—not Bennett. None of this information had been disclosed to defense counsel prior to trial.

281. "Dwayne Thorpe," National Registry of Exonerations.

Based on the information in the PCRA petition, Judge Sarmina granted Bennett's motion for a new trial.

The Third Trial

Bennett went to trial in 2018 and chose to represent himself, while **ADA Tracie Gaydos** prosecuted the case. By the time his third trial began, the Office was aware of allegations regarding Pitts' misconduct during interrogations. The Philadelphia Inquirer published a 2013 article that described three Office prosecutions that fell apart amid allegations of coercion and physical abuse by Pitts and his partner, and Philadelphia Court of Common Pleas Judge M. Theresa Sarmina had vacated a conviction against Dwayne Thorpe after finding that Pitts had a habit of coercing witnesses during interrogations.

At trial, Ford and Dade recanted their statements and testified that Pitts had coerced and abused them. The Office called Pitts to rebut Ford and Dade's claims, and he denied any abuse or coercion. The trial ended in a hung jury, with most jurors voting to acquit. At least one juror questioned the Commonwealth's evidence, telling the media that the Commonwealth did not even prove that Bennett was present for the murder. This same juror was also skeptical of Pitts' testimony, saying he believed that Pitts was rough and used his physical stature and his authority as a detective "to try to get the truth out of those guys and was being real abusive with them."[282]

The Fourth Trial

Bennett went to trial for the fourth time in 2019, and he again represented himself. This time, **ADA Ashley Toczylowski** prosecuted the case. She again called Ford and Dade as witnesses, and they again recanted their statements, testifying that Pitt coerced them. However, **ADA Toczylowski** opted not to call Pitts as a witness to rebut Ford and Dade. But this did not prevent Bennett from doing so: he called Detective Pitts and cross-examined him about his interrogation tactics, and he raised the question of why the Office chose not to call Pitts as a witness, if his interrogation tactics were legal, and if Ford and Dade's statements were truthful. **ADA Toczylowski** countered that Bennett, Ford, and Dade were making up their allegations against Pitts, arguing that none of them had raised these claims until six years ago, when allegations against Pitts began to be publicized.

In May 2019, after 81 minutes of deliberation, the jury acquitted Bennett.

After his acquittal, Bennett filed a civil lawsuit against the City of Philadelphia and police officers, including Pitts. His suit remains pending.

Detective Pitts Faces Criminal Charges

In 2022, Pitts was charged with perjury and obstruction stemming from his testimony and police work in Obina Onyiah's case (discussed *supra* in greater detail). His criminal case remains pending.

Orlando Maisonet (2005, 2019)[283]

Orlando Maisonet was convicted of first-degree murder in two separate trials for the deaths of Ignacio Slafman and Jorge Figueroa and was sentenced to life imprisonment for Slafman's murder and death for Figueroa's murder. Maisonet subsequently won a new trial for the Slafman murder and was acquitted at a retrial. Although the Slafman charges were expunged, he remained in prison for Figueroa's murder. Maisonet then filed a PCRA petition alleging *Brady* violations and ineffective assistance of counsel, and the Law Division agreed to investigate his conviction. The investigation revealed that prosecution witnesses gave inconsistent testimony across different trials, and that defense counsel was ineffective for failing to object to prejudicial evidence. As such, the Office agreed to vacate the Figueroa conviction and permitted Maisonet to plead guilty to third-degree murder, whereupon he was immediately released on time served.

282. Dean, "Jurors."

283. The information in this section is taken from various sources. *See, e.g., Comm. v. Maisonet*, No. 3477, *et al.*, 1997 WL 1433742 (Phila. Ct. Comm. Pl. May 2, 1997); *Maisonet v. City of Philadelphia*, No. 06-4858, 20017 WL 1366879 (E.D. Pa. May 7, 2007); *Comm. v. Maisonet*, 612 Pa. 539 (Pa. 2011); Counseled Pet. for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Pursuant to the Post Conviction Relief Act, 42 Pa. C.S. § 9541, *et seq.*, and Consolidated Mem. of Law ("Maisonet PCRA Petition"), *Comm. v. Maisonet,* CP-51-CR-1134831-1990 (Phila. Ct. Comm. Pl. Nov. 10, 2016); Comm. Resp. to Pet. for Post-Conviction Relief and Agreement to the Granting of a New Trial ("Law Division PCRA Response"), *Comm. v. Maisonet*, CP-51-CR-1134831-1990 (Phila. Ct. Comm. Pl. Dec. 19, 2018); Order of Sentence Alford Plea, *Comm. v. Maisonet*, CP-51-CR-1134831-1990 (Phila. Ct. Comm. Pl. May 9, 2019); Samantha Melamed, "Philly Man Freed From 28 Years on Death Row After Finding of Prosecutor's Misconduct," Philadelphia Inquirer, May 9, 2019; "Orlando Maisonet," National Registry of Exonerations.

The Criminal Investigation

In 1982, Ignacio Slafman was shot and killed during a robbery at his Philadelphia pizzeria. Employee Jose Rivera was at work when the robbery occurred, and he told police he ducked behind the counter and could not see who shot Slafman. After Slafman's murder, brothers Simon and Heriberto Pirela summoned Jorge Figueroa and Orlando Maisonet to a meeting, where they accused both men of "snitching" about the Slafman murder. The Pirela brothers then beat and stabbed Figueroa to death in front of Maisonet and told him to dispose of Figueroa's body in an abandoned house. Maisonet feared for his own life and followed their directions.

Police arrested Heriberto Colon and charged him with the Slafman and Figueroa murders, as well as a third, unrelated murder. Colon agreed to cooperate and told police he served as a lookout when Maisonet, Simon Pirela, and a third man robbed the pizzeria. Colon also said he was there when Figueroa was killed, and that Maisonet did not stab Figueroa—only the Pirela brothers did. In a subsequent statement to police, Colon reiterated that Maisonet did not stab Figueroa. Colon pleaded guilty to third-degree murder for Slafman's death, and the prosecution dropped the charges for Figueroa's death and the unrelated murder. At his plea hearing, the prosecution stated they would not recommend incarceration if Colon cooperated.

The Pirela Brothers' Trials

The Pirela brothers and Maisonet were charged with the Slafman and Figueroa murders. However, Maisonet fled to Puerto Rico, so the Pirela brothers were tried first in 1983 and 1984. **ADA Jack McMahon** prosecuted the cases. Colon testified that Simon Pirela emptied the cash register while Maisonet shot and killed Slafman. Colon also testified that the Pirela brothers stabbed Figueroa, and that Maisonet did not participate in the stabbing and only helped to dispose of Figueroa's body. Defense counsel called Rivera as a witness, and he testified that he could not see who shot Slafman because he had been hiding behind the counter. During closing arguments, **ADA McMahon** relied on Colon's testimony to argue that the Pirela brothers were the only two men who stabbed Figueroa.

The Pirela brothers were found guilty of the Slafman and Figueroa murders and were sentenced to life imprisonment.

Maisonet's Trials

Maisonet was eventually apprehended and went to trial for the Slafman murder in 1992. This time, **ADA Roger King** prosecuted the case, and he called Rivera as a prosecution witness. Although Rivera had previously testified that he could not see the shooter, at Maisonet's trial he identified Maisonet. To explain how Rivera was suddenly able to identify Maisonet, **ADA King** elicited testimony from Rivera that he had watched an episode of *America's Most Wanted* ("*AMW*") that aired ten years after the crime and had profiled Maisonet, who was a fugitive at the time. **ADA King** also played an edited version of the *AMW* episode for the jury, and he claimed this was necessary because the prosecution had the burden of proving that it had exercised "due diligence" in searching for Maisonet. The jury was never told that Rivera initially told police and testified at the Pirela brothers' that he could not see the shooters because he was hiding behind the counter. Nor did defense counsel cross-examine Rivera about these prior inconsistent statements.

Maisonet was convicted of first-degree murder and sentenced to life imprisonment after the jury was unable to reach a verdict on a death sentence.

Maisonet went to trial for the Figueroa murder in 1992, and **ADA King** also prosecuted this case. He argued that Figueroa was killed to stop him from snitching about Slafman's murder. Rivera testified and again identified Maisonet as Slafman's killer, and Colon testified that Maisonet stabbed Figueroa twice. Notably, Colon's trial testimony differed from his police statement, when he said Maisonet did not stab Figueroa, and his preliminary hearing testimony, when he said Maisonet only stabbed Figueroa once. Colon also denied helping to disposing of Figueroa's body, even though he initially told police that he was involved.

Maisonet was convicted of Figueroa's murder and sentenced to death. The prosecution used Slafman's murder as an aggravating factor in successfully arguing for the death sentence.

Maisonet is Acquitted at the Slafman Retrial

Maisonet won a new trial for Slafman's murder after he argued that his defense counsel was ineffective for failing to obtain transcripts of Rivera's testimony from the Pirela brothers' trial, which could have been used to impeach him and highlight for the jury his inconsistent testimony. **ADA King** retried the case and called Rivera and Colon as witnesses. This time, defense counsel impeached Rivera with his prior trial testimony and cross-examined Colon, forcing him to admit that he gave multiple different accounts of the pizzeria robbery-murder.

The jury acquitted Maisonet in 2005. However, he remained incarcerated on a death sentence for Figueroa's murder.

Maisonet's First PCRA Petition: the Figueroa Conviction

Maisonet filed a PCRA petition for the Figueroa conviction challenging **ADA King's** use of the edited *AMW* episode as prejudicial. However, the parties were unable to view the edited episode because it had been lost after **ADA King** personally took possession of the video (and other trial exhibits) following the conclusion of trial. **ADA King's** actions were unusual—the standard practice was for the trial court to retain possession of the exhibits. However, according to **ADA King**, the trial court permitted him to take possession of the trial materials, and he also claimed that he had to take possession of the exhibits because the court had lost evidence in one of his previous cases.

Maisonet's first PCRA petition was eventually heard by the Pennsylvania Supreme Court, who criticized **ADA King** for introducing the edited *AMW* video, because it contained footage that "would have had no place at [Maisonet's] trial."[284] However, the court did not grant Maisonet relief, in part because **ADA King** had lost the edited video, and as a result the court was unable view it in order to gauge its prejudicial impact on the trial.

Maisonet's Conviction for the Figueroa Murder is Vacated

Maisonet filed another PCRA petitionin the Figueroa trial, alleging that **ADA King** withheld favorable information about Rivera and Colon, both of whom were key prosecution witnesses. As a starting point, PCRA counsel highlighted how Rivera and Colon's testimony evolved over time. As previously noted, Rivera initially testified at the Pirela brothers' trial that he could not see the assailants because he was crouched behind the counter, but by the time of Maisonet's trial, Rivera said he had a view of the crime that enabled him to identify Maisonet. PCRA counsel questioned the circumstances of Rivera's changed testimony and claimed that **ADA King** used the *AMW* video as pretext to give Rivera a purportedly rational explanation for his about-face. PCRA counsel also argued that **ADA King's** rationale for introducing the *AMW* video was irrelevant. As noted above, when he introduced the video, **ADA King** had argued that the video was relevant to showing that the prosecution exercised due diligence in searching for Maisonet while he was a fugitive—but PCRA counsel noted that "due diligence" was a legal argument that related to Maisonet's right to a speedy trial, which was not being challenged and was thus not an issue at trial.

Turning to Colon's evolving testimony, PCRA counsel noted that at the Pirela brothers' trial, Colon testified that the Pirela brothers were the only people who stabbed Figueroa, and that **ADA McMahon** had emphasized this point in obtaining a conviction against the Pirelas. PCRA counsel also observed that the only time Colon ever implicated Maisonet was at Maisonet's trial—as soon as trial was over, Colon disavowed his testimony. For instance, when Colon testified at a resentencing hearing for the Pirela brothers that was held after Maisonet's trial, he said only the Pirela brothers stabbed Figueroa. **ADA King** handled this hearing, and he directed Colon to his testimony from Maisonet's trial, but Colon refused to implicate Maisonet and instead said he could not recall if Maisonet was involved in the stabbing.

Lastly, PCRA counsel alleged that **ADA King** withheld information about the benefits Colon received in exchange for his cooperation. Colon's written plea agreement was never disclosed to defense counsel, so they had no way to verify Colon's trial testimony that his only deal with the prosecution was that he had to testify against Maisonet and others. In actuality, the written agreement detailed more benefits: Colon was allowed to plead guilty to just one murder, despite being arrested for three, and the prosecution agreed not to recommend a sentence of incarceration if Colon's cooperation was satisfactory. Colon was later sentenced to 11 ½ to 23 months in prison and was immediately released on time served—which was a much lower sentence than what was recommended by Pennsylvania's sentencing guidelines, which prescribed 60-144 months for third-degree murder and 36-60 months for robbery.

Separately, PCRA counsel also disputed **ADA King's** claim that he was given judicial permission to take possession of the trial materials, noting that he investigated this claim and could not find a record of any request made by **ADA King** to the trial court. PCRA counsel also noted a pattern involving **ADA King**'s handling of other death penalty cases where files were lost, including the prosecutions of Jimmy Dennis, James Jones, and Willie Stokes. PCRA counsel noted that in those cases, **ADA King** appeared to have signed out all or part of the H-File that later went missing.

The Law Division conceded Maisonet's right to a new trial on the ground that defense counsel was ineffective for failing to object to the use of the edited *AMW* video as inflammatory

284. *Comm. v. Maisonet*, 612 Pa. at 554.

and prejudicial. Because the Law Division conceded relief on this ground, it did not address the allegations that **ADA King** suppressed favorable information regarding Rivera and Colon.

In 2019, the PCRA court vacated Maisonet's conviction for Figueroa's murder.

Maisonet Pleads to Reduced Charges

In 2019, Maisonet entered an Alford plea, which meant he did not admit guilt but acknowledged that the prosecution had evidence that could result in a conviction for third-degree murder for the Figueroa murder. He was immediately released from prison on time served.

Sherman McCoy (2019)[285]

Sherman McCoy was convicted of first-degree murder and sentenced to life imprisonment. After McCoy was convicted and sentenced, Detective Philip Nordo was accused of illegal interrogation tactics with witnesses and suspects, including sexually coercing or assaulting them in police interrogation rooms, and giving benefits to informant and witnesses with whom he may have had intimate relationships, by, among other things, putting money into their prison commissary accounts. The CIU also confirmed that the Office had knowledge of the allegations against Detective Nordo as early as 2005, when IA investigators referred a complaint to the Office regarding Nordo's alleged sexual assault of a witness in an interrogation room.

The CIU agreed to investigate McCoy's conviction because of Detective Nordo's involvement in the case, and it found evidence that Detective Nordo committed misconduct during his interrogation of McCoy, and that the prosecution did not disclose favorable impeachment information about one of their key witnesses. In 2019, the CIU moved to vacate McCoy's conviction and dismiss the charges against him.

The Criminal Investigation

In 2013, Shaheed Jackson was shot to death. Detective Nordo was assigned to investigate, and he suspected that the murder related to a home invasion robbery that occurred the night before on the same street. Brothers Lester and Curtis Lanier were the victims of the robbery and called 911 to report it. During the call, Lester was overheard telling Curtis that the robbers were the people who lived across the street, and at the time of his death, Jackson lived across the street. Detective Nordo also spoke with a witness known as "Savannah," who said that Lester confessed to her that he committed the murder with someone called "Mack." Savannah did not mention Sherman McCoy as being involved. Despite Savannah's identification of the alleged killers, Detective Nordo never took a formal statement from her.

Shortly after Jackson's murder, Lester was detained in a juvenile facility on unrelated charges. Based on notes from the DAO juvenile file, the Office was poised to charge Lester with Jackson's murder, and a Philadelphia judge increased Lester's juvenile placement level, based on the impending indictment. Shortly thereafter, Detective Nordo interviewed Lester. It does not appear that he gave Lester *Miranda* warnings, despite the incriminating evidence against him. During the interview, Lester denied involvement in the murder and implicated McCoy and "Mack" as the assailants.

Police went out to look for McCoy, and they arrested him after he tried to run away from them. McCoy was detained overnight, and Detective Nordo questioned him the next morning for nearly two hours. There are no records of what occurred during this interrogation. Eventually, Detective Nordo took McCoy's formal statement, in which McCoy confessed that he, Lester, and Mack chased down and shot Jackson. McCoy said that although he had a gun, he did not shoot Jackson. By the time he signed his confession, McCoy had been in custody for roughly thirteen hours.

Defense counsel moved to suppress McCoy's confession, because at the time of his interrogation, McCoy had significant intellectual disabilities that included difficulty reading and verbally expressing himself. In support of the motion, counsel filed documentation detailing his client's impairments, arguing that they were so severe that they must have been obvious to Detective Nordo. At a hearing on the motion, Detective Nordo

285. The information in this section is taken from various sources. *See, e.g.*, Corrected Mot. for a New Trial Following Remand from Superior Court ("McCoy Corrected Motion"), *Comm. v. McCoy*, CP-51-CR-0002501-2014 (Phila. Ct. Comm. Pl. Apr 30, 2019); Joint App'x of Stipulations, ("CIU McCoy Joint Stipulations") *Comm. v. McCoy*, CP-51-CR-0002501-2014 (Phila. Ct. Comm. Pl. May 7, 2019); Comm. Ans. to Corrected Mot. for a New Trial Following Remand from Superior Court ("CIU McCoy Answer"), CP-51-CR-0002501-2014 (Phila. Ct. Comm. Pl. May 7, 2019); "Sherman McCoy," National Registry of Exonerations; Comm. Ans., *Comm. v. McCoy*, CP-51-CR-0002501-2014 (Phila. Ct. Comm. Pl. May 7, 2019).

testified that he and McCoy spoke normally, and that he did not notice anything amiss—even when McCoy took nearly thirty minutes to read his six-page statement. The trial court found that McCoy was cognitively disabled, but it nonetheless reached the "difficult"[286] conclusion that his confession was admissible.

The Trial

McCoy went to trial in 2016, and **ADA Louis Tumolo** prosecuted the case. He presented McCoy's confession as evidence of his guilt but did not call Lester as a witness, even though Lester claimed to have witnessed the murder and was the only witness to directly implicate McCoy. Defense counsel made much of Lester's absence at trial, arguing that it indicated that the prosecution did not think Lester was reliable—and that if he was not reliable, neither was his accusation against McCoy. In rebuttal, **ADA Tumolo** elicited testimony from Detective Nordo that Lester would have needed prosecutorial immunity to testify, and that it was up to the Office to decide whether to seek immunity for a witness. Thus, the jury was left with the impression that Lester was not a witness because the Office decided not to give him immunity.

At trial, Detective Nordo was also cross-examined about his interrogation of Lester, and he stated that when he first began questioning Lester, he did not necessarily view Lester as a suspect in Jackson's murder. Detective Nordo did not mention his earlier conversation with Savannah, who told him that Lester confessed the murder to her.

The jury convicted McCoy of first-degree murder and sentenced him to life imprisonment.

The CIU Investigation

The CIU confirmed that Detective Nordo's pattern of coercive interrogations and sexual coercion of witnesses and suspects was not disclosed to defense counsel. In addition, the CIU reviewed the DAO trial file and found undisclosed information about Lester that contradicted the prosecution's trial argument. The DAO trial file included a folder labeled "Court Orders/Immunity,"[287] and the folder contained an immunity order for Lester, which was signed by **DA Seth Williams**. Notably, the order had been obtained roughly two years *before* McCoy's trial, and the existence of this order contradicted **ADA Tumolo's** implied argument that Lester was absent as a witness because was not given immunity.

Lastly, the CIU reviewed Detective Nordo's trial testimony and concluded that he gave false and misleading testimony when he claimed that he did not initially consider Lester a suspect at the outset of his interrogation. In support of this finding, CIU prosecutors pointed to Savannah's statement to Nordo that Lester confessed to the murder, which was given to Nordo prior to his interview with Lester.

McCoy is Exonerated

In 2019, the CIU moved to vacate McCoy's conviction, and the charges against him were dismissed shortly thereafter.

In March 2012, McCoy filed a civil rights lawsuit against the city, Nordo, and other police officers seeking compensation for his wrongful conviction.

Ronnell Forney (2019)[288]

Ronnell Forney was convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole. In 2019, Forney filed a post-sentence motion for a new trial on the ground that the prosecution suppressed the fact that two eyewitnesses failed to identify Forney in a photo array. The prosecution conceded nondisclosure but argued that the information was immaterial, and the Superior Court agreed and denied the motion.

The Criminal Investigation and Trial

In September 2007, Terrel Davis was shot and killed near a restaurant. Davis sold drugs for Eric Roberts, and police suspected that Roberts had Davis killed after learning that Davis stole money and drugs from him. At the time of the shooting, Sharde Murrell was in the restaurant and her sister, Tiare Murrell was at her nearby home and heard gun shots. Shortly after the murder, Detective Theodore Hagan assembled a photo array, which included Forney's photograph, and showed it to the Murrells, but neither woman made an identification.

286. McCoy Correction Motion at 6, ¶ 12.

287. CIU McCoy Joint Stipulations at 34-35, ¶¶ 125-128.

288. The information in this section is taken from various sources. *See, e.g., Comm. v. Forney*, No. 3612 EDA 2017, 2019 WL 2152586 (Sup. Ct. Pa. May 16, 2019); Br. for Appellant, *Comm. v. Forney*, No. 3612 EDA 2017, 2018 WL 6707061 (Sup. Ct. Pa. July 2, 2018,); Br. for Appellee, *Comm. v. Forney*, No. 3612 ED 2017, 208 WL 6707062 (Sup. Ct. Pa. Oct. 12, 2018); Ronell Forney DAO Trial File notes (on file with the Office); "Guilty Plea Request Checklist re: Ronell Forney."

The case went cold until police received information about the murder from Reginald Smith, who had been charged in a federal sex trafficking case and was facing a substantial prison sentence. Smith's plea agreement mandated that he cooperate with police, so he told them that he saw Roberts, Forney, and the victim on the street moments before the murder. Smith saw Roberts hand Forney a gun, which he then used to shoot the victim. Smith also told police that he did not provide information about the murder when it happened because he had a bench warrant out for his arrest and was also involved in the drug trade.

ADA Deborah Watson Stokes tried the case and presented evidence about the dispute between Davis and Roberts, as well as witnesses who said that Forney confessed to killing Davis. Defense counsel called the Murrells to testify about the shooting, but at the time he called them, counsel did not know that they had failed to identify Forney from a photo array. The Murrells' failure to identify Forney was not disclosed until Detective Hagan was called as a witness and testified that he had shown them a photo array, and they failed to make any identifications. Upon learning of the photo array and subsequent non-identification of his client, defense counsel informed the court that he had not received the array in discovery and moved for a mistrial. The trial court found that the Commonwealth's failure to disclose the array and non-identification was inappropriate but concluded that Forney suffered no prejudice and denied the motion.

Forney was convicted of first-degree murder and was sentenced to life imprisonment.

Eyewitnesses Failed to Identify Forney

It appears that the prosecution was aware that the Murrells failed to identify Forney. The DAO trial file contained handwritten notes from a trial preparation session indicating that the Murrells did not identify any of the assailants.[289] Both the trial court and the Superior Court agreed that the prosecutor should have disclosed the photo array and the Murrells' failure to identify Forney, calling this failure "inappropriate."[290] However, neither the trial court nor the Superior Court found that Forney suffered any prejudice from this failure, so they declined to award him a new trial. In reaching this conclusion, neither court was focused on the prosecution's pre-trial decision-making and was instead focused on whether the error was serious enough to have affected the outcome of the trial.

John Miller (2019)[291]

John Miller was convicted of second-degree murder and sentenced to life imprisonment. Before the CIU agreed to examine his conviction, Miller filed a successful federal habeas petition and won a new trial, so when the CIU took his case, it focused on whether the Office should retry him. The investigation revealed that the prosecution did not disclose impeachment information about a key cooperating witness. The CIU moved to dismiss the charges against Miller in 2019.

The Criminal Investigation and Trial

In 1996, Anthony Mullen was shot to death in a Philadelphia parking lot. There were no witnesses, and police had no leads until they arrested David Williams ("David") and Mark Manigault for robbery. After his arrest, David agreed to give police information about at least two different murders, including Mullen's murder, in exchange for leniency in his own case. First, David told detectives that he and Jack Williams (no relation) ("Jack") spoke on the phone, and that Jack confessed to murdering someone. Then, David told detectives that Miller confessed to killing Mullen during an attempted robbery, and that he threw away the gun he used. David said that Miller got the gun from Michael Arnold, a teenager who lived near Miller. David claimed that he and Arnold spoke, and Arnold said that Miller confessed to the murder.

289. Ronnell Forney DAO Trial File notes.

290. *Forney,* 2019 WL 2152586, at *3.

291. The information in this section is taken from various sources. *See, e.g.,* Mem. of Law in Support of Pet. for Habeas Corpus, *Miller v. Kerestes*, No. 12-cv-742 (E.D. Pa. Feb. 13, 2012); Mem. of Law in Support of Am. Pet. for Habeas Corpus, *Miller v. Kerestes*, No. 12-cv-742 (E.D. Pa. Feb. 21, 2013); *Comm. v. Miller,* No. 3563 EDA 2014, 2015 WL 9264308 (Pa. Sup. Ct. Dec. 18, 2015); Br. for Appellant ("Miller PCRA Brief"), No. 3563 EDA 2014, 2015 WL 10490164 (Pa. Sup. Ct. Apr. 28, 2015); Br. for Appellee, *Miller v. Comm.*, No 3563 EDA 2014, (Pa. Sup. Ct. Sept. 29, 2015); Reply Br. for Appellant, No. 3563 EDA 2014, 2015 WL 10489857 (Pa. Sup. Ct. Oct. 15, 2015); Mem. of Law in Support of Second Am. Pet. for Writ of Habeas Corpus, *Miller v. DelBalso*, No. 12-cv-742 (E.D. Pa. Mar. 2, 2016); Response to Pet. for Writ of Habeas Corpus, *Miller v. Kerestes*, No. 12-cv-742 (E.D. Pa. Nov. 14, 2016); Mar. 12, 2018 Ltr. fr. Thomas M. Gallagher and Nilam A. Sanghvi to Patricia Cummings with Attachments ("March 2018 Miller Letter"); *Miller v. Dist. Attorney for the Cty. of Philadelphia*, No. 12-0742, 2019 WL 2869641 (E.D. Pa. June 12, 2019); Resp'ts' Statement of Non-Objection to the Magistrate Judge's Report and Recommendation, *Miller v. Dist. Attorney for the Cty. of Philadelphia*, No. 12-0742 (E.D. Pa. June 26, 2019); Mot. for *Nolle Prosequi* Pursuant to Pa. R. Crim. P. 585(A) ("CIU Motion to Dismiss Charges"), *Comm. v. Miller*, CP-51-CR-1010301-1997 (Phila. Ct. Comm. Pl. July 29, 2019); Reply Br. for Appellant, *Miller v. Comm.*, No 3563 EDA 2014, (Pa. Sup. Ct. Oct. 15, 2015); Chris Palmer, "'Surreal' Feeling for Philly Man Cleared of Murder After Spending Half His Life Behind Bars," Philadelphia Inquirer, Jul. 31, 2019; "John Miller," National Registry of Exonerations.

Detective Richard Bova interviewed Arnold, a minor, without his parent or guardian present. Arnold told Detective Bova that he was at home when a fight broke out outside his house, so he carried a gun outside and then threw it away when he saw police. Arnold said he saw Miller pick up the gun, at which time he told Miller the gun was not working.

Miller went to trial in 1998, and **ADA Bill Fisher** prosecuted the case. The only direct evidence connecting Miller to the murder was David's testimony. David, however, had begun to recant his police statement almost immediately after he gave it. For instance, at Miller's preliminary hearing, David testified that he had lied to police and had only implicated Miller because they were not getting along at the time. Before trial, **ADA Fisher** offered leniency to David in his own criminal case if he would testify, consistent with his earlier police statement, that Miller was the shooter. However, David still refused. Despite his refusal, **ADA Fisher** called him as a prosecution witness, and when he recanted on the stand and testified that he never identified Miller and that police fabricated his statement, **ADA Fisher** admitted David's statement pursuant to *Brady-Lively* as substantive evidence for the jury to consider. Arnold also testified that he gave Miller a gun, but he did not know what kind of gun it was and that it was not working at the time.

Miller was convicted of second-degree murder and sentenced to life imprisonment.

David Continues to Recant

After Miller's conviction, David wrote a letter to Miller's mother claiming that he was the actual killer and had falsely accused Miller. Based on this letter, Miller filed a motion for a new trial. An evidentiary hearing was held, and David testified that he killed the victim in self-defense after they got into an argument over money that he had loaned the victim. However, David's testimony was filled with inconsistencies, such as giving an inaccurate description of the victim and incorrectly identifying the location of the murder. The court concluded that David was lying and denied Miller relief.

The Law Division Aggressively Defends the Conviction

Miller filed a series of PCRA petitions challenging his conviction. In preparation for filing his third PCRA petition, PCRA counsel interviewed David, who admitted that on the same day he spoke with police and falsely accused Miller of murder, he (David) also falsely accused Jack of a different murder. David also told PCRA counsel that he told police a story that was easily disprovable: when he and Jack spoke over the phone and Jack confessed, David had been incarcerated, which meant the prison would have had call records and the call itself would have been recorded. David also told PCRA counsel that he falsely accused Jack and Miller of murder in a bid to get a lenient sentence.

Counsel filed a third PCRA petition summarizing these newly discovered facts about David and his false allegations against Jack. PCRA counsel also suggested that the Commonwealth was aware of David's false accusation against Jack, because (i) David's accusation would have been easily to verify, given that prisons record and log calls to and from inmates, and (ii) when Jack went to trial for murder, the prosecution did not call David as a witness, despite his claim that he heard Jack's confession. PCRA counsel argued that David's false accusation against Jack was favorable information, because it would have enabled defense counsel to impeach David's credibility and to show that he was engaged in a "scheme to give false statements for leniency."[292]

Law Division ADA Anthony Pomeranz opposed the petition. He argued, among other things, that (i) David's accusation against Jack was not exculpatory information; (ii) David's false accusation against Jack was cumulative of other evidence that Miller had already offered to show that David falsely accused him of murder; and (iii) Miller could have discovered this information if he had exercised due diligence, given that David had begun assisting his post-conviction legal challenges, and the two men were longtime, childhood friends. In making these arguments, **ADA Pomeranz** did not address the fact that David was the sole witness linking Miller to the murder, and his testimony—and thus, his credibility—was crucial to determining Miller's guilt. Nor did he address the fact that defense counsel could have used this information to impeach David's credibility by showing that he was intent on making false accusations to secure leniency for himself.

ADA Pomeranz also conflated the newly-discovered favorable information—David's false murder accusation against Jack—with the defense's theory of the case that David has falsely accused Miller of murder. Miller contention, *i.e.*, that David had falsely accused him of murder when he was in fact innocent, was different from PCRA counsel's argument that David had made a false accusation against Jack, and that this penchant for making up murder accusations tended to (i) undermine David's credibility and (ii) make it likely that he was also lying

292. Miller PCRA Br. at *37.

about Miller. Finally, **ADA Pomeranz** failed to explain how Miller should have known or thought to ask about whether David was making up other murder allegations against other people, and whether he lodged those false accusations on the same day that he falsely accused Miller.

The PCRA court largely accepted the Law Division's arguments, and on appeal, so did the Pennsylvania Superior Court. Like the Law Division, it ignored the legal significance of David's false accusation against Jack and the arguments made by PCRA counsel. Instead of squarely addressing whether David's false accusation against Jack was newly discovered favorable information because of its impeachment value, the Superior Court glossed over this new accusation. It instead focused on Miller's "overarching claim"[293]—that David falsely accused Miller of murder—and held that David's alleged false accusation against Jack was just another attempt by Miller to "show, yet again, that David falsely accused him of Mullen's murder."[294] In other words the Superior Court treated David's accusation against Jack as just another means to show that David had lied about Miller, which was a fact previously known and litigated, and thus not "newly discovered" for purposes of the PCRA. Lastly, the court also agreed that Miller failed to exercise due diligence in discovering David's false accusation against Jack, because David was now helping Miller in his post-conviction litigation, and the two men were longtime friends. The court did not discuss how Miller should have known to ask David a fact-specific question regarding whether he also fabricated murder allegations against a different person on the same day he falsely accused Miller.

In dissent, Superior Court Presiding Judge John Bender noted that the majority (and by extension, the Law Division), "conflate[d] or confuse[d] a new fact—David's false accusation regarding Jack—with the defense theory that David falsely implicated [Miller] in the murder of Mullen."[295] Judge Bender noted that "[e]ven if one construes the defense theory as a fact, it is patently not the same fact as David's false statement regarding a different person and a different murder."[296] In a footnote, Judge Bender also noted that the majority disregarded the two distinct facts by "invoking the notion that the 'ultimate fact' at issue is David's false accusation of [Miller], and that the new fact regarding David's false accusation of Jack merely serves to reinforce or corroborate that 'ultimate fact.'"[297] This, Judge Bender concluded, was an "over-generalization"[298] that risked putting the court's "interpretation and application of the 'newly-discovered fact' exception [in PCRA cases] on a slippery slope towards oblivion."[299]

Judge Bender also rejected the notion that Miller should have discovered David's false accusation against Jack simply because David had begun assisting Miller with his post-trial challenges. He dismissed as "little more than speculation"[300] the Law Division's argument that Miller could have discovered this false accusation, and he questioned how both the PCRA court and the majority could reach this "fact-intensive conclusion"[301] without an evidentiary hearing.

Miller Wins in Federal Court

Miller also challenged his conviction in federal court. In a series of petitions, he alleged that the prosecution violated *Brady* when it failed to disclose that (i) David had also falsely accused Jack of murder on the same day he made up his allegations against Miller and (ii) David had also confessed his "false accusation" plan to his cellmate, Mark Manigault, and detectives were aware of the falsity of David's statements.

Habeas counsel learned that when David and Manigault were arrested for robbery, they were placed in a holding cell together, and David told Manigault he was going to do "whatever it took"[302] to get out of jail and was going to "pin a homicide that he [David Williams] had done on somebody else."[303] David was then taken from the cell to speak with police, wherein he falsely accused Jack and Miller of two different murders. During his statement, David told police that Manigault had information about Mullen's death, so they pulled Manigault to question him, as well. However, Manigault later told habeas counsel that he told

293. *Miller*, 2015 9264308, at *6.
294. *Id.* at *7.
295. *Miller*, 2019 WL 9264308, at *11.
296. *Id.*
297. *Id.* at *11, n. 4.
298. *Id.*
299. *Id.*
300. *Id.* at *12.
301. *Id.*
302. *Miller*, 2019 WL 2869641, at *7.
303. *Id.*

police he did not have any information about Mullen's murder because he had been incarcerated when it happened. This information, which should have put police on notice that David was lying, was not disclosed to Miller's defense counsel before trial.

The magistrate judge assigned to Miller's federal habeas petition found that the prosecution violated *Brady* and that Miller was entitled to a new trial. It held that "[e]vidence that David... gave the police irrefutably false information about Jack...and... Manigault (which directly related to his accusation against [Miller]) on the same day he gave the original statement against Miller would have provided a forceful method"[304] of impeaching David, as it could have been used to show that David "was willing to say just about anything, including demonstrably and incontestably false information, in an attempt to reduce his sentence."[305] Turning to the Manigault statement, the court held that this information was also impeachment information that should have been turned over, because it implicated David's credibility before the jury, and because it impacted defense counsel's pre-trial strategy by denying them the opportunity to learn about Manigault's statement and interview him. The court then considered the collective impact of the suppressed information and concluded that, had defense counsel known about this information, it would have "resulted in a markedly weaker case for the prosecution and a markedly stronger one of the defense,"[306] and that as a result, the suppressed information undermined confidence in the verdict, thus entitling Miller to a new trial.

The CIU Investigation

After Miller began challenging his conviction in federal court, the CIU agreed to investigate his conviction and found information that tended to corroborate Miller's allegations. Specifically, when prosecutors reviewed the H-File, they found handwritten detective notes summarizing David's statements to police. The notes indicated that David told police he had information on several murders, and that police should bring him and Manigault "down from prison for interviews."[307] The notes also mentioned David's claim that he and Manigault had information about the Mullen murder, and that David had information about Jack's case. These notes were not disclosed during trial or post-conviction proceedings.

After the magistrate judge issued his report, the CIU filed a response stating that it had no objections to the report and recommendations, and shortly thereafter Miller's federal habeas petition was granted and his conviction was vacated.

Miller is Exonerated

After Miller's federal court victory, they CIU moved to dismiss the charges against Miller. In support of its motion, the CIU (i) noted the *Brady* violations that were found by the federal court, and (ii) cited its independent investigation and discovery of police notes regarding David and Manigault, which corroborated the *Brady* violations. It concluded that because there was "insufficient evidence to make out a *prima facie* case against"[308] Miller, the charges should be dismissed, and the state court agreed to dismissal.

Miller filed a civil rights lawsuit against the city seeking compensation for his wrongful conviction, and it was settled in September 2021 for $4.6 million.

Chester Hollman III (2019)[309]

Chester Hollman was convicted of second-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his case after PCRA counsel uncovered favorable information about a key prosecution witness that had not been disclosed at trial. The CIU found evidence suggesting that the prosecution purposefully withheld this favorable information—and then made misrepresentations during post-conviction proceedings about how and why the information was not disclosed. Additionally, the CIU concluded that the prosecution withheld

304. *Id.* at *17.

305. *Id.*

306. *Id.* at *23.

307. CIU Motion to Dismiss Charges at 6, ¶¶ 12-13.

308. *Id.* at 2.

309. The information in this section is taken from various sources. *See, e.g.*, *Hollman v. Wilson*, 158 F.3d 177 (3d. Cir. 1998); Br. for Appellees ("Law Division Brief"), *Hollman v. Wilson*, No. 97-2062, 1998 WL 34110908 (3d Cir. Mar. 17, 1998); Comm. Ans. to Counseled PCRA Pet. ("CIU Hollman Answer"), *Comm. v. Hollman*, CP-51-CR-093311-1991 (Phila. Ct. of Comm. Pleas, June 24, 2019); Joint Stip. Of Fact of Pet. and Resp. ("CIU Hollman Joint Stipulations"), *Comm. v. Hollman*, CP-51-CR-093311-199 (Phila. Ct. of Comm. Pleas, June 24, 2019); "Chester Hollman III", National Registry of Exonerations.

favorable information, which corroborated the a key prosecution witness who had recanted her testimony and alleged police intimidation and coercion. Based on these findings, the Office conceded that Hollman was entitled to a new trial. In 2019, his conviction was vacated, and the charges against him were dismissed.

The Criminal Investigation

In August 1991, Tae Jung Ho and his friend were attacked by two assailants, and Ho was killed. One assailant tackled Ho, and the second assailant shot and killed him. Ho's friend told police that the man who tackled Ho was wearing red shorts, while the gunman was wearing a blue hooded sweatshirt. A cab driver in the area saw the two assailants get into a white Chevy, and later told police that one of them was wearing a blue hooded sweatshirt. The cab driver also thought he saw four people in the car. He began to follow the car, and during his pursuit the cab driver called his dispatch company and gave them a partial license plate of "YZA." Eventually, he lost the white Chevy in traffic. The dispatch company then called 911 to report the shooting.

Minutes after the dispatch company called 911, Chester Hollman and Deirdre Jones were stopped by police. Hollman was driving a white Chevy that had "YZA" in the license plate. They were the only two occupants of the car, and Hollman was wearing green pants, glasses, and a hat—not red shorts or a blue hooded sweatshirt. Police searched their vehicle but did not find any firearms, items from the robbery, or other articles of clothing. Hollman and Jones were taken to the police station for questioning, and Hollman told police he and Jones were on their way to a party, and that his roommate rented the white Chevy. Hollman denied that anyone else had been in the car with them, and he said he did not know anything about Ho's murder.

However, Jones told police that Hollman was involved in the murder. She said that when Hollman picked her up an unknown man and woman were already in the car, and the woman drove the car while Hollman and the man discussed robbing someone. Jones said she saw the victim fall but did not see who shot him. After the shooting, she said Hollman got into the car through the back window, and the other man got in through one of the car doors. At some point, the woman who had been driving stopped the car, and she and the man got out. Hollman then got into the driver's seat and began driving until they were stopped by police.

Police also spoke with Andre Dawkins, who was at a gas station near where the murder occurred. He told police he saw a white SUV idling in the parking lot and spoke briefly with the driver, who he described as a black female with straight dark hair and blonde streaks. Dawkins initially said he did not see the shooting but later told police he heard gunshots. Then, he changed his statement again and told police that he saw Hollman and another man push the victim down before shooting him. Dawkins said Hollman ran back to the white SUV. Dawkins also told police that neither assailant wore glasses or a hat—which is what Hollman was wearing when he was stopped by police.

During the investigation, police received an anonymous tip that Ho's assailants could be found at a specific residence in New Jersey. Detective David Baker went to the residence and found Denise Combs and two other men. (Combs and one man initially gave Detective Baker aliases, but he was later able to identify them.) He learned that Combs had a criminal history that included assaulting a prosecutor, and that Combs' brother was incarcerated for two murders. In at least one of the murders, Combs had rented a car that her brother used to commit the crime.

Police assembled a photo array with Combs' photograph in it and showed the photo array to Dawkins, who picked out Combs' photograph as the driver of the white Chevy. The prosecution eventually disclosed Dawkins' identification of Combs, but they did not disclose the anonymous tip that led to Combs' photograph being included in the photo array. There was also no indication that police further investigated Combs' possible involvement in the murder, beyond trying to link Combs to Hollman.

The Trial

Hollman went to trial in 1993, and **ADA Roger King** prosecuted the case. Although Jones and Dawkins implicated Hollman, aspects of the prosecution's case did not match eyewitness testimony. For instance, the clothes Hollman was wearing when he was stopped by police did not match the description of either assailant's clothing. Moreover, only two people were in Hollman's car when they were stopped, which was very shortly after the shooting, and during the period when the dispatcher was following the getaway car, he did not report seeing anyone exit the car.

Dawkins testified about seeing Hollman and another man shoot Ho, and defense counsel attacked his multiple accounts of what he claimed to have heard and seen, including Dawkins' initial statement that the suspects were not wearing glasses or a hat, which is what Hollman had been wearing. Dawkins also had a criminal record that included prior arrests and open bench warrants. When cross-examined about his record, Dawkins

pointed out that while he had been arrested, he had never been convicted of anything. **ADA King** did not ask Dawkins to clarify this testimony about his criminal record.

Prior to trial, defense counsel had conducted his own independent investigation into Combs, and he presented evidence that Combs had also rented a white Chevy with "YZA" tags, which she returned the morning after the murder. Based on these facts, defense counsel argued that it was Combs, not Hollman, who was the true assailant. However, defense counsel was unable to fully explore this alternate suspect defense. Because the prosecution suppressed the anonymous tip that led police to Combs, he was not able explain how police came to focus on Combs, or how police came to include Combs' photograph in the photo array shown to Dawkins.

Hollman was convicted of first-degree murder and sentenced to life imprisonment.

The Law Division Aggressively Defends the Conviction

After Hollman was convicted, defense counsel discovered that, due to a clerical error, Dawkins had been assigned two criminal identification numbers that were in turn tied to two different criminal records—and **ADA King** had only turned over the record listing Dawkins' arrests and open bench warrants. The second, undisclosed record contained Dawkins' convictions for robbery and conspiracy, as well as a conviction for filing a false report. Defense counsel filed a motion arguing that Dawkins' undisclosed criminal record was *Brady* material that had not been disclosed, and that Hollman was entitled to a new trial.

This issue was eventually litigated in federal court, where the Law Division argued that the failure to disclose Dawkins' second criminal record was due to a good faith mistake that should not disturb Hollman's conviction. In briefing before the Third Circuit, **Law Division Chief of Federal Litigation Donna Zucker** wrote that "no one involved with [Hollman's] case was aware of Dawkins' other photo number or of his convictions"[310] until after Hollman's trial ended. **ADA Zucker** also argued that **ADA King** had no reason to believe that the criminal record he produced was incomplete, or that he ought to request a further search, and she argued that **ADA King** turned over what he "reasonably believed was all the pertinent information."[311] Finally, **ADA Zucker** drew a distinction between what she described as **ADA King's** good faith mistake and the hypothetical prosecutor who finds favorable evidence in his possession and then intentionally fails to disclose it.

The Third Circuit accepted this characterization of the facts and held that no *Brady* violation occurred, because the prosecution did not withhold or suppress anything. The court found it significant that both the prosecution and the defense attributed the failure to produce the second criminal record to an administrative mistake, and that "*without some record evidence that it was something more than a mistake*, we cannot conclude that the government withheld information that was readily available to it or constructively in its possession."[312]

Hollman separately filed a PCRA petition for a new trial, arguing in part that the prosecution failed to disclose information about Denise Combs, including the anonymous tip that led detectives to question her and investigate her background. At a hearing on the petition, the parties disputed Combs' significance to the case. **ADA Samuel Ritterman** argued that there was nothing for the prosecution to disclose, because there was no evidence linking Combs to the murder.

At this same hearing, Jones testified and recanted her police statement. She told the PCRA court that she had requested an attorney during the interrogation, but detectives ignored her request and instead threatened and coerced her into signing a false statement. **ADA Ritterman** called Detective Baker as a witness to rebut Jones' testimony. Prior to calling Detective Baker, **ADA Ritterman** did not produce any impeachment material for Detective Baker to PCRA counsel. The PCRA court credited Detective Baker's testimony and denied the PCRA petition.

The CIU Investigation

CIU prosecutors reviewed the H-File and DAO trial file and found favorable information about both Dawkins and Combs that had not been produced at trial. The CIU also found that this information contradicted the Law Division's representations to the Third Circuit. For instance, **ADA Zucker** argued that **ADA King** was unaware of Dawkins' second criminal record until after trial was over—but the CIU found the second criminal record in **ADA King's** trial file, and CIU prosecutors were able to determine that it had been printed out and placed in the file *before* trial started. The CIU's findings suggest that **ADA King** knowingly withheld favorable information and permitted

310. Law Division Brief at 11 (emphasis supplied).

311. *Id*. at 17.

312. *Hollman*, 158 F.3d at 181 (emphasis supplied).

Dawkins to give false and misleading testimony. These findings also raise questions about what steps the Law Division took to investigate Hollman's claim before they made their representations to the Third Circuit.

The CIU also found information in the H-File about the anonymous tip regarding Combs, as well as the police investigation into her criminal history—and the fact that she had previously rented a car for her brother to use in a murder. Despite this circumstantial evidence suggesting Combs' possible involvement in Ho's murder, it did not appear that Detective Baker investigated Combs beyond trying to link her to Hollman. The CIU also determined that **ADA King** was likely aware of this information about Combs. In his trial file, CIU prosecutors found a "to-do" list written by **ADA King**, and it referred to a host of information that had come from the H-File, which suggests that he reviewed the H-File, which would have included the information about Combs. Finally, the information about Combs contradicted **ADA Ritterman's** representation at the PCRA hearing that there was nothing tying Combs to the murder, and it raises questions about what steps **ADA Ritterman** took to investigate Hollman's claim before he made this argument at the PCRA hearing.

Lastly, CIU prosecutors searched Detective Baker's internal disciplinary files for possible impeachment information and found that IA had sustained a finding against Detective Baker for denying a suspect their right to counsel after they specifically asked for an attorney. This sustained finding tended to corroborate what happened to Jones during her interview—she claimed she requested an attorney but was denied one and was instead threatened and intimidated by detectives. Relatedly, CIU prosecutors learned that police had also tried to interview Jones' sister about the murder and had tried to force her to sign a statement admitting that she was in the car. Jones' mother had been at home with her daughter at the time of the murder, so she knew the statement was false. Her daughter refused to sign the statement, writing "This Story is a Lie" on the document. None of this information was disclosed to defense counsel or PCRA counsel, which meant that Detective Baker's trial and PCRA testimony was allowed to stand unchallenged. These findings again raise questions about whether **ADA Ritterman** searched for impeachment information prior to calling Detective Baker as a witness.

Hollman is Exonerated

Based on the CIU's findings, they joined Hollman's PCRA petition to vacate his conviction and dismissed the charges against him shortly thereafter. CIU Chief Patricia Cummings apologized to Hollman at the proceedings.

Following his exoneration, the city agreed to pay him $9.8 million in damages before Hollman even filed a lawsuit.

Willie Veasy (2019)[313]

Willie Veasy was convicted of second-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his conviction because of Detectives Martin Devlin and Paul Worrell's involvement in the investigation, and because of Veasy's claim of actual innocence. The CIU investigation found that Veasy had an alibi for the night of the murder, and that the detectives coerced a false confession from Veasy. CIU prosecutors also concluded that the prosecution was primarily focused on winning a "close case," instead of on ensuring that the right person had been charged. The CIU moved to vacate Veasy's conviction in October 2019, and the charges against him were dismissed shortly thereafter.

The Criminal Investigation

In January 1992, Efrain Gonzalez and John Lewis were shot. Lewis died, but Gonzalez survived, and he told police he did not know the shooter but would be able to identify him if he saw him again. Police interviewed multiple eyewitnesses, all of whom reported seeing the shooter exit a red or maroon car. Only one witness, Denise Mitchell, claimed to recognize the shooter as someone she called "Pee Wee." Mitchell told police she was outside talking with Lewis right before the shooting and then went into her apartment when she heard gunshots. She said she ran to the window and saw Pee Wee trying to rob Gonzalez. Mitchell said she also saw another assailant, whom she called "Man," holding a gun. Mitchell said she did not actually see Lewis get shot.

313. The information in this section is taken from various sources. *See, e.g.*, Pet. for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, *et seq.*, *Comm. v. Veasy*, CP-51-CR-641521-1992 (Phila. Ct. Comm. Pl. June 23, 2017); Joint Stipulations of Fact of Pet'r Willie Veasy and Resp't Commonwealth of Pennsylvania ("CIU Veasy Joint Stipulations"), *Comm. v. Veasy*, CP-51-CR-641521-1992 (Phila. Ct. of Comm. Pl. Oct. 1, 2019); Commonwealth's Ans. to Second Am. PCRA Pet. ("CIU Veasy Answer"), *Comm. v. Veasy*, CP-51-CR-641521-1992 (Phila. Ct. of Comm. Pl. Oct. 1, 2019); "Willie Veasy," National Registry of Exonerations; UNDISCLOSED, State v. Willie Veasy, Episode 3 – The Alibi, Nov. 6, 2017.

After police spoke with an "unidentified girl,"[314] they came to believe that Willie Veasy was "Pee Wee." Police put Veasy's photograph in a photo array and showed it to Mitchell, but the first time she looked at the array, she did not identify anyone. Several months later, Mitchell looked at the array again, and this time she identified Veasy as Pee Wee. She was the only witness to identify Veasy as the shooter. Despite Gonzalez's assertion that he would recognize the shooter if he saw him again, police never showed him any photo arrays or asked him to make further identifications.

Veasy was arrested and questioned by Detectives Devlin and Worrell for roughly 30 to 45 minutes until he supposedly confessed. According to his statement, which Devlin claimed to have handwritten in a word-for-word transcription, Veasy initially denied involvement until detectives told him multiple witnesses identified him as the shooter. Veasy then admitted his role in the murder. According to his confession, he was playing basketball when Lyndel Johnson drove up in a blue car with two unknown men sitting in the backseat. Veasy got into the car, and Lyndel gave Veasy a gun and told him he and the other men were going to retaliate against some people who had robbed Lyndel. Lyndel drove to the area where Gonzalez and Lewis were, and he and the men got out of the car and began shooting. Veasy said that after the shooting they all drove away together in the car, and that he received $150 for his role. After Veasy confessed, police showed Mitchell a photograph of Lyndel, but Mitchell said she knew Lyndel and that he was not involved in the murder.

The Trial

Veasy went to trial in **ADA Mark Gilson** prosecuted the case. He called Mitchell as a witness, and she testified that Veasy was Pee Wee, and that she saw Veasy shoot Lewis. On cross-examination, Mitchell admitted that she had only 40/100 vision, that it was dark on the night of the shooting, and that no streetlights had been on. Notably, Mitchell's trial testimony also conflicted with her earlier statements about the crime. For instance, although she told police she did not see Lewis get shot, at trial she testified that she was on the phone with her sister when the shooting happened and that she saw Lewis get shot. Moreover, even though she told the police she recognized the shooter as "Pee Wee," her sister later said that Mitchell did not mention that she recognized any of the assailants.

Veasy presented alibi evidence that at the time of the shooting he was working a Friday night shift at a restaurant that was roughly 8 miles from the crime scene, and that he did not have a car and took public transportation. He introduced his timecard showing that he punched in the evening of the shooting and then punched out early the next morning, during which time the murder occurred. The restaurant's shift manager testified about the restaurant's timekeeping practices and said that she had never encountered an instance of timecard fraud during her employment at the restaurant, and the restaurant's kitchen manager testified that it would be nearly impossible for anyone to clock in and then disappear from work for any lengthy period on a Friday night because it was always so busy and because they were walking around the restaurant to see who was there and how the shift was going.

In response, **ADA Gilson** attacked Veasy's alibi evidence. He cross-examined the restaurant manager about the restaurant's timekeeping practices to suggest that they were not accurate, and that Veasy could have manipulated his timecard so that it did not necessarily prove he was at work for that entire period. He also tried to undermine the restaurant witnesses' credibility, arguing that they were covering for Veasy and for themselves, because they were afraid of being held civilly liable for Veasy's murder. During closing arguments, **ADA Gilson** questioned what "interest"[315] the restaurant might have in the "outcome of this case." He asked jurors to "[t]hink about"[316] whether restaurant employees could "admit"[317] that one of their employees "was not where they said he was supposed to be,"[318] and how that "opens up the door to all kinds of liability for the corporation."[319] He observed that "you better believe [restaurant] is going to get sued,"[320] and he suggested that the restaurant witnesses were not being truthful because they did not want to admit they failed to supervise Veasy. When defense counsel objected to this argument because it was a misstatement of the law regarding civil liability, **ADA Gilson** claimed he was only making a theoretical argument.

314. CIU Veasy Joint Stipulations at 3, ¶ 9.
315. Willie Veasy, UNDISCLOSED, Episode 3 at 18 (quoting trial transcript).
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*

During closing arguments, **ADA Gilson** also emphasized that Veasy's confession was evidence of his guilt, because "[n]o one confesses to a murder that they did not commit, no one."[321] Elsewhere, he said that Veasy's confession was not false because people who "have no idea, who weren't there, weren't involved, do not confess, especially to murder."[322] Finally, he noted the absence of "trickery, of any kind of physical abuse [or] psychological abuse,"[323] during Veasy's interrogation, thus implying that the confession was accurate and voluntary.

The jury convicted Veasy of second-degree murder, and he was sentenced to life imprisonment.

The CIU Investigation

By the time the CIU began its investigation, they were aware of Detectives Devlin and Worrell's abusive and coercive conduct in Anthony Wright and Shaurn Thomas' cases, both of which resulted in exonerations, and that none of the misconduct in those cases had been disclosed to Veasy's defense counsel. CIU prosecutors were also aware that in those cases, Detective Devlin claimed to be able to write down handwritten transcriptions of word-for-word suspect confessions, and that several of these purported confessions turned out to be false.

When CIU prosecutors reviewed the files from Veasy's case (which did not include the DAO trial file, because it had been misplaced), they noticed that the Devlin-drafted confession contradicted nearly all the neutral eyewitnesses to the crime. For instance, in the Devlin confession, Veasy said he and his co-conspirators were in a blue car, but nearly all the eyewitnesses described the car as red or maroon. Veasy also said four people were in the car and that they all got out, but several eyewitnesses only saw one person—the shooter—exit the vehicle. Veasy said he got $150 for his role in the crime, but Gonzalez told police the shooter only stole $10 from him, along with some marijuana. Veasy said he had a semi-automatic pistol, but Gonzalez said the gun looked like at .38 revolver, and this was corroborated by physical and crime scene evidence.

The CIU also spoke with **ADA Gilson** about his recollection of the case. He acknowledged that the case was a close one because of the alibi evidence. In fact, he said he would not have been surprised if the jury returned a verdict of "not guilty" because of the alibi evidence. In speaking with **ADA Gilson,** the CIU came away with the impression that he had been motivated by the challenge of winning such a close case, so he focused on marshaling the facts and making arguments that would result in a win, and less on whether the alibi evidence suggested that Veasy had been wrongly charged. The CIU also noted that **ADA Gilson** acknowledged false confessions do occur, and that one occurred in a case he prosecuted after Veasy's case.

Veasy is Exonerated

The CIU determined that Detectives Devlin and Worrell falsified Veasy's confession, and that the prosecution did not sufficiently evaluate Veasy's alibi evidence to ensure that the right person had been charged. Instead, they treated the alibi evidence like any other "bad fact" that needed to be discredited or overcome in order to get a guilty verdict. The CIU moved to vacate Veasy's conviction in 2019 and dismissed the charges against him shortly thereafter. After the exoneration, DA Krasner noted that a "guilty man went free almost 30 years ago,"[324] while an "apparently innocent man" [325] went to prison instead.

After his exoneration, Veasy sued the city and eventually settled the lawsuit for $5 million.

321. CIU Veasy Answer at 6, ¶ 20.

322. *Id*.

323. *Id*.

324. "Willie Veasy," NRE.

325. *Id*.

Christopher Williams (2019) and Theophalis Wilson (2020)

Christopher Williams (2021) and Troy Coulston (2021)[326]

Christopher Williams was exonerated twice following two separate wrongful convictions for different murders. In one case, Williams and Troy Coulston were convicted of first-degree murder and other crimes stemming from the death of Michael Haynesworth, and Williams and Coulston were both sentenced to life imprisonment. After that trial ended, Williams and Theophalis Wilson were convicted of first-degree murder in the killings of Otis Reynolds and brothers Gavin and Kevin Anderson (the "triple murders"). Williams was sentenced to death, while Wilson, who was a minor at the time of the killings, was sentenced to life imprisonment. In both trials, the prosecution relied extensively on cooperating witness James White.

After Williams filed a PCRA petition challenging his conviction for the triple murders and won a new trial, the CIU agreed to investigate his conviction and focused on whether the Office should retry Williams. Around the same time, the CIU also agreed to investigate Wilson's conviction. However, because Wilson had not yet won PCRA relief, the CIU focused on whether Wilson was entitled to a new trial.

The CIU reviewed the H-File and DAO trial file and concluded that White fabricated the entirety of the allegations against Williams and Wilson in the triple murders trial. The CIU also found that the prosecution failed to disclose (i) impeachment information about White and another cooperating witness, David Lee; (ii) favorable information implicating alternate suspects; and (iii) permitted White and Lee to give false and misleading testimony and failed to correct them. In December 2019, the charges against Williams were dismissed. In January 2020, the CIU moved to vacate Wilson's conviction, and the charges were dismissed shortly thereafter.

Because the Office had also relied on cooperating witnesses White and Lee to convict Williams and Coulston in the Haynesworth murder trial, the CIU agreed to investigate these convictions, as well. Once again, the CIU found that White fabricated the allegations against Williams and Coulston, and that the prosecution failed to disclose impeachment information for White and Lee and permitted them to give false and misleading testimony which they did not correct. In February 2021, the CIU moved to vacate Williams' conviction and dismissed the charges against him shortly thereafter. In November 2021, the CIU moved to vacate Coulston's conviction and dismissed the charges against him.

Six Murders, As Told By James White

In September 1989, Otis Reynolds and brothers Gavin and Kevin Anderson were murdered, and their bodies were found in different locations in Philadelphia. Reynolds was found in a driveway lying face up, and he had been shot twice in the left side of his face. Kevin was found face down on the sidewalk, and he had been shot twice in the head. Gavin was found face down in a parking lot, and he had been shot three times in the face and neck.

326. The information in this section is taken from various sources. *See, e.g.*, Mem. Op. and Order Sur Petition Under the Post-Conviction Relief Act ("Williams PCRA Opinion"), *Comm. v. Williams*, CP-51-CR-0417523-1992 (Phila Ct. Comm. Pl. Dec. 30, 2013); *Comm. v. Williams*, 636 Pa. 105 (Pa. 2016); Comm. Ltr. Br., *Comm. v. Wilson*, CP-51-CR-0417522-1992 (Phila Ct. Comm. Pl. Apr. 8, 2019); Mot. for *Nolle Prosequi* Pursuant to Pa. R. Crim. P. 585(a), *Comm. v. Williams*, CP-51-CR-0417523-1992 (Phila. Ct. Comm. Pl. Dec. 18, 2019); Comm. Answer to Pet. for Post-Conviction Relief ("CIU Wilson Answer"), *Comm. v. Wilson*, CP-51-CR-0417522-1992 (Phila. Ct. Comm. Pl. Jan. 13, 2020); Joint Stipulations of Fact of Pet'r Theophalis Wilson and Resp't Comm. of Pennsylvania ("CIU Wilson Joint Stipulations"), CP-51-CR-0417522-1992 (Phila Ct. Comm. Pl. Jan. 13, 2020); Joint Stipulations of Fact of Pet'r Christopher Williams and Resp't Comm. of Pennsylvania ("CIU Williams Joint Stipulations"), CP-51-CR-0513111-1991 (Phila. Ct. Comm. Pl. Feb. 5, 2021); Comm. Answer to Counseled PCRA Pet., *Comm. v. Williams*, CP-51-CR-0513111-1991 (Phila. Ct. Comm. Pl. Feb. 6, 2021); Comm. Answer to Counseled Pet. for Post-Conviction Relief, *Comm. v. Coulston*, CP-51-CR-0513011-1991 (Phila Ct. Comm. Pl. Sept. 17, 2021); "Troy Coulston," National Registry of Exonerations; "Christopher Williams," National Registry of Exonerations; "Theophalis Wilson," National Registry of Exonerations; Samantha Melamed, "A Brutal Triple Murder, an Eager Informant, Hidden Evidence, and Now, Exoneration," Philadelphia Inquirer, Jan. 8, 2020; Samantha Melamed, "A 'Perfect Storm' of Injustice: Philly Man Freed After 28 Years as DA Condemns 'Decades' of Misconduct," Philadelphia Inquirer, Jan. 21, 2020; Samantha Melamed, "After 25 Years on Pennsylvania Death Row, an Exonerated Man Was Fatally Shot At a Funeral," Philadelphia Inquirer, Dec. 19, 2022.

In November 1989, Michael Haynesworth was found blindfolded and shot to death in the back seat of his own car. His hands were bound in front of him, and his feet were also tightly bound. He had dried grass on his clothing and around his gunshot wounds. Autopsy reports showed no other injuries to Haynesworth other than the gunshot wounds. Police also found a set of tire tracks next to Haynesworth's car.

Police arrested James White for Haynesworth's murder. White confessed to killing Haynesworth and implicated his girlfriend, Rashida Salaam, and Williams, and Troy Coulston. White also confessed to five more murders—the triple murders of Reynolds and the Anderson brothers, and the murders of Marion Genrette and William Graham. White implicated Williams in all five of these murders. According to White, Williams recruited and used younger men—like White, Wilson, and Coulston—to rob and murder suspected drug dealers in furtherance of Williams' criminal organization.

White pleaded guilty to all six murders and agreed to cooperate with the Commonwealth. He was sentenced to six concurrent life sentences, and the Office agreed not to seek the death penalty. The Office charged Williams with all six murders, and White was the key prosecution witness at each trial. The Genrette and Graham murders were tried first. White and another co-conspirator testified against Williams in the Genrette case, and White testified again in the Graham case. Neither the Genrette nor the Graham juries were persuaded by the prosecution's case, and Williams was acquitted of both murders.

Despite two acquittals, the Office proceeded to try Williams and Coulston for the Haynesworth murder and Williams and Wilson for the triple murders. **ADA David Desiderio** tried both cases.

The Haynesworth Murder Trial

ADA Desiderio relied extensively on testimony from White and Salaam, who testified in exchange for pleading guilty to third-degree murder in juvenile court and agreeing to remain under juvenile court supervision until she turned twenty-one. White and Salaam testified that they met with Williams to plan the crime. Salaam said she lured Haynesworth to an apartment where White, Williams, and Coulston were waiting. While testified that the three men tied up, blindfolded, and beat Haynesworth, by hitting him with a shotgun and hammer, kicking him in the stomach, and walking on his head. At some point, the group decided that they had to kill Haynesworth, and that Coulston should do it because Williams was worried his gun could be traced. The three men forced Haynesworth into his car, which White drove, while Williams followed behind in his own car. Once they arrived at the park, White drove the victim's car onto the grass, and Coulston shot him multiple times while he was in his car. All three men then returned to the apartment, where Salaam had been cleaning up evidence. Salaam testified that after the murder, Williams threatened to blow up her house if she talked about what happened.

ADA Desiderio also called David Lee to testify about buying guns for Williams—including the same type of gun that White claimed Williams was worried could be traced. Despite admitting to buying firearms for Williams, Lee did not have to plead guilty to any crime. Lee also testified that Williams had asked him about buying grenades, which tended to corroborate Salaam's testimony that Williams threatened to blow up her house. Notably, Lee's trial testimony was the first time he mentioned Williams' request for grenades—in prior to statements to police, Lee had never mentioned this. Moreover, at trial Lee had to be prompted by the prosecution about whether Williams ever requested grenades. On cross-examination, defense counsel highlighted Lee's failure to mention the request for grenades until trial, and the fact that he had to be prompted to do so by the prosecution. Lee denied that he had been coached to testify a certain way and claimed that he had never even met **ADA Desiderio** until he began preparing for the Haynesworth trial.

In January 1992, Williams and Coulston were convicted of first-degree murder and sentenced to life without the possibility of parole.

The Triple Murders Trial

The Office tried the triple murder case next. Once again, **ADA Desiderio** relied on White, who provided the sole account of the triple murders. He testified that Williams lured the victims to Philadelphia under the guise of selling them guns when he really planned to rob them. White testified that Williams told him to steal a van that could be used in the crime, and that Williams dipped into his own stash of firearms to give guns to White and other unknown gang members.

White testified that he, Williams, Wilson, and the other unknown gang members met the victims and held them at gunpoint while demanding cash. After one of the men gave them money, Williams demanded more, and he and other gang members left with one victim in the stolen van. When he returned, the victim was not with them, and one of the other gang members said Williams shot the victim in the head. Williams, White, and other gang members got into the van with the two remaining victims and drove around Philadelphia. As they were driving, White said Williams shot the smallest victim in the face before

tossing him out of the van while it was moving. White then saw Williams put his gun to the remaining victim's face, and he turned away as he heard two gunshots and the van's back door open. When he turned around, the victim was gone. White assumed that this victim was also thrown out of the van.

As in the first trial, Lee testified about selling firearms to Williams and Wilson (who was Lee's nephew). Lee also testified that he was not expecting and was not promised any benefit in exchange for his cooperation. On cross-examination, he claimed he was a tree surgeon who was "squeaky clean"[327] and did "not even ha[ve] a parking ticket…."[328] **ADA Desiderio** did not ask Lee any follow-up questions or otherwise seek to clarify any aspect of Lee's testimony.

In August 1993, Williams and Wilson were convicted of first-degree murder. Williams was sentenced to death, while Wilson was sentenced to life imprisonment.

Williams Wins His PCRA Petition

Williams filed a PCRA petition for a new trial in the triple murders case on the grounds that White's testimony was contradicted by scientific and forensic evidence, and that defense counsel was ineffective for failing to call any witnesses to rebut White. The PCRA court reviewed the scientific and forensic evidence and compared it to White's testimony. After finding that "a jury could readily find from this evidence that White lied at trial,"[329] it vacated Williams' conviction in the triple murders case.

The Law Division appealed the ruling to the Pennsylvania Supreme Court, which upheld the PCRA court's ruling. The court criticized the Office for relying on White when his description of the triple murders clearly contradicted the other evidence. For instance, White testified that he saw Williams shoot one of the victims in the face, but none of the victims had gunshot wounds to the front of their faces. White also testified that two victims were killed and then thrown from the van while it was moving, but blood spatter and blood pattern evidence, as well as the victims' body positions, were consistent with the victims being killed where they were found. Nor did any of the victims have scrapes or abrasions on their bodies or tears or scuffs on their clothing consistent with being thrown from a moving vehicle. The court also pointed out White's "numerous, conflicting statements"[330] about "various crimes that he purportedly witnessed,"[331] including "one highly detailed statement"[332] where he "falsely implicated Williams as the perpetrator of another murder,"[333] and observed that although White was the prosecution's "key witness and central"[334] to the case, his credibility was "dubious at best."[335]

The Office Prepares to Retry Williams for the Triple Murders

After Williams won a new trial and before the CIU became involved, the Homicide Unit was preparing to retry Williams. During pretrial discovery, defense counsel requested information on Lee's cooperation in two prior murder cases against Alfie Coats. The Office responded that Lee had never cooperated against Coats and was at most just an eyewitness in the two cases. For instance, **ADA Bridget Kirn** stated that she "reviewed the Alfie Coats material,"[336] and that "Lee was not involved in the investigation into the [second murder],"[337] and that the second murder trial "did not involve…Lee at all."[338] **ADA Kirn** also told defense counsel that Lee was only an "eyewitness" to the second murder,[339] and she repeated these representations in pretrial filings.

When the trial court ordered a hearing on Williams' discovery requests, **ADA Alisa Shver** represented that **ADA Kirn** had "previously twice gone through all of the boxes"[340] on Coats' two prosecutions, and that she, too, had "personally went through

327. CIU Wilson Joint Stipulations at 17, ¶ 94.
328. *Id.*
329. Williams PCRA Opinion at 38.
330. *Williams,* 636 Pa. at 147.
331. *Id.*
332. *Id.*
333. *Williams,* 636 Pa. at 147.
334. *Id.* at 146.
335. *Id.* at 147.
336. CIU Wilson Joint Stipulations at 17, ¶ 97.
337. *Id.* at ¶ 98.
338. *Id.*
339. *Id.* at 17, ¶ 100.
340. *Id.* at 17-18, ¶ 102.

each and every box of files that we have…."[341] **ADA Shver** stated that, based on this review, Lee was only involved in one of Coats' prosecutions, and she described him as just a witness in that case. She also represented that "Lee never really actually testified on anything"[342] in Coats' second prosecution.

The Law Division Opposes Wilson's PCRA Petition

While Williams awaited retrial, Wilson filed a PCRA petition for a new trial based in part on the prosecution's failure to disclose favorable information about Lee's prior cooperation in the Coats cases. **Law Division ADA Laurie Williamson** opposed the petition. In a letter brief to the court, she evaluated Wilson's *Brady* allegations regarding White and Lee and argued that none of this information *independently* met *Brady*'s materiality standard.

The CIU Investigation: Williams' and Wilson's Convictions

Before Williams' retrial started and while Wilson's PCRA petition was pending, the CIU agreed to investigate their convictions for the triple murders. The investigation uncovered a host of favorable information that was never disclosed to defense counsel, including (i) information that contradicted White's account of the triple murder, (ii) information pointing to alternate suspects in the triple murders, and (iii) information that Lee cooperated in two murder trials and avoided charges for his role in those murders. These categories are discussed below.

First, the prosecution suppressed information that contradicted White's account of the triple murders. For instance, a gas station employee called 911 to report that an unknown witness told him they saw a man get shot in the same area where one of the Anderson brothers was found. Notably, the witness did not describe the man as having been thrown from a moving vehicle. A second witness told police they saw one of the victims arguing with another man, and it looked like the man was going to hit the victim until he realized he was being watched. When he realized this, he put his arm around the victim, and the witness saw them walk away together. Police showed this witness a photograph of a man who was at the scene when this victim's body was found and who lived at a residence near where the victim was found. The witness identified the photograph as showing the man she saw arguing with the victim and then walking away with him. A third witness told police she was walking near where one of the victims was found and heard four gunshots but no vehicle noises.

The prosecution also suppressed information about different alternate suspects whom police had investigated and who had motive to commit the triple murders—including "Steplight," who police described as the "prime suspect." Police had information suggesting that, in the months before their deaths, Reynolds and the Anderson brothers were in an escalating drug dispute with Steplight, because had allegedly taken over a business the victims used as a drug front, and Reynolds and the Anderson brothers had retaliated by robbing Steplight's stash house at gunpoint and assaulting the people inside. According to people who knew them, Reynolds and the Anderson brothers were known as "the stick up boys."[343]

Police called Steplight the "prime suspect"[344] in the triple murders and convened a task force to investigate him. They conducted background searches on Steplight and his associates, identified his residences and businesses, and interviewed his employees.[345] Police also asked one of the victim's girlfriends to look at photographs and identify Steplight's associates. One of the associates she identified turned out to be the subject of an anonymous tip sent to the police. This tip said that the associate knew about or participated in the triple murders. In fact, police had interviewed this associate, and although he had no alibi, they did not investigate him further. Police also interviewed a second associate who used to work for Steplight and who was one of the last people to be seen with the victims. After the triple murders, this associate somehow came into possession of one of the victim's belongings, which he turned over to police. However, his explanation for how he came to possess these items contradicted other witnesses' accounts of what happened.

341. *Id.*

342. *Id.* at ¶ 103.

343. CIU Wilson Joint Stipulations, at 9, ¶ 44.

344. *Id.* at 10, ¶¶ 47.

345. During pretrial discovery, the prosecution did not disclose records regarding one of Steplight's employees and then made an incomplete disclosure when they disclosed an interview with another employee but omitted Steplight's connection to the store where the employee worked. *See id.* at 11, ¶ 56.

Separately, police also received information suggesting that the murders were drug-related. A confidential informant passed on a tip that a Junior Black Mafia ("JBM") gang member known as "Q" was claiming credit for the triple murders. Q said he retaliated against the victims because they had begun working with a rival drug operation that was competing with JBM. Q was known to drive a Cadillac, which was the same type of car seen by a witness in the area where one of the victims was found.

The victims' friends and family also told police that the victims were likely killed over drugs or other illegal conduct. The father of the Anderson brothers told police he heard a rumor that Reynolds had robbed a man and the man's brother was looking to exact revenge for the robbery. A friend of the Anderson brothers told police she heard a similar rumor: she said that someone called her the day after the murders and told her that the killings were result of the victims' own behavior. Finally, a girlfriend of one of the Anderson brothers told police that they were involved in robbing drug stash houses, and that they had robbed one house on the same day that a mutual friend was murdered outside of the house.

The CIU also investigated Lee's prior cooperation, which included reviewing the Alfie Coats files—which were the same materials that **ADAs Kirn** and **Shver** reviewed when they prepared to retry Williams. The files showed that Lee was involved in the two murders for which Coats was prosecuted, but that Lee was never charged for his role in these offenses, likely because he agreed to cooperate. For instance, in the first murder committed by Coats, Lee was driving Coats when he shot the victim, and Lee later removed shell casings and live ammunition from the car, which he turned over to police. In the second murder committed by Coats, the victim was shot in front of Lee's house, and the victim's brother was overheard screaming, "Lee, you didn't have to do this. You could have had your money any time, you didn't have to do this."[346] Lee later admitted that the victim owed Coats money, and that in the weeks before the murder, Coats ordered Lee to take the victim to get cash so Coats could be repaid. None of this information was disclosed to defense counsel, either before the initial trials or during pretrial discovery for Williams' retrial.

The CIU also found information suggesting that Lee was involved in both murder trials as a cooperating witness. The CIU found that Lee had testified against Coats at the preliminary hearings in both murder cases, and that he was prepared to testify against Coats had the first murder case gone to trial. Instead, Coats pled guilty, and **ADA Desiderio**—the same prosecutor who tried Williams, Coulston, and Wilson—handled the plea hearing. According to the transcript for Coats' plea hearing, **ADA Desiderio** told the court that, had the case gone to trial, the prosecution was prepared to call Lee as a witness to testify against Coats. This plea hearing occurred before the Haynesworth and triple murder trials, which meant that **ADA Desiderio** was familiar with Lee by the time he was called as a witness against Williams, Coulston, and Wilson—and knew or should have known that Lee's trial testimony about his own background was false and misleading.

The CIU also found that Lee gave false and misleading testimony when he claimed to be squeaky clean and without so much as a parking ticket, and that he did not expect any benefit for testifying. Contrary to his testimony, the CIU found that the evidence in the Coats cases suggested that Lee was involved in two murders and apparently avoided being charged because he cooperated and testified against Coats—which in turn suggested that he received a substantial benefit for his testimony and could have hoped to receive additional benefits in the future in exchange for his cooperation.

Based on their review of the Coats' materials, the CIU also scrutinized the representations made by **ADAs Kirn** and **Shver** during pretrial discovery proceedings. Specifically, the CIU was critical of **ADAs Kirn** and **Shver's** representations that they reviewed the entirety of the Coats materials and that nothing suggested that Lee was anything more than a witness in one of Coats' cases, given that (i) the underlying facts of both murders, including Lee's own statements to police, suggested his involvement, and (ii) Lee did in fact testify against Coats in both cases.

Lastly, the CIU reviewed the Law Division's filings in Wilson's PCRA proceedings and learned that the Law Division had a prior practice of routinely denying *Brady* violations without first reviewing the DAO trial file or H-File to confirm whether these denials were accurate or had any basis in fact, and that this practice was in place during Wilson's proceedings.[347] Relatedly,

346. *Id.* at 15, ¶ 85.

347. This practice, which was sanctioned by prior DAO leadership, has since ended, and the Office is trying to educate ADAs about the ongoing nature of their legal and ethical obligations to find and disclose favorable information, including by implementing open file policies.

the CIU reviewed **ADA Williamson's** letter brief[348] and found that she had applied the wrong legal standard for *Brady*: **ADA Williamson** had independently analyzed each item of favorable information against *Brady*'s standard for materiality, when the Supreme Court instructed that materiality required a collective assessment of the suppressed evidence. Relatedly, the CIU found that **ADA Williamson** also failed to cite or disclose any of the exculpatory information that the CIU subsequently found in the DAO trial file. The CIU found that the Law Division response did not satisfy its "duty to learn of any favorable evidence … prior to submitting"[349] its briefing. Accordingly, the CIU moved to withdraw **ADA Williamson's** letter brief.

Wilson's Defense Counsel Failed to Impeach Lee

ADA Desiderio was not the only attorney at trial who knew or should have known about Lee's cooperation against Coats. **Former ADA Jack McMahon** was Wilson's defense counsel at the triple murders trial, and when he was an ADA in the Office, he personally prosecuted Coats for the second murder—in which Lee testified at the preliminary hearing. During the triple murders trial, **McMahon** did not cross-examine Lee about his prior cooperation with the prosecution. Nor did **ADA Desiderio** notify the court about **McMahon's** prior involvement in a case involving Lee. For his part, **McMahon** said he had no recollection of David Lee, telling the Philadelphia Inquirer that he "never heard that name in my life."[350]

Williams and Wilson are Exonerated

Based on its investigation, the CIU moved to dismiss the charges against Williams and to vacate Wilson's conviction and dismiss the charges against him. The CIU concluded that the prosecution "plainly did not satisfy its 'duty to learn of any favorable evidence'" [351] in Williams' and Wilson's cases. Williams was exonerated in 2019, and Wilson was exonerated in 2020.

The CIU Investigation: Williams' and Coulston's Convictions

After finding that James White gave false statements about the triple murders and made false accusations against Williams and Wilson, the CIU agreed to investigate Williams and Coulston's convictions in the Haynesworth case because White was also a key witness in that case. This investigation yielded similar findings: (i) White falsely accused Williams and Coulston of murder and likely fabricated his account of Haynesworth's murder; (ii) the prosecution did not disclose favorable information that undercut White's account of the murder, and (iii) the prosecution did not disclose Lee's involvement in the two Coats murders, and failed to correct Lee's false and misleading testimony.

As in the triple murders, the CIU found that the forensic and physical evidence contradicted White's account of the crime. For instance, White said Haynesworth was beaten in the stomach and torso and his face was walked on. However, the autopsy report found no evidence of injuries to his scalp, forehead, face, neck, or midsection, aside from gunshot wounds. The dried grass on Haynesworth's face and clothing, including over his gunshot wounds, also contradicted White's account of the victim being beaten in the apartment and then shot inside his car. White also said that Haynesworth's hands were tied behind his back and his feet were loosely bound so that he could walk, but police testimony and photographs showed his hands were bound in front of him and that his foot bindings were much tighter. Finally, White said Williams did not pull off the road onto the grass during the shooting, but there were tire impressions next to the victim's car that did not match either the victim's or Williams' car, and White never mentioned any other car in his statements.

The CIU also reviewed White's statements about Haynesworth's murder and found that he gave multiple inconsistent statements about what happened—none of which was disclosed to defense counsel. In one statement, he said Williams shot Haynesworth in the apartment, and that he and Salaam left while Williams and another unknown man stayed behind. In another statement, White said that a different girl (not Salaam) lured Haynesworth to a different apartment, where two men beat him up. In that statement, White said one man shot Haynesworth in the body, and Williams shot him in the face. The CIU also noted that neither statement mentioned Coulston at all, and both statements conflicted with what White eventually testified to at trial.

CIU prosecutors also confirmed that, as in the triple murders trial, (i) the prosecution did not disclose Lee's involvement in the two Coats murders or his cooperation in those cases, and (ii) Lee gave false and misleading trial testimony, which the

348. The letter brief was subsequently withdrawn. *See* CIU Wilson Answer at 29, ¶ 96 n. 18.

349. *See* CIU Wilson Answer at 29, ¶ 96 n. 18.

350. McMahon recalled his defense of Wilson but had no recollection of David Lee. *See* Melamed, "A Brutal Triple Murder."

351. CIU Wilson Answer at 28-29, ¶ 96, n. 18.

prosecution failed to correct. As previously noted, when defense counsel tried to show that Lee's trial testimony was coached by the prosecution, he responded that he only just met **ADA Desiderio** before the Haynesworth trial started. **ADA Desiderio** did not ask Lee to clarify this aspect of his testimony, and during closing arguments he emphasized that Lee was a credible, neutral witness without any motive to lie or curry favor, and that the defense did not "have any quarrel with"[352] Lee. However, the CIU had previously determined that **ADA Desiderio** handled one of Coats' murder prosecutions in which Lee was scheduled to testify for the prosecution, and which took place before the Haynesworth trial. Given **ADA Desiderio's** involvement in that case, CIU prosecutors found it unlikely that the first time the two men met was during preparation for the Haynesworth case.

Williams and Coulston are Exonerated

In 2021, Williams' and Coulston's convictions were vacated and the charges against them were dismissed. Philadelphia Court of Common Pleas Judge Tracy Brandeis-Roman called the case against Williams "mind-boggling."[353] CIU Supervisor Patricia Cummings echoed this sentiment, noting that while even she had some "cynicism"[354] that one person could be wrongfully convicted twice, it turned out that "lightning did strike twice."[355]

After his release, Williams filed a civil lawsuit against the city. In December 2022, Williams was driving in a funeral procession for Tyree Little, another formerly incarcerated man, when he was shot and killed.

Coulston's conviction was also vacated. However, he was not eligible for immediate release, because while he was incarcerated on his wrongful conviction, he was convicted of assaulting another incarcerated person, which carried a mandatory life sentence. The Abolitionist Law Center successfully petitioned to vacate the life sentence for this prison assault conviction, and Coulston was resentenced to 10-to-20 years' imprisonment. He became eligible for parole in October 2022.

Kareem Johnson (2020)[356]

In 2007, Kareem Johnson was convicted of first-degree murder and sentenced to death. During PCRA proceedings, counsel discovered that the prosecution had misunderstood its own evidence, and that as a result they presented false testimony and false evidence at trial. Specifically, the prosecution's trial theory was that a red baseball cap found at the crime scene contained both Johnson's sweat DNA on the inside band and the victim's blood on the brim of the cap, which meant that Johnson must have shot the victim at such close range that blood spattered onto the cap he was wearing. However, counsel later discovered that there were two different caps found at the crime scene—the red cap, which had Johnson's sweat DNA on it, and a black cap, which had the victim's blood spatter on it. The Office conceded that Johnson was entitled to a new trial based on this error. Johnson then moved to prohibit a retrial pursuant to Double Jeopardy. The trial court held a hearing on Johnson's motion before denying relief. Johnson's Double Jeopardy motion was eventually heard by the Pennsylvania Supreme Court, which granted the motion and prevented the prosecution from retrying Johnson. Johnson remains incarcerated on a separate conviction.

The Criminal Investigation

In December 2002, Walter Smith was shot to death outside a Philadelphia bar. Right before he was shot, he was getting into his car with Debbie Williams, when someone wearing red clothing and a baseball cap ran past her and began shooting. Police recovered a red baseball cap next to Smith's body, and crime scene investigator Officer William Trenwith logged the red cap as evidence and assigned it a property receipt with a unique identification number. Officer Trenwith also detailed the recovery of the red cap in a crime scene report. When he wrote his report, Officer Trenwith did not mention seeing any fresh blood on the red cap, and he did not photograph the red cap.

352. CIU Williams Joint Stipulations, at 16, ¶ 90.

353. "Christopher Williams," NRE.

354. Melamed, "A Perfect Storm of Injustice."

355. *Id.*

356. The information in this section is taken from various sources. *See, e.g., Comm. v. Johnson*, 927 EDA 2016, 2018 WL 3133226 (Pa. Sup. Ct. June 27, 2018); *Comm. v. Johnson*, 231 A.3d 807 (Pa. 2020); Br. for Appellant ("Johnson SCOPA Brief"), *Comm. v. Johnson*, 927 EDA 2016, 2017 WL 8676465 (Pa. Sup. Ct. Feb. 24, 2017); Comm. Br. for Appellee, *Comm. v. Johnson*, 927 EDA 2016, 2017 WL 8676466 (Pa. Sup. Ct. July 31, 2017); Reply for Appellant, *Comm. v. Johnson*, 927 EDA 2016, 2017 WL 8676467 (Pa. Sup. Ct. Aug. 10, 2017); Comm. Sur-Reply, *Comm. v. Johnson*, 927 EDA 2016, 2017 WL 8676468 (Pa. Sup. Ct. Sept. 8, 2017); Br. for Appellant, *Comm. v. Johnson*, 40 EAP 2018, 2019 WL 4575765 (Pa. Feb. 19, 2019); Br. for Appellee, *Comm. v. Johnson*, 40 EAP 2018, 2019 WL 4675291 (Pa. June 12, 2019); Reply for Appellant, *Comm. v. Johnson*, 40 EAP 2018, 2019 WL 4575764 (Pa. July 15, 2019); "Kareem Johnson," National Registry of Exonerations; Joseph Slobodzian, "D.A. Drops Death Penalty in 2002 Murder Retrial," Philadelphia Inquirer, Feb. 16, 2016.

After Smith's murder, Williams spoke with police and gave them Smith's black baseball cap, which she had picked up from near his body after the shooting. The black cap had a bullet hole in it. Police logged the black cap into evidence and assigned it a property receipt with a unique identification number that was different from the red cap's number, and the black cap was submitted to the crime lab for testing. The black cap later tested positive for Smith's blood under the brim.

The case went cold until a jailhouse informant told police that Johnson was involved in Smith's murder. Based on this information, police took Johnson's DNA sample and submitted it with the red cap for DNA testing. Test results later showed that Johnson's sweat DNA was found on the inner band of the red cap, and he was eventually arrested and charged with Smith's murder.

The Trial

Johnson went to trial in 2007, and **ADA Michael Barry** prosecuted the case and sought the death penalty. The prosecution's trial theory was that the red cap found at the scene proved Johnson's guilt, because it contained both his sweat DNA on the inner band and the victim's blood spatter on the underside of the brim. According to **ADA Barry**, this meant that Johnson was wearing the red cap and that he must have "got in real close"[357] to shoot the victim, which led to the victim's blood spattering back onto the red cap. He also argued that the physical evidence recovered from the red cap told a compelling and truthful story about the murder, because unlike an eyewitness, "physical evidence has no bias,"[358] and "physical evidence cannot lie… it says what it says."[359]

Officer Trenwith testified about finding the red cap at the crime scene and seeing fresh specks of blood on the underside of the brim, and he also testified that he had never seen blood travel so far from a victim to an assailant, implying that Johnson must have shot the victim at very close range. Lab scientist Lori Wisniewski testified about the DNA testing she performed, and that she found Johnson's DNA and the victim's blood on "the hat."[360] The jailhouse informant also testified about hearing Johnson's alleged confession to the crime.

Johnson was convicted of first-degree murder and sentenced to death.

The Commonwealth Misunderstood its Own Evidence

Johnson filed a PCRA petition for a new trial, and his counsel also filed an open-records request from the criminalistics lab. The lab generated a criminalistics report,[361] which detailed the items of physical evidence submitted to the lab for testing and the results of those tests. The criminalistics report revealed that the prosecution misunderstood its own evidence and offered false and misleading evidence at Johnson's trial. According to the report, two different caps were recovered from the crime scene—a red cap and a black cap. The lab tested both caps and found Johnson's sweat DNA on the red cap, while it found the victim's blood on the brim of the black cap. In other words, there was never a single cap that had both Johnson and the victim's DNA on it. Although Johnson's counsel had requested the report, for unknown reasons the criminalistics lab only mailed copies to the Homicide Units at the Philadelphia Police Department and the DAO—Johnson's counsel did not receive a copy.

In the interim, Johnson's counsel requested discovery on all information relating to the DNA evidence presented at trial. Roughly sixteen months after the criminalistics report was mailed to the DAO, **Law Division ADA Tracy Kavanaugh** opposed this request, calling it a "clear fishing expedition"[362] to "attempt to locate evidence"[363] to see if there was any basis to make a "speculative, as-yet-unbrought"[364] claim relating to "hypothetical exculpatory evidence regarding the DNA evidence."[365] **ADA Kavanaugh** objections were eventually overruled, and Johnson's counsel was given a copy of the criminalistics report.

After reviewing the criminalistics report, Johnson's counsel realized that the prosecution misunderstood and misstated its own evidence at Johnson's trial. Counsel eventually sought to bar retrial, and the trial court held an evidentiary hearing on the issue. At the hearing, none of the Commonwealth witnesses could recall how the prosecution came to (wrongly) believe that

357. *Johnson*, 231 A.3d at 812 (citing trial transcript).
358. *Id.* at 813.
359. *Id.*
360. *Id.* at 812.
361. A criminalistics report is generated by the criminalistics lab and contains a list of the items of physical evidence tested and the results of those tests. *See id.* at 812 n. 3.
362. Johnson SCOPA Brief at 12.
363. *Id.*
364. *Id.*
365. *Id.*

the red cap also had the victim's blood on it. **ADA Barry** testified that he learned that a cap had blood on it during a conversation with Officer Trenwith and lab analyst Wisniewski. However, he could not recall who told him that it was the *red cap* that had the victim's blood on it. **ADA Barry** also acknowledged that he did not realize that there were two unique property receipts for two different caps in the PAS, and police documents, and in the criminalistics lab's DNA reports, which would have put him on notice that there were two different caps. He also acknowledged that the crime scene reports and photographs of the red cap did not mention or show any blood.

Detective James Burns testified that he also could not recall who told him the blood was found on the red cap, and he acknowledged that nothing in the police file indicated that the red cap had blood on it. Officer Trenwith testified about his crime scene investigation and trial testimony, admitting that when he testified at trial about finding blood on the red cap, he "was going on the assumption, which I shouldn't have done, that there was, in fact, blood on it,"[366] and he admitted that his report did not state that there were "actual drops of blood."[367] Officer Trenwith traced this (mis)assumption about the red cap to Johnson's preliminary hearing, where a lab technician testified that blood stains were found on *a cap*—which turned out to be the black cap.

The witnesses were also asked about the criminalistics report that the lab mailed to the police department and DAO. **ADA Barry,** Detective Burns, and **ADA Kavanaugh** all testified that they never received or saw a copy of the criminalistics report. **ADA Kavanaugh** also testified that when she opposed Johnson's discovery request and referred to "hypothetical exculpatory evidence,"[368] she did not know about the criminalistics report, and she further testified that the first time she saw it was when defense counsel attached it to a discovery petition.

The Prosecution's "Unimaginable" Mistakes

At the conclusion of the hearing, the trial court harshly criticized the Commonwealth's investigation and prosecution of the case. He questioned why the Office would rush into a death penalty trial without first requesting a criminalistics report, calling the decision to push forward "more than negligence,"[369] and "extremely negligent, perhaps even reckless."[370] The court was also skeptical of any "that's the way we used to do it back then"[371] attitude, because that attitude and approach to cases had led to a "huge slew of reversals of convictions and death penalties," and because "the way we used to do it back then was, in fact, intolerable then and [is] still intolerable now."[372]

The court also levied specific criticisms against the prosecution team, finding **ADA Barry's** handling of the evidence to be "intolerable."[373] The court also directly addressed Officer Trenwith, who was present for the ruling, stating that he was "100 percent certain"[374] that Officer Trenwith" did not see "fresh drops of blood,"[375] because if he had then there would have been "a lot more evidence with regard to that cap and a lot more detail in the property receipt...."[376]

However, the court also said that Pennsylvania's Double Jeopardy clause prohibited retrial only where there was intentional misconduct or bad faith by the prosecution, and he did not believe **ADA Barry's** errors met this standard. In fact, the court credited **ADA Barry's** testimony, describing him as an "experienced fine prosecutor"[377] who made a "gross series of almost unimaginable mistakes,"[378] which rendered the trial a

366. *Id.* at 7 (citing PCRA hearing testimony).
367. *Id.*
368. Johnson SCOPA Brief at 12.
369. *Johnson*, 231 A.3d at 815.
370. *Id.*
371. Johnson SCOPA Brief at 13 (citing hearing transcript).
372. *Id.*
373. *Johnson*, 231 A.3d at 815.
374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*

"farce."[379] Accordingly, he denied the Double Jeopardy motion. On appeal, the Pennsylvania Superior Court affirmed the ruling. While it found the Commonwealth's conduct "intolerable"[380]—it wrote that it was "being generous"[381] in describing the Commonwealth's mistake as "egregious"[382]—and noted that the "lack of preparation and resultant misrepresentation about the physical evidence"[383] turned the trial into a farce, it did not prohibit retrial. Instead, it held that none of the errors rose to the level of intentional misconduct—which was the standard of conduct that triggered Double Jeopardy.

Reckless Disregard for Johnson's Right to a Fair Trial

Johnson appealed to the Pennsylvania Supreme Court. **Law Division ADA Jessica Attie Gurvich,** and Law Division supervisors **Lawrence Goode, Paul George, Nancy Winkelman,** filed briefing opposing the appeal, which was also signed by **DA Krasner**. **ADA Gurvich** argued that, despite the serious errors made in the first prosecution, the Office should not be prevented from retrying Johnson because the Double Jeopardy clause did not apply to negligent or reckless misconduct.

The Pennsylvania Supreme Court disagreed and expanded the state Double Jeopardy clause to encompass prosecutorial conduct that was taken recklessly—that is, with a "conscious disregard for a substantial risk"[384] that a defendant would be deprived of the right to a fair trial. In then held that the Commonwealth was prohibited from retrying Johnson. In applying this new articulation of the Double Jeopardy clause to the facts of Johnon's case, the state high court found that **ADA Barry** made "almost unimaginable mistakes"[385] that "dovetailed"[386] with other serious errors made by law enforcement and police personnel. Focusing on Officer Trenwith, the court wrote that it "cannot escape the conclusion that [Trenwith] testified to something *that he did not actually observe*...."[387] The Pennsylvania Supreme Court found that these mistakes, when viewed collectively, suggested a reckless disregard for Johnson's right to a fair trial. Accordingly, the court reversed the Superior Court's judgment and prohibited Johnson from being retried.

Johnson remains in prison serving a life sentence for a separate murder.

Walter Ogrod (2020)[388]

Walter Ogrod was tried twice for murder and other crimes. After his first trial ended in a mistrial, he was convicted at his retrial. The CIU agreed to investigate Ogrod's conviction because of Detectives Martin Devlin and Paul Worrell's involvement in the investigation, and because of Ogrod's claim of actual innocence. The CIU found a host of favorable information that was not disclosed, including information that conflicted with the prosecution's theory of the crime, as well as substantial impeachment information about two jailhouse informants who claimed Ogrod confessed to them while he was awaiting retrial. The CIU agreed to vacate Ogrod's conviction in February 2020, and the charges against him were dismissed shortly thereafter.

The Criminal Investigation

In 1988, four-year-old Barbara Jean Horn's body was found inside an empty cardboard box on a Philadelphia street. She had head wounds and bruising, and her body was unclothed and wrapped in plastic. At least five witnesses reported seeing a man carrying or dragging the box in which her body was found, but no one recognized him. The case drew substantial media attention, and facts about the murder were widely reported. Despite this coverage and a tip line dedicated to the case, it

379. *Id*.

380. *Johnson*, 2018 WL 3133226, at *5.

381. *Id*.

382. *Id*.

383. *Id*.

384. *Johnson*, 231 A.3d at 826.

385. *Id*.

386. *Id*.

387. *Id*. at 827 (emphasis supplied).

388. The information in this section is taken from various sources. *See, e.g.*, Comm. Mot. to Dismiss ("Law Division Motion to Dismiss"), CP-51-CR-05322781-1992, *Comm. v. Ogrod* (Phila. Ct. Comm. Pl. Apr. 4, 2013); Comm. Answer to Pet. for Post-Conviction Relief ("CIU Ogrod Answer"), *Comm. v. Ogrod*, CP-51-CR-0532781-1992 (Phila. Ct. Comm. Pl. Feb. 28, 2020); Joint Stipulations of Fact of Pet'r Walter Ogrod and Resp't Comm. of Pennsylvania ("Ogrod CIU Joint Stipulations"), *Comm. v. Ogrod*, CP-51-CR-0532781-1992 (Phila. Ct. Comm. Pl. Feb. 28, 2020); "Walter Ogrod," National Registry of Exonerations; Robert Moran "Philly Agrees to $9.1 Million Settlement for Man Exonerated in 1988 Slaying of 4-Year-Old Girl," Philadelphia Inquirer, Nov. 4, 2023.

went cold until 1992, when police arrested Walter Ogrod. At the time of her murder, Ogrod lived across the street from Barbara Jean and her family.

Ogrod was arrested after he voluntarily accompanied Detectives Devlin and Worrell to the police station for an interview. At the time he met with police, Ogrod had finished an all-night, 18-hour shift driving a delivery truck and had been awake for nearly 30 hours. According to the confession obtained by the detectives, Ogrod lured Barbara Jean to his basement and tried to sexually assault her. When she resisted, Ogrod hit her on the head with a weight bar from some gym equipment that was in his basement.[389] Ogrod said he then exited the basement via a door that opened to the garage, got a trash bag, and took the victim's body out through the basement door, hiding her in the garage until he ultimately disposed of her body. Ogrod's confession was not audio- or video-recorded, and the detectives claimed that their handwritten statement was a word-for-word transcription of his confession.

The First Trial

Ogrod's first trial began in 1993, and **ADA Joseph Casey** prosecuted the case. Ogrod testified in his own defense, telling the jury that he was coerced into confessing. He said the detectives confronted him with photographs of the victim and told him he had a mental block about committing the murder, and that they closed the door to the interview room and blocked him from leaving.

The jury in the first trial returned a verdict of "not guilty," but as the trial judge announced the acquittal, a juror blurted out that they did not agree with the verdict. Accordingly, a mistrial was declared instead.

The Retrial

The Office retried Ogrod in 1996. This time, **ADA Judy Rubino** prosecuted the case. She presented testimony from Dr. Lucy Rorke, a forensic neuropathologist, that the victim's head injuries caused brain swelling and were consistent with being hit by a heavy object. However, when asked whether she could determine the cause of death, Dr. Rorke stopped short of concluding that these injuries caused Barbara Jean's death. Dr. Rorke also testified that she did not see any evidence of possible suffocation, and that if suffocation occurred, she would have expected to see changes in color intensity in the brain, depending on how long the brain was deprived of oxygen.

ADA Rubino also presented new evidencein the form of a jailhouse confession Ogrod allegedly made to Jay Wolchansky and John Hall, both of whom were detained at the same jail as Ogrod while he awaited retrial. According to the two men, Ogrod admitted to the murder and to threatening his own mother when she accused him of the crime. Although both men heard the confession, only Wolchansky was called as a witness, and he testified under the alias "Jason Banachowski." Wolchansky claimed he was not given a deal in exchange for his testimony, and the prosecution argued that the only way Wolchansky could have obtained such detailed information about the crime was through Ogrod's confession.

Ogrod did not testify at his second trial. He was convicted of, among other things, first-degree murder and was sentenced to death.

The Law Division Aggressively Defends the Conviction

After his conviction, Ogrod filed a PCRA petition alleging, among other things, that the Office failed to disclose that (i) Wolchansky and Hall had a history of cooperation, including a previous "scheme" where they fabricated a jailhouse confession in another high-profile murder prosecution of David Dickson; (ii) Hall was a prolific informant with a lengthy history of cooperation in other cases; and (iii) at the time Wolchansky testified, he had mental health diagnoses that impacted his ability to accurately perceive and recall events. In support of his PCRA petition, Ogrod obtained an affidavit from Hall (who had since died), and Hall's wife, Phyllis, in which they both admitted that Hall made up the confession and "gave the story"[390] to Wolchansky, and that both Wolchansky and Hall were given secret sentencing reductions in exchange for their cooperation.

Law Division ADA Tracy Kavanaugh opposed the petition. She dismissed the substance of Hall's affidavit because he did not testify at trial—only Wolchansky did—and argued that Ogrod had not presented sufficient evidence to support his allegations. With respect to Wolchansky and Hall's prior cooperation, **ADA Kavanaugh** argued that trial counsel was aware of the two

389. Police knew that there was gym equipment in Ogrod's basement well before they interviewed Ogrod. Two years before her death, the Ogrod basement was the site of a separate homicide, and police took photographs of the basement, which included at least one picture of a weight machine and its pull-down weight bar. *See* Ogrod CIU Joint Stipulations at 11-12, ¶¶ 54-61.

390. Law Division Motion to Dismiss at 50.

men's prior cooperation, including in the Dickson case. She also argued that defense counsel knew about Wolchansky's mental health and substance abuse history, because they obtained Wolchansky's prison medical records before trial.

The PCRA petition was ultimately denied.

The CIU Investigation

When the CIU began its investigation, prosecutors reviewed the DAO trial file and the H-File and found a host of undisclosed favorable information that (i) undercut the prosecution's theory of the crime; (ii) supported Ogrod's claims that his confession was coerced; and (iii) undermined Wolchansky and Hall's credibility, including by suggesting that they engaged in a scheme to fabricate jailhouse confessions in the hopes of getting leniency for themselves.

First, the CIU found a crime scene report noting that the basement door to the garage had both an interior and exterior door, and that the interior door was nailed shut, with the top slide lock in place, while the exterior door was blocked by a large car transmission that had been pushed up against it. This report contradicted the prosecution's theory of the crime, not to mention Ogrod's confession, where he supposedly admitted to using that door to go back and forth between the basement and the garage to clean up evidence and hide the victim's body.

Second, CIU prosecutors found **ADA Rubino's** handwritten notes in the trial file, which referenced "asphyxiation,"[391] and noted that Ogrod "probably smothered [Barbara Jean.]."[392] The CIU showed a copy of these notes to **ADA Rubino,** and she identified them as hers and thought they were taken during a witness preparation session with Dr. Rorke. The CIU also found police notes in the trial file that had been taken contemporaneously with the autopsy, which indicated that the weapon used to inflict the head injuries were "probably 2x2 or a 2x4. Something lighter than a baseball bat or tire iron."[393] These documents contradicted the prosecution's evidence, including Dr. Rorke's testimony, that Barbara Jean was hit on the head with a weight bar and was not asphyxiated.

Third, the CIU found information that corroborated Ogrod's defense at his first trial, where he presented expert testimony that his personality left him susceptible to coercive interrogation tactics, and that the detectives tricked him into confessing. At the first trial, **ADA Casey** responded that Ogrod's confession was voluntary and that no one manipulated him. However, the CIU found a document, entitled "Supplemental Investigation of Walter J. Ogrod,"[394] in the DAO trial file, which summarized nine interviews of Ogrod's former teachers. Nearly all of them described him as "very passive"[395] and easily manipulated, due to his inability to make his own decisions and his desire to please and be accepted by his peers.

Fourth, Ogrod had claimed he was mistreated by detectives during his interrogation, and the CIU found evidence to corroborate his claims. The DAO trial file contained a letter from the attorney for Barbara Jean's family asking that police no longer contact the family directly because of mistreatment by Detectives Devlin and Worrell. The letter asserted that the family went to police headquarters under the guise of receiving an update on the investigation but were instead detained for over four hours, during which time they gave Barbara Jean's mother a polygraph and accused her of withholding information that her husband had killer Barbara Jean.

Finally, the CIU found a host of information that was not disclosed about Wolchansky and Hall and their history of colluding on jailhouse confessions. As a starting point, Hall was a well-known police informant nicknamed "Monsignor" [396] because he claimed to have heard so many jailhouse confessions. **ADA Rubino** was also aware of Hall's cooperation history: her handwritten notes in the DAO trial file listed Hall's cases where he cooperated, and he cooperated in another case she prosecuted.

When the CIU reviewed other files from the Office, they found indications that Hall was not viewed as a trustworthy source of information. For instance, ADA Mark McGovern dealt with Hall in a separate prosecution, and he told the media that Hall was "patently incredible"[397] and had made up conversations he claimed to have had with the defendant in ADA McGovern's case. Likewise, when ADA Carol Sweeney dealt with Hall, she

391. Ogrod CIU Joint Stipulations at 41, ¶ 221 (showing photocopy of ADA Rubino's notes).

392. *Id*.

393. *Id*. at 24, ¶ 123.

394. *Id*. at 42-43, ¶ 224.

395. *Id*. at 43, ¶ 226.

396. *Id*. at 38, ¶ 203.

397. *Id*. at 51, ¶ 281. ADA McGovern handled the Jean Claude Hill case, which, like Ogrod's case, was a high-profile one that garnered substantial media attention. *See id*. at 51, ¶ 275.

took handwritten notes, entitled "John Hall-errors,"[398] detailing several glaring falsehoods in the confession he supposedly heard from a defendant in ADA Sweeney's case.

As previously noted, Ogrod had obtained affidavits from both Hall (before his death) and his wife, Phyllis, detailing certain falsehoods about Ogrod's jailhouse confession. The CIU spoke with his wife to evaluate Hall's statements. She responded by turning over hundreds of letters Hall wrote to her detailing his "snitch scheme."[399] She also said she helped Hall with Ogrod's case by gathering information from newspaper articles and by impersonating another woman and writing directly to Ogrod while was in jail.

The CIU also found evidence that Hall and Wolchansky had colluded in another snitch scheme in a similar high profile murder case against David Dickson. The Dickson case bore similarities to Ogrod's, in that both Wolchansky and Hall claimed to have heard Dickson confess to the crime, and the Office initially called only Wolchansky to testify about the confession. However, at Dickson's trial Wolchansky testified that Dickson confessed to manually strangling the victim, while the medical examiner said the victim had been choked by a cord or wire. After the jury failed to return a verdict, the Office retried the case but swapped out Wolchansky for Hall, who testified in accordance with the medical examiner.

CIU prosecutors also found **ADA Rubino's** handwritten notes in the DAO trial file which indicated that Wolchansky was taking medication to manage schizophrenia and psychosis and was hearing voices, and that he was also using cocaine. When prosecutors searched other DAO files for information about Wolchansky's credibility, they found information indicating that Wolchansky had diagnoses that impacted his ability to perceive and truthfully recall events. In some of these other case files, **ADA Rubino's** colleagues also opined that Wolchansky may have been faking or overstating his mental health issues to get leniency. For instance, ADA Lyn Nichols wrote that Wolchansky was presenting a "bogus mental health defense"[400] in the case she was prosecuting. Notably, when Wolchansky testified at Ogrod's trial, he denied he had any mental health issues, and **ADA Rubino** did not ask him to clarify his testimony.

Lastly, the CIU also found information that undermined the substance of the jailhouse confession that Wolchansky and Hall claimed they heard, as well as Wolchansky's trial testimony, where he claimed that Ogrod admitted to threatening his mother because she accused him of murdering Barbara Jean. CIU prosecutors found a letter from Ogrod's mother to the Governor's Office seeking help for Ogrod. In her letter, she proclaimed Ogrod's innocence and explained his mental condition, accusing the detectives of mistreating her son.

The CIU's investigation and subsequent discovery of Wolchansky and Hall's "snitch scheme" led them to revisit the Law Division's motion to dismiss Ogrod's PCRA petition. As previously noted, **ADA Kavanaugh** had argued that the information about Wolchansky and Hall's cooperation had been disclosed and/or were known to defense counsel, and that Wolchansky's mental health diagnoses were turned over. The CIU moved to withdraw **ADA Kavanaugh's** filing after concluding that these "factual assertions"[401] about defense counsel's knowledge of Wolchansky and Hall's prior cooperation and Wolchansky's mental health history were "incorrect, incomplete, or misleading"[402] when compared to the CIU's investigative findings. Based on its investigation, the CIU also found that the Law Division [c]learly…did not review the entire prosecution file before including these factual assertions in its motion."[403] The CIU explained that this was indicative of a "practice sanctioned by the leadership of prior administrations,"[404] wherein the Law Division did not require its prosecutors to "review trial file boxes or make them available to defense counsel or the defendant for their review."[405]

Ogrod is Exonerated

Based on the information that was not disclosed in either of Ogrod's trials, the CIU moved to vacate Ogrod's conviction in 2020 and dismiss the charges against him shortly thereafter.

398. *Id.* at 51-52, ¶ 282-84.
399. CIU Ogrod Ans. at 29, ¶ 179.
400. Ogrod CIU Joint Stipulations at 48, ¶ 267.
401. CIU Ogrod Answer at 27-28, ¶ 171, n. 18.
402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*

In June 2021, Ogrod filed a civil rights lawsuit against the city and Detectives Devlin and Worrell. Two months later, the two detectives were indicted for misconduct stemming from their investigation of Anthony Wright. In November 2023, the city agreed to a $9.1 million settlement.

Andrew Swainson (2020)[406]

Andrew Swainson was convicted of first-degree murder and sentenced to life imprisonment. The CIU agreed to investigate Swainson's conviction based on his claim of actual innocence. The investigation found that the prosecution failed to disclose information about a cooperating witness, as well as information that contradicted their trial argument that Swainson fled Philadelphia to avoid prosecution. Based on these findings, in June 2020 the CIU agreed to vacate Swainson's conviction, and the charges against him were dismissed shortly thereafter.

The Criminal Investigation

In January 1988, Stanley Opher was shot and killed in front of a house in Philadelphia. Police arrested Paul Presley, Jeffrey Green, and Ashley Hines after they were found at or near the scene of the shooting. Presley and Green were arrested near the house. Police found Presley hiding in the bushes, and his hand was bleeding, and he had a lot of blood on his clothes. Hines was arrested after he was seen leaving the house. Police also searched the scene and recovered two firearms from near the house.

Detective Manuel Santiago investigated the murder. He interviewed Opher's friend, Jacqueline Morsell, who said that Opher sold drugs out of the house where he was killed, and that he and "Dred" had been in a dispute over money. Morsell also said Dred had a lot of guns. She said Green used to sell drugs at the house but now was a buyer. Morsell also mentioned Andrew Swainson as being involved in the drug business, but she did not mention his involvement in the murder. Police spoke with Swainson, who allowed detectives to photograph him and take his fingerprints. During this interaction, Detective Santiago never told Swainson that he was a suspect and never informed him that he should remain in the Philadelphia area during the investigation. Police also interviewed Hines and Green, neither of whom gave any information about the murder. For unknown reasons, police did not ask either Hines or Green to describe any of the people they saw on the street the night Opher was killed.

Three weeks after the murder, the Office dropped the charges against Presley, Green, and Hines. After his charges were dropped, Presley agreed to cooperate. He told police he had gone to the house to buy drugs and was on the porch when he saw two armed assailants chasing Opher down the stairs. Presley said he fought one of the men and fell. After the shooting, Presley said one of the assailants threw a bag as they fled, so he stopped to look inside and saw that it contained Opher's personal items. Presley gave a vague description of the first assailant and did not describe the second. After saying he could identify the shooter, Presley was shown a series of photographs and picked Swainson's photograph. Although Presley said he would be able to identify the second assailant, there is no indication police asked him to do so. Nor does it appear that police asked Presley if he knew anyone named "Dred." After police took Presley's formal statement, he signed a separate, handwritten confidence statement attesting to the accuracy of what he told police. This was not a common practice, and when Detective Santiago was later asked about it at a pretrial hearing, he claimed that he left Presley alone in the interrogation room, and when he returned Presley had written out the statement on his own, without anyone asking him to do so.

Police obtained an arrest warrant for Swainson, but when they went to find him, they learned from relatives that he had gone to Jamaica for a wedding. Detective Santiago subsequently deemed Swainson a fugitive and sought a warrant for Swainson's arrest for unlawful flight to avoid prosecution (UFAP). After Detective Santiago obtained the UFAP warrant, Swainson called Santiago to tell him that he was back from Jamaica and would be staying with his parents in the Bronx. At no time during the conversation did Detective Santiago tell Swainson he was a suspect or that there was a warrant for his arrest. However, he continued to treat Swainson as a fugitive and turned his case over to the Fugitive Squad, who arrested Swainson in New York.

406. The information in this section is taken from various sources. *See, e.g.,* Law Division Letter Re: Swainson PCRA Petition ("Law Division Letter"), *Comm. v. Swainson*, CP No. 51-CR-0431311-1988 (Phila. Ct. Comm. Pl. Apr. 14, 2016); Law Division Letter Re: Swainson PCRA Amendment ("Law Division Amendment Letter"), *Comm. v. Swainson*, CP No. 51-CR-0431311-1988 (Phila. Ct. Comm. Pl. Nov. 6, 2017); Joint Stipulations of Fact of Pet'r Andrew Swainson and Resp't Comm. of Pennsylvania ("CIU Swainson Joint Stipulations"), *Comm. v. Swainson,* CP-51-CR-0431311-1988, (Phila. Ct. Comm. Pl. Feb. 12, 2020); Comm. Answer to Am. Pet. for Post-Conviction Relief ("CIU Swainson Answer"), *Comm. v. Swainson*, CP-51-CR-0431311-1988 (Phila. Ct. Comm. Pl. Feb. 12, 2020); "Andrew Swainson," National Registry of Exonerations; Chris Palmer, "As Philly Judge Agreed to Overturn a Murder Conviction After 31 Years, the DA's Office Took Aim at the Justice System," Philadelphia Inquirer, June 12, 2020.

Upon his arrest, Swainson waived his *Miranda* rights and spoke with police. He said Opher was his friend, and that Opher and Dred lived together at the house, where both men sold drugs. On the night of the murder, Swainson said he stopped by the house, but no one answered, so he went out to a club. The next morning, he learned something had happened at the house. Swainson recalled hearing a rumor that the house was going to be robbed, so he called the person who told him this, and she informed Swainson that Opher had been killed.

The Trial

Swainson went to trial in 1989, and **ADA Judy Rubino** prosecuted the case. She argued that Swainson killed Opher after learning that Opher was trying to get out of the drug business, and she presented testimony from Morsell and Presley to prove her case. At trial, Morsell deviated from her police statement and testified that Swainson, and not Dred, had threatened Opher. By the time Presley testified at trial, he had recanted and unrecanted several times. For instance, at the preliminary hearing, he recanted and testified that Swainson was not the gunman, because Swainson was "red-skinned,"[407] while the gunman was "brown-skinned" and "darker complected."[408] Presley also went on to sign a defense affidavit where he again stated that Swainson was not the shooter, because the shooter was "much darker."[409] After these recantations, Presley met with Detective Santiago at the DAO. During this meeting, Presley claimed that he recanted at the preliminary hearing because he thought Swainson had him assaulted while he was in jail. Presley also said he signed the defense affidavit after being pressured into signing it.

At trial, Presley admitted that when he agreed to speak with police, he had been arrested and jailed for a misdemeanor drug possession charge. He also admitted that he had previously used aliases, but he did not mention specific aliases he had used. He also testified that he was not given any special benefits and was not promised anything in exchange for his cooperation. The prosecution did not ask him to clarify any aspect of this testimony.

Detective Santiago testified about Swainson's status as a fugitive, and Detective Michael Cohen of the Fugitive Squad testified that after Swainson spoke with police, he then traveled to Jamaica and New York, and that police obtained the UFAP warrant once Swainson traveled to Jamaica. Based on the detectives' testimony, the prosecution successfully requested a jury instruction that Swainson's flight could be considered as circumstantial evidence of his guilt.

Swainson was convicted of first-degree murder and sentenced to life imprisonment.

The Law Division Aggressively Defends the Conviction

Swainson filed a PCRA petition alleging that the prosecution suppressed impeachment information about Presley and permitted him to give false testimony. Specifically, the petition alleged that Presley had been arrested on a felony drug distribution charge—not a misdemeanor charge as he claimed. The petition also alleged that Presley had been arrested under the alias "Kareem Miller" and had been given a secret deal in exchange for his testimony. **Law Division ADA Tracy Kavanaugh** opposed relief and denied the allegations in their entirety. She dismissed as pure speculation the allegation that Presley was "Kareem Miller.". While she conceded that someone named Kareem Miller had been arrested and charged with felony drug distribution, **ADA Kavanaugh** suggested that it was Kareem Miller who was using Paul Presley's name as an alias (although she did not offer any facts to support her argument). **ADA Kavanaugh** also repeatedly referred to Swainson as a fugitive, describing how he "promptly fled to Jamaica," where he supposedly stayed "until he felt assured that he was finally in the clear and then returned to New York...."[410]

The PCRA petition was denied.

The CIU Investigation

By the time the CIU began its investigation, Presley had recanted his testimony, claiming he was pressured into identifying Swainson in exchange for a deal on his drug case, and Morsell alternated between recanting and standing by her testimony. For instance, Morsell told PCRA counsel she falsely implicated Swainson after being threatened by Opher's family, and she signed an affidavit to that effect. But years later, at the request of the City of Philadelphia, Morsell signed a four-sentence affidavit that she testified truthfully at Swainson's trial. At the

407. CIU Swainson Joint Stipulations at 7, ¶ 36.
408. *Id.*
409. *Id.* at 7, ¶ 38.
410. Law Division Letter at 2.

time it requested this affidavit, the City of Philadelphia was defending a federal civil rights lawsuit alleging that Detective Santiago violated multiple people's civil rights.

The CIU investigated Presley's recantation and his claim that he was pressured into identifying Swainson. Presley died before the CIU could interview him, but CIU prosecutors found circumstantial evidence suggesting that he had been arrested on felony drug charges under the alias "Kareem Miller" and had been given a deal in exchange for his testimony—and that **ADA Rubino** was aware of these facts. For instance, the CIU reviewed the DAO trial file and found a "Bring Down Order" requesting that Presley be brough to the DAO for a meeting with Detective Santiago. The Bring Down Order referred to "Paul Presley AKA Kareem Miller."[411] The CIU also found handwritten notes in the DAO trial file that listed Presley and Kareem Miller as having the same inmate number.

Although the CIU was unable to locate any police or DAO files relating to the drug charges filed against "Kareem Miller," they did confirm that roughly four months after Swainson's trial ended, the Office dismissed all charges against Miller in a case captioned *Commonwealth v. Kareem Miller*, CP-51-CR-1024751-1988. The case was also dismissed at its first trial listing, which CIU prosecutors found unusual, considering Presley's extensive criminal record and the severity of the charge. The CIU determined that the information about Presley's drug case, charged under the alias "Kareem Miller," was not disclosed to defense counsel. They also concluded that **ADA Rubino** permitted Presley to give false and misleading testimony when he (i) omitted any reference to the alias "Kareem Miller;" (ii) testified that his open criminal case was for misdemeanor drug possession; and (iii) denied receiving any benefits or promises in exchange for cooperating against Swainson.

When CIU prosecutors spoke with **ADA Rubino** about the Swainson prosecution, she recalled that the evidence in the case was "weak."[412] When they showed her the Bring Down Order and handwritten notes that CIU prosecutors found in the DAO trial file, **ADA Rubino** stated that she had no recollection of either document. However, she said that had she seen them, she would have turned them over to defense counsel.

The CIU also found undisclosed alternate suspect information. Immediately after the shooting, police received information from Opher's friend, Vernon Montague, that Opher was killed during an attempted robbery.[413] A homicide detective noted that Allen Proctor had been arrested two days after Opher's death for a separate homicide. It does not appear the police investigated this link further, because Proctor's name does not appear elsewhere in the H-File. However, the CIU investigated Proctor and found that he was arrested for homicide after Proctor and two other men held up a drug dealer at gunpoint and then shot and killed him. The CIU also learned that Proctor was out on bail for that murder and had committed another murder at another drug house. A PAS for that murder indicated that Proctor was a "holdup guy"[414] who was always armed and who was going around "sticking up dope dealers."[415] Proctor was eventually killed in a shootout with someone he was attempting to rob, and the victim said Proctor had been robbing him for months.

The CIU also found information suggesting that Presley initially identified a different suspect when he was arrested. CIU prosecutors found a form that police filled out in order to formally document Presley's left hand injury at the time of his arrest; the form had a section entitled, "Known Assailants," under which police wrote the name "Kevin Pearson." After reviewing the form, the CIU concluded that Presley apparently told police that Kevin Pearson caused his hand injury. When the CIU investigated further, they found information that a "Kevin Pearson" had an arrest record in Philadelphia, including arrests for robbery. None of the information about Proctor or Pearson was disclosed to defense counsel prior to trial.

The CIU also scrutinized the prosecution's theory that Swainson was a fugitive who fled to avoid prosecution, and their review uncovered information that contradicted the facts presented at trial. For instance, as noted previously, Swainson did not know he was a suspect when he spoke with police before he went to Jamaica. Then, when he returned to the United States, he voluntarily gave police his contact information, including his mother's address and his work address in New York City. Police also spoke with multiple witnesses who told them that Swainson was on a trip and would be coming back. When Swainson did return, he called Detective Santiago to let him know that he was

411. CIU Swainson Joint Stipulations at 17, ¶ 90.

412. *Id.* at 16, ¶ 86.

413. The CIU found that information about the possible drug-related motive had been selectively omitted from pre-trial discovery, because while the prosecution did turn over Montague's statement, they redacted his reference to the possibility that Opher was killed in a drug-related robbery. *See* CIU Swainson Answer at 26, ¶ 120.

414. CIU Swainson Joint Stipulations at 22, ¶ 115.

415. *Id.*

staying in the Bronx—and Detective Santiago did not inform him that he was a suspect in Opher's murder. When the CIU spoke with **ADA Rubino** about this conflicting information, she said she had no recollection this information.

Finally, the CIU scrutinized the Law Division's arguments in opposition to Swainson's PCRA petition. As described above, **ADA Kavanaugh** filed briefing that characterized the Paul Presley-Kareem Miller link as speculation, and she repeatedly referred to Swainson as a fugitive. However, as detailed herein, the CIU found information suggesting that the prosecution knew Paul Presley and Kareem Miller were the same person, and that police were aware that Swainson was going on vacation and was not trying to flee the jurisdiction. These findings by the CIU raise questions about what **ADA Kavanaugh** did to confirm the accuracy of her pleadings before she filed them.

Swainson is Exonerated

In June 2020, Swainson's conviction was vacated and the charges against him were dismissed shortly thereafter. Following his exoneration, the DAO described the investigation against Swainson as "emblematic" [416] of an era where police were pressured to make arrests without regard for truth, and which led to Philadelphia's clearance rate being 20 percent higher than the national average, as people were arrested for crimes they did not commit.

Antonio Martinez (2020)[417]

Antonio Martinez was convicted of first-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his conviction after a Law Division ADA referred the case to the CIU. The Law Division ADA had been reviewing the DAO trial file and H-File in order to respond to Martinez's PCRA petition when she found favorable information that did not appear to have been disclosed to defense counsel. Following this referral, the CIU conducted its own investigation and provided PCRA counsel with open file discovery. PCRA counsel subsequently amended Martinez's PCRA petition to include the newly discovered favorable information, and the CIU conceded that Martinez was entitled to relief.

In October 2020, Martinez's conviction was vacated, and the charges against him were dismissed that same day.

The Initial Criminal Investigation: 1985-1986

In 1985, brothers Hector and Luis Camacho were shot and killed outside a Philadelphia store owned by Wilson Santiago. Police received information that the brothers were killed over a drug dispute, and that Santiago killed the brothers. The victims' mother also said that Santiago's brother and another man killed her sons over drugs, and that the killers fled to Puerto Rico. The wife of one of the brothers also told police that members of Santiago's family were the killers.

Heriberto Ramirez told police he witnessed the murders. He said the Camacho brothers were outside the store arguing about drugs with Santiago's family, and one brother began fighting with a Santiago family member. Ramirez said that Santiago and his brother-in-law each shot one of the Camacho brothers. Ramirez thought Santiago's brother-in-law then fled to Puerto Rico. Radame Lopez gave police a similar account: he heard that Hector Camacho bought bad cocaine from either Wilson Santiago or Santiago's cousin, "Tony," and that Tony shot the brothers.

Police spoke with Maria Torres, an eyewitness who lived close to Santiago's store who was initially reluctant to provide information. Torres said she was at her window when she saw Hector Camacho enter the store and then heard a loud argument, followed by what sounded like gunshots coming from inside the store. She then saw Santiago drag Hector's body to the sidewalk and saw Luis Camacho moving toward Santiago. She said Santiago's brother, Manuel, shot Luis in the head. She also saw Santiago's stepson, Jose DeJesus, at the scene. Police did not take a written statement from Torres. They arranged for her to come back to the police station a few days later, but she never did.

416. *See* Palmer, "As Philly Judge Agreed to Overturn a Murder Conviction."

417. The information in this section is taken from various sources. *See, e.g.*, *Martinez v.DelBalso*, No. 19-5606, 2021 WL 510276 (E.D. Pa. Feb. 11, 2021); Response to Pet'r's Mot. for Relief from Judgment, *Martinez v. DelBalso*, No. 16-1157 (E.D. Pa. Dec. 13, 2018); Mem. of Law in Supp. of Pet. Under 28 U.S.C. § 2254 for Writ of Habeas Corpus, *Martinez v. DelBalso,* No. 19-cv-5606 (E.D. Pa. Nov. 27, 2019); Answer to Pet. for Writ of Habeas Corpus, *Martinez v. DelBalso,* No. 19-cv-5606 (E.D. Pa. Apr. 6, 2020); Comm. Supplemental App. To Resp. for Writ of Habeas Corpus, *Martinez v. DelBalso,* No. 19-cv-5606 (E.D. Pa. Apr. 6, 2020); Counseled Supplemental Pet. for Post-Conviction Relief, *Comm.v. Martinez*, CP-51-CR-0530631-1989 (Phila. Ct. Comm. Pl. Oct. 17, 2020); Joint Stipulations of Fact ("CIU Martinez Joint Stipulations"), CP-51-CR-0530631-1989 (Phila. Ct. Comm. Pl. Oct. 17, 2020); Comm. Answer to Pet. for Post-Conviction Relief, *Comm.v. Martinez*, CP-51-CR-0530631-1989 (Phila. Ct. Comm. Pl. Oct. 17, 2020); Resp. of Pet'r's Counsel to Order to Show Cause, *Martinez v. DelBalso*, No. 19-5606 (E.D. Pa. Jan. 8, 2021); Resp. of commonwealth to This Court's Order to Show Cause, *Martinez v. DelBalso*, No. 19-5606 (E.D. Pa. Jan. 8, 2021); Samantha Melamed, "Philly Man, Exonerated at 73, Faced 'Stunning Violation of Constitutional Rights,' Lawyers Say," Philadelphia Inquirer, Oct. 23, 2020; "Antonio Martinez," National Registry of Exonerations.

The Office opened a grand jury investigation to identify and prosecute the Camacho brothers' killers. Internal DAO documents indicate that Santiago and his brother Miguel were identified as potential suspects. The Office assigned a prosecutor to review the case for grand jury presentment, and this prosecutor asked police to bring Santiago and his wife in for questioning and to inform them of the possibility of a grand jury subpoena being issued to them. Police were not able to locate Santiago or his wife, and it does not appear any grand jury presentment was ever made.

The Cold Case Investigation: 1989

The case went cold until 1989, when police arrested Angel Fuentes on an unrelated charge, and Fuentes claimed he saw the Camacho brothers' murders while he was driving down the street. Fuentes said the brothers were talking to two men, one of whom was holding a gun and whom he called "Tony." Fuentes heard a couple gunshots and saw the Camacho brothers fall to the ground. Fuentes said he had known Tony for about a year, and that Santiago and Tony were friends.

Police also spoke with Carlos Diaz, who said the Camacho brothers delivered drugs for Santiago and were cheating him at the time of their deaths. Diaz heard Santiago threaten to kill the brothers and said that Santiago was always armed. A PAS from this period indicates that Santiago was involved in drugs and that his wife ran the drug business in his absence. Finally, police spoke with Santiago's stepson, Jose DeJesus. As previously noted, during the 1985-1986 investigation, Torres said DeJesus had been at the scene of the crime. DeJesus told police that Santiago's brother-in-law "Tony" killed the brothers over dispute about money that the brothers owed.

The Trial

Police arrested and charged Santiago's brother-in-law Antonio Martinez with the murders. Martinez waived his right to a jury trial and was tried before Philadelphia Court of Common Pleas Judge Theodore McKee. **ADA Richard Sax** prosecuted the case. He presented testimony from Fuentes and a new witness, Renaldo Velez, both of whom identified Martinez as the shooter. Velez had not previously been identified during either phase of the investigation and was only discovered "on the eve of trial."[418]

Fuentes and Velez both had credibility problems. Fuentes admitted that he only offered information about the murders after he was arrested for failing to report on a work-release sentence and that he was hoping for leniency. Fuentes also gave false testimony. At trial, he testified that he was not promised anything in exchange for his cooperation, but when Detective Miguel Deyne testified, he described a meeting he attended with Fuentes' counsel, prosecutors, and the court to discuss Fuentes' cooperation, and that after this meeting the court reinstated Fuentes' work release sentence. Velez gave conflicting statements about the shooting. When he initially spoke with police, he did not mention any self-defense issues. However, at trial, Velez said that Martinez shot the brothers in self-defense. Velez also testified that police threatened to charge him with a crime if he did not identify Martinez as the shooter.

At the conclusion of trial, Judge McKee expressed skepticism about Fuentes' version of events, telling both the prosecution and defense not to spend time on Fuentes' testimony because there were "a lot of problems"[419] with it. Judge McKee ultimately convicted Martinez of first-degree murder and sentenced him to life imprisonment, ostensibly basing his decision solely on Velez's testimony.

Martinez Challenges his Conviction

Following trial, Martinez challenged the verdict, arguing that trial counsel was ineffective for failing to present evidence about the full scope of the benefits promised to Fuentes. During these proceedings, the parties debated the weight of Fuentes' testimony and the impact of the testimony on the verdict. **ADA Sax** conceded that Velez was crucial to the prosecution's case because Fuentes was not seen as credible, and that "there probably would have been an acquittal"[420] if the prosecution had not identified Velez as a second witness.

At the conclusion of the proceedings, Judge McKee found trial counsel ineffective and granted Martinez a new trial. However, the Superior Court overturned the ruling on appeal, and Martinez's conviction was affirmed.

Martinez then filed a PCRA petition and a federal habeas petition and simultaneously challenged his conviction in both state and federal court.

418. CIU Martinez Joint Stipulations at 8, ¶ 23 (citing trial transcript).

419. *Id.* at 9-10, ¶ 25 (citing trial transcript).

420. *Id.* at 10, ¶ 28 (citing hearing transcript).

The CIU Investigation

After the PCRA and federal habeas petitions were filed, the CIU began its own investigation. It reviewed the H-Binder that homicide detectives had given to the prosecution and compared it to the information from the H-File. Notably, the CIU found that detectives did not include Torres' statement that she saw Santiago dragging one brother's body from the store and saw Santiago's brother shoot the other brother. The CIU also reviewed the pretrial disclosures made in Martinez's case and confirmed that the prosecution did not disclose the bulk of the witness statements and information from the 1985-1986 phase of the investigation. Thus, defense counsel never learned that witnesses believed Santiago was responsible for the murders; that the brothers were fighting with Santiago over drugs; or that Torres allegedly saw Santiago dragging one of the brothers' bodies from his store.

Martinez is Exonerated

In October 2020, the CIU moved to vacate Martinez's conviction and dismiss the charges against him. Philadelphia Court of Common Pleas Judge Tracy Brandeis-Roman apologized to Martinez and the Camacho family, noting that everyone involved "suffered a great, great loss here for the last 30 years."[421]

ADA Sax gave a statement to the media that he received the Martinez file a week before trial, which was a common occurrence during his tenure in the Office, and that he turned over everything he had to defense counsel. He denied any wrongdoing and said he had never suppressed or omitted exculpatory information in his life. He also told the media that he informed CIU Supervisor Patricia Cummings about "numerous inaccuracies"[422] in her filings and expressed his desire to testify at an upcoming federal habeas hearing before United States District Judge Mitchell Goldberg.[423] However, because Judge Brandeis-Roman vacated the conviction and dismissed the charges against Martinez, the pending federal habeas petition and hearing was no longer necessary.

The Federal Court Versus the CIU

United States District Judge Mitchell S. Goldberg had been assigned Martinez' federal habeas petition, and when he learned that Martinez's conviction had been vacated, he criticized the CIU and Martinez's habeas counsel for simultaneously litigating the case in federal and state court and for failing to notify him of this new litigation development, given that he had set an evidentiary hearing in the federal proceedings and had indicated a desire to hear from **ADA Sax**, in light of the CIU's "remarkable allegations"[424] regarding **ADA Sax**, which did not include a "plausible reason or motive as to why the trial ADA would engage in such unethical, reprehensible conduct."[425]

Judge Goldberg eventually ordered the parties to show cause as to why, among other things, they did not violate their duty of candor to notify the court about the developments in state court litigation, especially given the fact that the CIU had previously stated a preference for litigating Martinez's case in federal court and had thus waived the defense of "non-exhaustion," *i.e.*, had waived the right to argue that Martinez's federal proceedings should be dismissed because he had not yet exhausted his claims in state court. The CIU's motion included a detailed timeline of the parallel state court and federal court proceedings, as well as an explanation that it had no prior knowledge that the state court was going to consider Martinez's PCRA petition on the merits and issue a ruling vacating his conviction.

In his opinion on the order to show cause, Judge Goldberg did not sanction the Office or find that it violated the duty of candor. Instead, he criticized the Office for "knowingly [and] simultaneously litigat[ing] this case in both state and federal court and fail[ing] to advise the federal court that this was occurring."[426] He took aim at this sort of parallel litigation by the CIU, *i.e.*, the simultaneous pursuit of relief in both state and federal court after waiving state court exhaustion. Judge Goldberg concluded that federal habeas law disfavored this practice, and he rejected the notion that the CIU was entitled to exercise its prosecutorial discretion by "waiv[ing]"[427] exhaustion of state claims on a "pick and choose,"[428] case-by-case basis, because this would

421. Melamed, "Philly Man Exonerated."

422. *Id.*

423. Martinez had also filed a federal habeas petition challenging his conviction and was challenging his conviction in both state and federal court.

424. *Martinez*, 2021 WL 510276, at *1.

425. *Id.*

426. *Id.* at *2.

427. *Id.*

428. *Id.*

"flout"[429] the principles of comity and candor to the tribunal.[430] Judge Goldberg did not impose sanctions on the Office but did deem the CIU's conduct in the case "highly unusual,"[431] and he announced that the Office would be required to file status reports in habeas cases assigned to him going forward. He also stated his intent to share his ruling with other judges in the district.

Termaine Hicks (2020)[432]

Termaine Hicks was convicted of sexual assault and sentenced to 12.5-to-25 years in prison. The CIU agreed to investigate his conviction after he filed a PCRA petition claiming actual innocence and alleging that the prosecution relied on false and miselading police officer testimony to convict him. Hicks argued that police shot him from behind almost immediately after he came upon the victim after she had been sexually assaulted by an unknown assailant, and that police then planted a gun on him to justify the shooting and falsely claimed they saw Hicks sexually assault the victim. The CIU investigation found evidence that corroborated Hicks' allegations. The CIU moved to vacate Hicks' conviction in December 2020 and dismissed the charges against him a day later.

The Criminal Investigation

In November 2001, WL was sexually assaulted at gunpoint. Her assailant dragged her into a hospital loading dock and beat her repeatedly. She later told police that she could not identify her attacker because it was dark, and she was terrified. Witnesses heard her screaming and called 911. One witness who saw the assailant said he was wearing a gray hooded sweatshirt and black jacket.

Around the time these witnesses called 911, Hicks was passing the hospital on his way home when he heard WL screaming. He followed the sound and found her on the ground in the loading dock when Philadelphia police officers Martin Vinson and Dennis Zungolo responded to the scene. Vinson shot Hicks three times. He radioed in the shooting and claimed that he told Hicks to put his hands where he could see them, and that he shot Hicks after he saw Hicks reaching for something. Hicks was eventually taken to the hospital where he underwent emergency surgery to remove the bullets.

Officers Robert Ellis and Duane Watson arrived at the scene shortly after Hicks was shot. Officer Ellis recovered a firearm from inside Hicks' right jacket pocket. Police later traced the firearm and learned that it was registered to Officer Valerie Brown, who had bought the gun from a retired officer. Officer Brown stored the gun in a closet in her basement and did not know it had been taken. Police found no link between Hicks and Officer Brown.

The Trial

Hicks went to trial in 2002, and **ADA Sybil Murphy** prosecuted the case. WL testified that there were bright lights and cars around during the attack, and that when police arrived at the scene, she thought her attacker was still there on top of her. Because WL was unable to identify the attacker, the prosecution relied exclusively on officer testimony to link Hicks to the crime. **ADA Murphy** called sixteen officers, including Officers Vinson and Ellis, as witnesses—although she did not call either of their partners.

Officer Vinson testified that when he arrived on scene, he saw Hicks in the act of sexually assaulting WL. In fact, he claimed to have seen Hicks pull his penis out of the victim's vagina. Officer Vinson further testified that he ordered Hicks to put his hands up, but Hicks refused to comply. He and Hicks began struggling with each other, and at one point he claimed Hicks caused him to trip and fall backwards into Officer Zungolo. Officer Vinson testified that Hicks was turning and backing away from him, so he drew his weapon and repeatedly told Hicks to keep his hands visible. Hicks then lunged at him, and Officer Vinson said he "could see off the light a gun coming around toward me."[433] Officer Vinson testified that he shot Hicks when he was "almost" "fully facing"[434] him. When Hicks stepped back and raised the gun again, Officer Vinson shot him once more. At

429. *Id.*

430. *Id.*

431. *Id.* at *9.

432. The information in this section is taken from various sources. *See, e.g.,* Joint Stipulations of Fact of Pet'r Joseph Termaine Hicks and Resp't Comm. of Pennsylvania ("CIU Hicks Joint Stipulations"), CP-51-CR-0306311-2002 (Phila. Ct. Comm. Pl. Dec. 15, 2020); Comm. Answer to Second Am. Pet. ("CIU Hicks Answer"), CP-51-CR-0306311-2002 (Phila. Ct. Comm. Pl. Dec. 15, 2020); Second Am. Pet. for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541 *et seq.*, CP-51-CR-0306311-2002 (Phila. Ct. Comm. Pl. Jan. 24, 2019); "Termaine Hicks," National Registry of Exonerations; Samantha Melamed, "Police Shot a Philly Man, Then Accused Him of Rape. He Was Exonerated After 19 Years," Philadelphia Inquirer, Dec. 16, 2020.

433. CIU Hicks Joint Stipulations at 7, ¶ 50.

434. *Id.* at 7, ¶ 51.

various points during his testimony, Officer Vinson emphasized that he shot Hicks because he was almost fully facing him while pointing a gun at him. After he shot him, Officer Vinson said Hicks slouched over, put the gun back into his pocket, and then backed into the alley where he collapsed.

Officer Ellis testified that Officer Vinson told him to "get the gun…[i]t should be in his pocket,"[435] so he searched Hicks and recovered a firearm from inside Hicks' right jacket pocket, which he then stuffed into his waist band. He also testified that the gun was covered in blood, and that he got blood on his own hands. Officer Ellis also testified that Hicks was wearing a gray top and gray knit hat, and another officer testified that Hicks was wearing a gray hoodie when he was arrested, which matched the clothing the assailant was wearing.

The prosecution also introduced forensic test results performed on Hicks' clothing and the gun that Officer Ellis recovered. Blood found on the gun barrel was consistent with WL's blood type, and WL's blood type was found on the front waistband of Hicks' boxer shorts and the right leg of his sweatpants. However, a crime lab DNA analyst also testified that blood from WL could have innocently transferred to Hicks after he was shot, because Hicks was lying in the same narrow alley way where WL was found, and both WL and Hicks had been bleeding profusely. The analyst also testified that there was no way to determine how blood ended up on Hicks' clothing, because it was possible Hicks fell into WL's blood or an officer touched WL before tending to Hicks.

Testimony from other police officer and civilian witnesses contradicted Officer Vinson's version of events. For instance, Officer Michael Youse testified that he did not see Hicks lying on top of the victim when he arrived on scene and only saw him standing above her. He also testified that the only commands he heard were "let me see your hands,"[436] followed by the sound of gunshots. Officer Brian Smith testified that he heard Officer Vinson order Hicks to "get off of her,"[437] but on cross-examination he admitted that he did not mention this in either his initial incident report or his statement to the Special Victims Unit. In those statements, Officer Smith only reported hearing a command to Hicks to remove his hands from his pocket. This was consistent with what civilian witnesses heard—someone saying "freeze"[438] and "put up your hands"[439] before hearing shots fired.

Hicks testified in his own defense. He maintained that WL was mistaken about her attacker being present when police arrived, and that Officers Vinson and Ellis were not telling the truth about the shooting. He said he was walking home from the store when he heard WL screaming and saw a man running from the loading dock where he eventually found WL. When he saw her on the ground, she was covered in blood and did not respond when he nudged her to ask if she was alright. Hicks put his hand in his pocket to pull out his cell phone to call 911 when he heard, "Freeze. Get your hands up."[440] Hicks was startled and tried to say that he was about to call 911 when officers again told him to raise his hands. At this point, he let go of his cell phone while his hand was in his pocket, and then he was shot in the back. Hicks testified that he was facing away from the officers when they shot him. When he fell to the ground, he hit his face and chipped a tooth. Hicks testified that after he was shot, he heard Officer Vinson swear and saw him crying while he patted him down.

Defense counsel called Officer Vinson's partner, Officer Zungolo, as a defense witness, and he gave testimony that conflicted with his investigative statements. Officer Zungolo initially told investigators that Officer Vinson shot Hicks because Hicks had his hand in his jacket pocket, and they thought he might have had a gun. However, at trial, Officer Zungolo testified that Vinson shot Hicks after he thrust his arm out of his jacket pocket. He also testified that he could not see Hicks' hand and what he might have been holding, because Officer Vinson was blocking his line of sight.

Defense counsel also highlighted inconsistencies in the prosecution's case, pointing out that Hicks had not been wearing a gray hoodie or sweatshirt and did not match the description of the perpetrator, and arguing that Officer Ellis planted the gun on Hicks after realizing he was unarmed. Defense counsel did not offer any expert testimony about the directionality of the bullets, even though trial evidence showed that a bullet

435. *Id.* at 4, ¶ 25.
436. *Id.* at 8, ¶ 61.
437. *Id.* at 8, ¶ 58.
438. *Id.* at 8, ¶ 62.
439. *Id.*
440. *Id.* at 11, ¶ 87.

entered Hicks' body at the back of his right arm. The prosecution countered that the bullet's entry point into Hicks' body did not necessarily mean Hicks was shot from behind, and both Officer Vinson and a ballistics expert testified that it was possible that the bullet ricocheted off a building before hitting Hicks in the rear of his body.

Hicks was convicted of sexual assault and sentenced to 12 ½ to 25 years in prison.

New Post-Conviction Evidence is Disclosed

After Hicks was convicted but before he was sentenced, the prosecution produced surveillance footage that captured the beginning of WL's attack. Police had initially viewed this footage on the day of the crime, but there were purportedly problems with copying and transferring the video, which meant that production of the footage was delayed until after Hicks' trial was over. The video partially explained WL's belief that her attacker was still present when police arrived: the footage showed that while the attack was in progress, a van pulled into the delivery dock, and its lights shone into the loading dock area for roughly two minutes until it drove away just before police arrived, which ostensibly led WL to believe that the police lights were the van lights and the attack was still in progress.

Hicks sought a new trial based on the production of this new evidence, but his motion was denied.

Post-Conviction DNA Testing

Hicks filed a PCRA petition maintaining his innocence and seeking additional DNA testing on WL's clothing. Because the assailant touched WL's underwear and pants, testing was done on the inside and outside waistbands of these items of clothing. Test results found DNA, and they excluded Hicks as the person who left the DNA, but did not exclude either WL's husband or the assailant. DNA testing was also conducted on a blood stain on WL's pants. Test results showed male DNA belonging to Hicks, which was consistent with the crime scene and what Hicks argued at trial, *i.e.*, that blood from WL and Hicks was transferred by police as they secured the scene and patted Hicks down, and because Hicks was bleeding profusely after he was shot.

Hicks also submitted new evidence from a pathologist who examined his medical records and concluded that all three bullets entered from the rear of Hicks' body, and that no bullet wounds entered from the front of his body. These findings were presented to the Philadelphia Medical Examiner's Office, which initially declined to adopt the pathologist's report. However, PCRA counsel also asked the Medical Examiner to analyze the clothing Hicks was wearing when he was shot. His clothing had only rear entrance bullet holes and no front entry bullet holes, which led the Medical Examiner to issue a new report concluding that Hicks had been shot in the back.

The CIU Investigation

When the CIU began its investigation, they reviewed the DNA test results and Hicks' new forensic analysis, as well as the prosecution's trial theory and supporting evidence, which led them to conclude that key aspects of the trial evidence contradicted police officer accounts of the shooting. For instance, Officer Ellis claimed that he recovered a bloody gun from inside Hicks' pocket. However, the CIU noted that no blood was detected anywhere on the inside of Hicks' pocket, and when they inspected his clothing, they did not observe any blood stains. Officer Ellis and another officer also testified that Hicks was wearing a gray hoodie and hat when he was arrested, but the CIU noted that no police paperwork or other evidence indicated that a gray hoodie, gray top, or gray knit hat was ever seized from Hicks or the crime scene at any point during the investigation.

During **ADA Murphy's** closing argument, she emphasized that there was no conspiracy amongst the officers to lie or to frame Hicks, and that the officers were being truthful, because they swore an oath to do so before testifying. However, CIU prosecutors noted that at least one of the officers had impeachment information that was not disclosed to defense counsel: prior to Hicks' trial, IA sustained a finding against Officer Youse for denying a suspect the right to counsel. (In addition, after Hicks' trial ended, several of the officers involved in Hicks' case were either found to have engaged in misconduct or were arrested for criminal conduct.)

During trial, **ADA Murphy** attacked Hicks' account as lacking evidentiary support because he did not offer any expert testimony to support his claim that he was shot in the back. While this was true—defense counsel did not offer expert or other testimony on the directionality of the bullets—CIU prosecutors also noted that there was evidence available to **ADA Murphy** that supported Hicks' account and raised red flags about the officers' accounts. For instance, Hicks' clothing had only rear bullet entry points and no front entry points, which contradicted Officer Vinson's repeated testimony that he shot Hicks when Hicks was nearly facing him. As previously noted, there was also no blood in Hicks' right jacket pocket, contrary to Officer Ellis' claim that he found a bloody gun there.

The CIU attempted to speak with **ADA Murphy** about Hicks' case and what she did to prepare for trial. After exchanging initial communications about setting up a time to speak, **ADA Murphy** stopped responding and a meeting never occurred.

Hicks is Exonerated

The CIU agreed that Hicks was entitled to a new trial and dismissed the charges against him shortly thereafter. Following his exoneration, Hicks filed a civil lawsuit against the city and the arresting officers, including Officer Vinson.

Donald Outlaw (2020)[441]

Donald Outlaw was charged under the name Robert Outlaw and convicted of first-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his conviction after he filed and won a PCRA petition alleging that the prosecution suppressed favorable information about prosecution witnesses. Because Outlaw had already been granted a new trial, the CIU focused on whether the Office should retry him. In December 2020, the CIU moved to dismiss the charges against Outlaw.

The Criminal Investigation

In September 2000, Jamal Kelly was sitting outside with Shelby Green when he was shot to death. Before he died, witnesses heard Kelly say that "Shank" set him up. Green told police "Shank" was Derrick Alston, and she said she saw Kelly and Alston arguing earlier that day. Green also told police that Charles Paladino might have witnessed the shooting. Alston was in the crowd that had gathered at the scene, so police questioned him. Alston said he had been with Paladino, and he admitted being angry with Kelly but denied shooting him. Police also spoke with Paladino, who denied seeing the shooting but said he saw a gold car leaving the scene.

The case went cold until Paladino was arrested on an unrelated charge. He agreed to cooperate and gave police three separate statements about the shooting. In his first statement, he said Lamar Rodgers told him that Donald Outlaw shot Kelly. In his second statement, he said he saw Outlaw threaten Kelly the night before the shooting, and that he saw Outlaw shoot Kelly. In his third statement, he said that Outlaw beat him up and threatened him if he continued to cooperate with police.

Police then interviewed Rodgers, who signed a statement written by detectives. According to the statement, Rodgers said Outlaw was in Paladino's yard when he heard someone say it was "fucked up" what Outlaw did, to which Outlaw responded, "[n]obody was meant to get killed, sometimes shit just happens."[442] Police also showed a photo array to Eric Lee, who purportedly identified a photograph of Outlaw as the shooter.

Outlaw was arrested and charged with Kelly's murder. At the preliminary hearing, Paladino testified that Outlaw had him beaten him up for being a snitch. Paladino also testified that he did not have a deal or agreement with the prosecution in exchange for his testimony, other than an offer of witness protection.

The Trial

Outlaw went to trial in 2004, and **ADA Yvonne Ruiz** prosecuted the case. By the time of trial, all the prosecution witnesses had recanted their police statements. Alston denied that Outlaw was the shooter, and he said he signed his statement so that police would stop repeatedly arresting him. Rodgers testified that he never overhead Outlaw talking about shooting Kelly, and that he signed his statement without reading it because he wanted his 8-hour interrogation to end. Rodgers also said he tried to meet with the prosecution before trial to say that his statement was false. Lee testified that he was barely literate and had been on drugs when police interviewed him, and that he never implicated Outlaw. Lee also met with the prosecution before trial and said that detectives made up his statement. Finally, Paladino testified that detectives coerced him into implicating Outlaw,

441. All facts are taken from Br. of the App. Robert Outlaw, *Comm. v. Outlaw,* No. 962 EDA 05, 2006 WL 4015733 (Pa. Sup. Ct. Mar. 30, 2006); Ltr. Br., *Comm. v. Outlaw*, No. 962 EDA 05, 2006 WL 4015734 (Pa. Sup. Ct. June 30, 2006); Mem. Op., *Comm. v. Outlaw,* No. 962 ADA 2005 (Pa. Sup. Ct. Feb. 20, 2007); Br. for Appellant, *Comm. v. Outlaw*, No. 2376 EDA 2009, 2010 WL 4018100 (Pa. Sup. Ct. Feb. 25, 2010); Ltr. Br.-PCRA Appeal, *Comm. v. Outlaw*, No. 2376 EDA 2009, 2010 WL4018099 (Pa. Sup. Ct. June 1, 2010); Appellant's Br., *Comm. v. Outlaw*, No. 1530 EDA 2015, 2016 WL 8924548 (Pa. Sup. Ct. Nov. 30, 2016); Br. for the Comm. as Appellee, *Comm. v. Outlaw*, No. 1530 EDA 2015, 2017 WL 1945988 (Pa. Sup. Ct. Feb. 28, 2017); Appellant's Reply Br., *Comm. v. Outlaw*, No. 1530 EDA 2015, 2017 WL 1945989 (Pa. Sup. Ct. Mar. 14, 2017); Second Am. Pet. for Relief Pursuant to the Pa. Post-Conviction Relief Act, Pursuant to 42 Pa. C.S. § 9541 *et seq.*, *Comm. v. Outlaw*, CP-51-CR-1101321-2003 (Phila. Ct. Comm. Pl. July 5, 2018); Com. Post-Hearing Br., *Comm. v. Outlaw*, CP-51-CR-1101321-2003 (Phila. Ct. Comm. Pl. Jan. 15, 2019); Post-Hearing Mem. of Law ("Outlaw Post-Hearing Memo"), *Comm. v. Outlaw*, CP-51-CR-1101321-2003 (Phila. Ct. Comm. Pl. Jan. 15, 2019); Supplemental Post-Hearing Mem. of Law, *Comm. v. Outlaw*, CP-51-CR-1101321-2003 (Phila Ct. Comm. Pl. Jan. 18, 2019); Mot. for *Nolle Prosequi* Pursuant to Pa. R. Crim. P. 585(a) ("CIU Motion to Dismiss"), *Comm. v. Outlaw*, CP-51-CR-1101321-2003 (Phila Ct. of Comm. Pl., Dec. 18, 2020); Mem. in Supp. of Mot. for *Nolle Prosequi* Pursuant to Pa. R. Crim. P. 585(a) ("CIU Memo in Support of Motion to Dismiss"), *Comm. v. Outlaw*, CP-51-CR-1101321-2003 (Phila Ct. of Comm. Pl. Dec. 18, 2020); "Donald Outlaw," National Registry of Exonerations; Samantha Melamed, "Philly Man Wins New Trial After DA Hands Over Evidence it Withheld for 15 Years," Philadelphia Inquirer, Jan. 31, 2019; Samantha Melamed, "Donald Outlaw Clear of Murder, is Philadelphia's 17th Exoneree in 3 Years," Philadelphia Inquirer, Dec. 29, 2020.

442. Outlaw Post-Hearing Memo at 6.

and he went along with it so he could get out of jail on his own criminal case. After all the witnesses recanted, the prosecution admitted their statements pursuant to *Brady-Lively* as substantive evidence for the jury to consider.

Outlaw was convicted of first-degree murder and sentenced to life imprisonment.

Outlaw Wins his PCRA Petition

Outlaw filed a PCRA petition seeking a new trial based on newly discovered information provided by witness Katima Jackson. During PCRA proceedings, the Law Division also turned over a letter Paladino had written to Detective Howard Peterman, the homicide detective assigned to the case. Paladino's letter referred to prior conversations with Detective Peterman, which suggested that he had been promised help on his own criminal case, including dismissal of a pending drug charge, if he cooperated against Outlaw. Elsewhere in the letter, Paladino wrote that he had "put together a little speech for the up coming [sic] trial,"[443] and he thought Peterman would be "happy with it."[444] He also wrote that he had learned "a lot about being a witness, so please, help me help you."[445] Finally, he threatened to stop cooperating unless the police agreed to help him.

The Law Division also disclosed new information which indicated that, in the aftermath of the shooting, police received an anonymous tip that Jerome Grant, aka "Blunt," was bragging about the shooting. Police learned that Blunt sold drugs to the victim, and they interviewed a witness who saw a gold car leaving the area after the shooting; police also learned that Blunt had a gold car. This alternate suspect information was not disclosed prior to trial. Instead, the prosecution argued to the jury that they should find Outlaw guilty because the police had conducted a high-quality investigation that led directly to Outlaw.

The PCRA court ordered an evidentiary hearingon Jackson's newly discovered information, and she testified that she saw the murder and that it was Alston, not Outlaw, who shot Kelly. Paladino also testified that Detective Peterman promised to help him with his case if he cooperated against Outlaw. Paladino also admitted that he gave false testimony when he claimed that Outlaw had him beat up for cooperating. Outlaw said he was beaten up because he got caught trying to steal a car, but that Detective Peterman paid him to lie and say that Outlaw was behind it.

At the conclusion of the hearing, Philadelphia Court of Common Pleas Judge Diana Anhalt granted Outlaw's petition. She credited Jackson's testimony and found that the prosecution failed to disclose favorable information pertaining to Paladino's credibility and his motive to lie. Despite this new evidence, which undermined Paladino's credibility as a cooperating witness, the Office indicated that it would retry Outlaw for murder. In briefing, **Law Division ADA Samuel Ritterman** argued that the new evidence "fails to even budge the needle on the scale, weighed down by the evidence of defendant's guilt."[446]

When asked by the media to comment about Outlaw's conviction being vacated, **ADA Ruiz** declined to discuss the case other than to deny that she ever withheld evidence.

The CIU Investigation

The CIU reviewed the H-File and DAO trial file and interviewed Paladino, who maintained that detectives promised to help him with his case if he cooperated against Outlaw and reiterated that he had made up allegations that Outlaw had him assaulted. The CIU spoke with another witness who also corroborated Paladino's statement—that his assault was due to an unrelated matter and not tied to Outlaw's case. Paladino also told the CIU that he had cooperated in at least three other homicide cases around the time he testified against Outlaw, none of which had been disclosed to defense counsel. (The CIU was able to corroborate Paladino's involvement in at least one of these cases.)

Finally, the CIU investigated any possible link between Outlaw and Alston, aka "Shank," but they could not find a link between the two men. Instead, the CIU found additional information in the H-File suggesting that Alston shot the victim—which was consistent with the victim's dying declaration. The H-File contained police notes from a witness who said that the victim "repeatedly said"[447] that "Shank set him up."[448] Paladino also

443. *Id.* at 12.
444. *Id.*
445. "Donald Outlaw," NRE.
446. Melamed, "Philly Man Wins New Trial."
447. CIU Memo in Support of Motion to Dismiss at 4, ¶ 14.
448. *Id.*

told CIU prosecutors that on the night of the murder, he heard gunshots and saw the victim fall to the ground, followed by Alston running up to him and telling him, "don't go over there."[449]

Outlaw is Exonerated

Based on the evidence uncovered during PCRA proceedings and the CIU's investigation, the CIU determined that there was insufficient evidence to prove Outlaw's guilt beyond a reasonable doubt, and it moved to dismiss the charges against him. When the Philadelphia Inquirer sought comment on Outlaw's exoneration from Detective Peterman, he hung up on the reporter without comment.

Jahmir Harris (2021)[450]

Jahmir Harris was convicted of first-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his case after Harris filed a PCRA petition alleging that he was innocent, and that the prosecution suppressed favorable information. CIU prosecutors found alternate suspect information that was not disclosed to defense counsel, and it turned this information over to Harris, who amended his PCRA petition to include this information.

In 2021, Judge Rose Marie DeFino-Nastasi of the Philadelphia Court of Common Pleas vacated Harris' conviction but refused to dismiss the charges against him. Instead, she ordered the CIU to provide additional information about its investigation. The CIU submitted briefing detailing its investigative findings, which included facts pointing to an alternate suspect, but Judge DeFino-Nastasi still refused to dismiss the charges against Harris and ordered the CIU to take additional investigative steps. In response, the CIU filed a motion objecting to the PCRA court's order as a violation of the Pennsylvania constitution's separation of powers between the executive and the judiciary. After this motion was filed, Judge DeFino-Nastasi dismissed the charges against Harris.

The Criminal Investigation and Trial

In December 2012, Louis Porter was shot to death in a Walgreens parking lot. A security camera captured the shooting, which showed Porter and the shooter drive into the parking lot in separate cars. The shooter got out of his car and walked to Porter's car, shooting him multiple times before fleeing. The shooter's face was not visible on the footage.

Harris went to trial in 2015, and **ADA Erin Boyle** prosecuted the case. The prosecution's theory was that Harris killed Porter over bad drugs that Porter sold to him. There were gaps in this theory, given that (i) no physical evidence linked Harris to the murder; (ii) two cell phones used by Harris were connected to cell towers miles away from the crime scene at the time of the shooting; and (iii) one of the cell phones showed that Harris was on an active call to his mother at the time of the shooting.

The sole eyewitness to identify Harris as the shooter was Michelle Markey, who had been in the parking lot before the shooting. Markey was not facing the shooter when she saw him and was instead looking through the rear window of her hatchback while the shooter reversed his car out of the parking lot and fled the scene. Her initial description of the shooter was also vague: when she called 911, she gave a generic description of the shooter as tall, with a large build, and dark complexion. While she later picked Harris out of a photo array, the array contained several filler photographs that did not match the shooter's description.

Markey's statements about the shooting also evolved over time. When she initially spoke to police, she said two men shot the victim, and both men were standing outside the car. However, when police viewed security footage after they spoke with Markey, the footage showed only one man shooting the victim, and no one else shooting from inside the car. Other witnesses also said they either saw only one person in the car or were uncertain of whether anyone else was in the car. By the time she testified at trial, Markey testified that she only saw one shooter.

Markey's recollection of the shooter's car also diverged with other witnesses. When she called 911, she told the dispatcher that the shooter's car had Pennsylvania plates and gave them

449. *Id*. at 5, ¶ 18.

450. The information in this section is taken from various sources. *See, e.g.*, Pet'r Mot. to Amend PCRA and Proposed Amendments ("Harris Motion to Amend"), *Comm. v. Harris*, CP-51-CR_7962-2013 (Phila Ct. of Comm. Pl. Dec. 15, 2020); Decl. of Erin M. Boyle ("ADA Boyle Declaration"), *Comm. v. Harris*, CP-51-CR-7962-2013 (Phila Ct. of Comm. Pl. Jan. 18, 2021); Comm. Mot. for *Nolle Prosequi* Pursuant to Pa. R. Crim. P. 585(a), CP-51-CR-0007962-2013 (Phila Ct. of Comm. Pl. Feb. 24, 2021); CIU Investigative Report Requested by the Court and Filed in Support of Motion for *Nolle Prosequi*, CP-51-CR-0007962-2013 (Phila Ct. of Comm. Pl. Feb. 24, 2021); "Jahmir Harris," National Registry of Exonerations; Samantha Melamed, "A Philadelphia Man Who Was Wrongfully Convicted of Murder Eight Years Ago Was Released From Prison Friday Night," Philadelphia Inquirer, Mar. 12, 2021; AP News, "Philadelphia Judge Allows Prosecutors to Drop Charges for Man Who Served 8 Years For Slaying Before Conviction Was Tossed Out," Pennsylvania Patriot-News, Mar 13. 2021; Chris Palmer, "Philly Man Who Was Exonerated of Murder Last Year is Now a Suspect in a New Murder Case," Philadelphia Inquirer, Oct. 20, 2022.

partial plate information containing "FSH 456." However, all the other witnesses who saw the car told police the car had New York plates.

Harris was convicted of first-degree murder and sentenced to life imprisonment.

The CIU Investigation

The CIU reviewed the H-File and found a host of undisclosed favorable information suggesting that a man, known as "AJ," killed Porter over a bad drug deal. Notably, most of this information had been gathered by police over a short time frame immediately following the murder but was never disclosed to defense counsel before Harris' trial. For instance, police looked through license plate reader data to identify a gray Ford with New York license plate FSH 4856 that was seen near the Walgreens on the night of the murder. Police then checked the gray Ford's registration and learned that it was a rental car. The next day, police ran a DMV check on a license number that belonged to AJ. The printout of AJ's DMV records also contained police handwritten notes indicating that AJ rented the gray Ford and listed the rental return date, which was the day after the murder. Police then ran AJ's prison release data and saw that he had been incarcerated and had prior arrests for aggravated assault with a firearm.

The H-File also contained several anonymous tips suggesting that the motive for Porter's murder was a botched drug deal. The tips mentioned that the buyer was angry and had been sending Porter text messages. One tipster claimed he was with Porter the morning he was killed, and that Porter's phone records would lead police to the shooter. Although the prosecution's theory was that the victim was killed over a drug deal gone bad, it did not disclose these tips to defense counsel.

Separately, the CIU investigated both Harris and AJ to try to link them to (or exclude them from) Porter's murder. When the CIU subpoenaed the car rental company, they had no records for Harris, but they did disclose rental records for AJ confirming that he rented the gray Ford. The rental records included AJ's cell phone number. The CIU also ran a criminal background check on AJ and found a trial conviction for aggravated assault.

When the CIU pulled the transcripts from this trial, they learned that AJ went by the nickname "Tone," and that AJ had shot another person in a dispute over drug territory.

The CIU then examined Porter's cell phone and found AJ's cell phone number listed in the contacts as "Tone." The victim's cell phone extraction records also showed that AJ and the victim were in contact in the days leading up to the murder, including a missed call from AJ on the day of the murder. In contrast, the extraction records did not show any contacts or attempted contacts between Harris and Porter.

ADA Boyle and the CIU: Contrasting Reviews of the H-File

During their investigation, CIU prosecutors spoke with **ADA Boyle** about her recollection of the Harris trial. After receiving assurances that neither the DAO nor PCRA counsel was accusing her of intentionally withholding information, she submitted a written declaration detailing her recollections. In her declaration, **ADA Boyle** did not dispute the CIU's discovery of information about AJ, the gray Ford, or the anonymous tips about the drug-related motive for the murder. Nor did she suggest that the information the CIU found was missing from the H-File at the time she reviewed it.

In her declaration, **ADA Boyle** said she reviewed the H-File before Harris' trial and had no recollection of seeing (i) documents relating to the car with NY license place FSH 4856; (ii) DMV documents for AJ; or (iii) anonymous tips regarding motive.

ADA Boyle pointed out that the H-File was not clearly labeled or well-organized. For instance, she described the H-File as consisting of a "brown expansion folder"[451] with documents spread across "42 separate folders." [452] **ADA Boyle** also noted that (i) photographs of the gray Ford were not contained in one folder but were instead spread across different folders, and none of these folders were labeled as "AJ" or "Alternate Suspect(s);"[453] (ii) documents related to AJ were in a folder labeled "MISC,"[454] which also contained unrelated documents; (iii) none of the documents that mentioned AJ also mentioned or tied him to a car with New York license plates; and (iv) the anonymous tips pertaining to motive did not mention AJ or any rental car with New York license plates.

451. ADA Boyle Declaration at 2, ¶ 7.b.

452. *Id.* When the CIU started its investigation, they produced a copy of the H-File to PCRA counsel. The H-File consisted of 676 bates-stamped documents. *See* Conversation with P. Cummings.

453. ADA Boyle Declaration at 2, ¶ 7.d.iii.

454. *Id.* at 2, ¶ 7.e.ii.

Although she spent time describing the H-File, **ADA Boyle** did not discuss what steps she took to try to understand the police investigation. Nor did she explain what she did to fulfill her obligation to find and disclose favorable information known to the police. For instance, she did not mention if she met with homicide detectives to go over the contents of the H-File. Nor did she mention if she spoke with detectives about why documents that appeared unrelated to Harris were in the H-File. These omissions seem important, given **ADA Boyle's** observations in her declaration that the H-File was not clearly organized.

Finally, it bears noting that when CIU prosecutors reviewed the H-File, they found it in substantially the same condition that **ADA Boyle** did. In other words, the H-File was not clearly labeled, and documents were spread across multiple envelopes. However, despite this lack of organization, CIU prosecutors were able to discover the favorable information detailed above—including favorable information that enabled them to identify AJ's cell phone number and his nickname, which in turn allowed them to link AJ to the victim's cell phone.

Harris is Exonerated

Philadelphia Court of Common Pleas Judge Rosemary DeFino-Nastasi vacated Harris' conviction due to *Brady* violations. However, Judge DeFino-Nastasi denied the motion to dismiss the charges against Harris and directed the Office to file briefing detailing its investigation, which the CIU did. However, after Judge DeFino-Nastasi still refused to dismiss the charges and ordered the CIU to take additional specific investigative steps, the CIU was forced to file a motion objecting to the court's directive as a violation of the Pennsylvania constitution's separation of powers. Judge DeFino-Nastasi then dismissed the charges, but she called the CIU's theory about AJ "unsubstantiated,"[455] and criticized the CIU's filings as "utterly inappropriate"[456] and "designed to harass and influence the court."[457]

In 2022, Harris was arrested for the murder of Charles Gossett after he allegedly drove two gunman to shoot Gossett. The charges against him are pending.

Obina Onyiah (2021)[458]

Obina Onyiah was convicted of second-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his case because of Detective James Pitts' involvement in the investigation. CIU prosecutors concluded that Pitts coerced Onyiah's confession, and that the prosecution did not disclose impeachment information regarding Pitts. Onyiah's conviction was vacated and the charges against him were dismissed in May 2021. In 2022, Pitts was indicted in for obstruction and perjury stemming from his misconduct in Onyiah's case.

The Criminal Investigation

In October 2010, two armed men, one thin and the other heavyset, tried to rob a Philadelphia jewelry store. The thin man pointed a gun at a store employee, who knocked it away and ran out of the store, and the thin man chased the employee before giving up and getting into a nearby parked car. The heavyset man and the store owner got into a shootout, and both were killed. The heavyset man was later identified as Kevin Turner, who was 6'1". When police interviewed witnesses, three of them described the thin man as around 5'7" or 5'8". Store employees also told police that the two men had visited the store before the robbery. Police obtained surveillance video and released an image of the thin man to the public, stating that he was roughly 5'8".

Two days after the shooting, a woman called police to say that the thin man resembled Donte Waters, the father of her child. Police included Waters' photograph in a photo array that was shown to store employees, and one of them identified Waters as the thin man, while the other said he resembled the thin man. The next day, police searched Waters' residence and found clothing that resembled what the thin man was wearing during the robbery, including a distinctive hat. Police pulled Waters' criminal history and found he had a prior robbery conviction.

Two days after the tip on Waters came in, another woman called police to say that her boyfriend, Donnell Cheek, had information on the robbery-murder. Police spoke with Cheek, who was

455. AP News, "Philadelphia Judge Allows Prosecutors to Drop Charges."

456. *Id.*

457. *Id.*

458. The information in this section is taken from various sources. *See, e.g.,* Br. for Appellant Obina Onyiah, *Comm. v. Onyiah*, CP-51-CR-001632-2011, 2014 WL 8726382 (Pa. Sup. Ct. Nov. 5, 2014); Comm. Br. for Appellee, *Comm. v. Onyiah*, CP-51-CR-001632-2011, 2015 WL 1882502 (Pa. Sup. Ct. Feb. 3, 2015); *Comm. v. Onyiah*, No. 3010 EDA 2013, 2015 WL 5971352 (Pa. Sup. Ct. Sept. 28, 2015); Joint Stipulations of Fact of Pet'r Obina Onyiah and Resp't Comm. of Pennsylvania ("CIU Onyiah Joint Stipulations"), *Comm. v. Onyiah*, CP-51-CR-001632-2011 (Phila. Ct. Comm. Pl. Apr. 23, 2021); Resp't Comm. of Pennsylvania Answer ("CIU Obina Answer"), *Comm. v. Onyiah*, CP-51-CR-001632-2011 (Phila. Ct. Comm. Pl. Apr. 23, 2021); "Obina Onyiah," National Registry of Exonerations; Samantha Melamed, "Lawyers Say Philly Cops Coerced a Man to Confess to Murder. He's Cleared After 10 Years," Philadelphia Inquirer, May 4, 2021.

incarcerated in federal prison. Cheek said that the thin man on the video was Obina Onyiah, and that he had known Onyiah since 1997. Police then shifted their focus to Onyiah, executing a search warrant at his mother's house that did not yield any evidence. Detetive Pitt brought Onyiah's sister Christine in for questioning. She gave police Onyiah's cell phone, and she purportedly identified Onyiah as the thin man on the video. Finally, she arranged a meeting with Onyiah as a ruse so that police could arrest him.

At the time of his arrest, Onyiah was 6'3" and roughly 195 pounds—taller and heavier than the thin man. He was detained and was not given Miranda warnings until roughly seven hours after his arrest. Detective Pitts questioned him, and Onyiah waived his constitutional rights and supposedly confessed to the crime. According to his confession, Onyiah met up with Turner and Jamal Hicks, and then he and Turner went into the jewelry store to rob it.

Onyiah Loses His Suppression Hearing

Before trial, an evidentiary hearing was held to determine whether Onyiah's confession was involuntary and coerced. His girlfriend, Katherine Cardona, testified that she went with him to the homicide unit and was outside the interrogation room where she heard Onyiah yelling and asking detectives to stop hitting him. She also testified that the police asked her to identify Onyiah as the thin man on the video, and that when she refused to do so, they called her a derogatory term and threatened to take her kids away. Cardona described one of the detectives as having a "fatty tissue scar,"[459] which is consistent with other descriptions of Detective Pitts.

Detective Pitts testified at the hearing and denied abusing or coercing Onyiah. He claimed that Cardona was not present at the homicide unit during Onyiah's interrogation, pointing out that Cardona's name did not appear in the homicide visitor logbook. When he was questioned about witnesses identifying Donte Waters as the thin man, Pitts testified that he was able to exclude Waters as a suspect. However, he also admitted that he did not interview Waters and could not recall specifically what he did to exclude him. The trial court denied Onyiah's motion and credited Pitts' testimony, concluding that Onyiah's girlfriend was "wholly lacking in credibility."[460]

The Trial

ADA Deborah Watson Stokes prosecuted the case. Despite Cheek's identificationof Onyiah, the case had challenges. For instance, there were no records of cell phone communications between Onyiah and Turner, and Onyiah was much taller than the thin man on the video, whom police had described as 5'8" when they released his image to the public. At trial, Detective Pitts addressed this issue, testifying that police were mistaken when they initially described the thin man as 5'8". He claimed that after further review of the surveillance video, police were able to determine that the thin man was much taller. Pitts also changed his suppression hearing testimony and testified that he eliminated Waters as a suspect after he interviewed him—although he could not recall how long he spent talking to Waters, and there was no paperwork documenting the interview.

Cheek testified that Onyiah was the thin man on the surveillance video. Although Cheek had not seen Onyiah in the five years before the robbery-murder, he testified that he had seen Onyiah nearly 200 times between 1997 and 2005 and was certain of his identification. Onyiah's sister Christine was not located in time for trial, so Detective Pitts testified that she also identified Onyiah as the man on the video.

Defense counsel called Cardona to testify about what she heard while at the homicide unit, and about how she was treated by detectives after she refused to identify Onyiah as the thin man on the video. Onyiah's mother also testified about how detectives forced Christine to accompany them to the homicide unit for questioning.

Onyiah was convicted of second-degree murder and sentenced to life imprisonment.

The Law Division Aggressively Defends the Conviction

Onyiah filed a PCRA petition alleging abuse and coercion by Detective Pitts. Shortly after his petition was filed, Detective Pitts' interrogation practices came under public scrutiny when the Philadelphia Inquirer published an article about several cases that fell apart at trial due to accusations that Pitts was coercive and abusive during interrogations. In the face of these allegations, **Law Division ADA Mary Huber** argued that Pitts' conduct in other investigations was not relevant to the allegations of

459. CIU Obina Answer at 6, ¶ 30.

460. *Id.* at 8, ¶ 43.

coercion and abuse in Onyiah's case, and that Onyiah had no right to an evidentiary hearing because he had not identified witnesses who would testify about Detective Pitts' behavior.

While the PCRA petition was pending, the CIU agreed to investigate Onyiah's conviction.

The CIU Investigation

During the investigation, CIU prosecutors learned the Office had a prior policy of refusing to request or review police disciplinary files, and that this policy was in effect when Onyiah was prosecuted. Pursuant to this policy, the Office alerted defense counsel of its refusal to obtain these records and advised them to subpoena the records themselves. Accordingly, **ADA Watson Stokes** likely did not search for or disclose any impeachment information from Pitts' disciplinary files when she prosecuted Onyiah.

When the CIU searched Pitts' disciplinary files for the period preceding Onyiah's trial, prosecutors found three separate IA investigations into Pitts. Two of the investigations involved allegations of mistreatment and abuse of witnesses and/or possible suspects, and a third involved abuse and dishonesty. In all three investigations, IA concluded that Pitts committed misconduct.

In the first incident, Detective Pitts tried to arrest a witness on a material witness warrant. When he could not find the witness, he detained the witness' 84-year-old grandfather for over six hours and damaged property. Detective Pitts claimed that he arrested the grandfather for hindering apprehension and/or obstruction of justice, and that he left the grandfather at the homicide unit before going off duty. IA did not credit this account and concluded it was more probable that Detective Pitts retaliated when he could not locate the witness, and that he detained the grandfather to coerce cooperation from either the grandfather or the witness.

In the second incident, Detective Pitts assaulted his then-wife, who was also a police officer. Detective Pitts and his wife were in the process of divorcing and had been arguing over spousal support when he punched her. She called 911 and said Pitts pleaded with her to lie and say that someone tried to rob her. When police arrived, Pitts kept leaving the room and had to be told remain where he was. His wife told IA investigators that he was marking his face and claiming that she caused the marks, and that he told her "he needed to buy time"[461] and "needed time to think."[462] Pitts claimed that he and his wife were arguing, and that she threw something at him and hit him in the face, and that he only hit her once in response. IA did not credit Pitts and concluded that it was more plausible that he assaulted his wife. IA did not make any findings against his wife.

In the third incident, which was pending during Onyiah's trial, Pitts detained a witness for three days. The witness saw an incident that preceded a murder but did not see the murder itself. Nevertheless, Pitts picked the witness up from her job and took her to the homicide unit, where she was detained for roughly 47 hours. She told IA she was not allowed to arrange childcare for her son or call her job to let them know why she was not at work. She was also not given anything to eat or drink except pretzels and a soda. During her detention, Detective Pitts told her she was going to jail, and he asked to search her cell phone. She said Detective Pitts abruptly released her after he said he reviewed her text messages and told her that she seemed truthful. He offered a ride and then gave her $20 and his business card. IA reviewed interview logs that corroborated the witness' statements. Detective Pitts admitted that the logs showed her detention lasted roughly three days, but he claimed he did not know she was there for that long and that he left her sitting outside the interrogation rooms on a bench. IAB did not credit Pitts and ultimately found it more probable that he abused his authority.

Separately, the CIU also investigated Detective Pitts' interrogation of Onyiah and found evidence that corroborated Onyiah's claims of abuse and coercion. CIU prosecutors spoke with Robert "Chaz" Iezzi, Jr., who had been with Onyiah and his girlfriend on the day Onyiah was arrested. Chaz was brought to the homicide unit in handcuffs and was told he could not call his parents. He was in a nearby interrogation room and could hear Onyiah screaming for a long time. He also heard a detective yelling, "you did it, this is you,"[463] and what sounded like punching noises. CIU prosecutors also interviewed Onyiah's mother and his sister, Christine. His mother reiterated her trial testimony and emphasized the negative impact the police interrogation had on Christine. Christine told the CIU that police stormed into her house and told her she had to go with them, even though she had school. She denied identifying her brother in the video

461. CIU Onyiah Joint Stipulations at 22, ¶ 132.

462. *Id.*

463. *Id.* at 14, ¶ 85.

and claimed that Detective Pitts told her that Onyiah was in danger, which was why she agreed to set up the meeting with her brother that led to his arrest.

Onyiah is Exonerated

Based on the undisclosed information pertaining to Pitts, as well as expert opinion from a forensic video analyst who concluded that Onyiah was not the thin man on the video, the CIU conceded that Onyiah was entitled to relief. Onyiah's PCRA petition was granted, and the charges against him were dismissed shortly thereafter.

In March 2022, Pitts was indicted for perjury and obstruction stemming from his handling of Onyiah's interrogation. In April 2022, Onyiah filed a federal civil rights lawsuit against the city of Philadelphia.

Eric Riddick (2021)[464]

Eric Riddick was convicted of first-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his case after he claimed he was innocent. The CIU found that that the prosecution did not disclose favorable information about a firearm that supposedly belonged to Riddick and that was supposedly used during the murder. Although the CIU found that favorable information had been suppressed, its investigation did not fully exonerate Riddick, so the CIU offered Riddick a plea to a reduced charge of third-degree murder and a lesser sentence of 10 to 20 years, which more accurately reflected Riddick's role in the offense. In May 2021, Riddick was released from prison based on time served.

The Criminal Investigation and Trial

In November 1991, William Catlett was shot to death outside a Philadelphia store. At the time of his death, Catlett was in a gang that was rivals with Eric Riddick's gang. Two different bullet calibers were recovered from Catlett's body, suggesting that at least two gunmen shot him. Police spoke with Shawn Stevenson, who gave inconsistent accounts of the murder. In his first statement, Stevenson said he saw the shooter on a fire escape holding a rifle but could not identify him. Stevenson also said he saw Bernard Nolton acting as a lookout. However, the next day Stevenson was escorted to the police station by a friend of Catlett's and identified Riddick as the man he saw on the fire escape. Stevenson claimed he did not initially identify Riddick because he was afraid.

Other witnesses also placed Riddick with a firearm in the vicinity of the murder. Nolton, the alleged lookout, told police that Riddick and two other men had plotted to kill Catlett, but Nolton did not actually see Riddick shoot him. Nolton also said two of the men had handguns that were operable, and Riddick had a rifle that had been jamming the day before the murder, although Nolton thought Riddick fixed it. Terrance Taylor told police that on the morning of the shooting he saw Riddick and two friends outside a nearby house, and saw Riddick carrying a duffel bag with the butt of a rifle sticking out. Riddick spoke to police and said he was sitting on the steps of a house in the general vicinity of the shooting when it occurred. He said he heard gunshots but did not see who fired them. Three days after the murder, police recovered a fully loaded rifle near the crime scene, which police later believed belonged to Riddick.

Although two of Riddick's friends, including Nolton, were viewed as possible suspects in the murder, only Riddick was charged. Riddick went to trial in 1992, and **ADA Randolph Williams** prosecuted the case. He presented testimony from Stevenson and Taylor. Stevenson's testimony mirrored his second statement to police—that he saw Riddick shoot Catlett—and Taylor testified to seeing Riddick with a rifle on the morning of the murder. Firearms examiner James O'Hara testified that he performed testing on firearms submitted to the crime lab in connection with the case, but he did not test a .22 caliber rifle because police did not submit any such rifle for testing.

Two days after O'Hara testified, **ADA Williams** made a mid-trial disclosure to defense counsel that "someone had come up with a rifle in this case,"[465] *i.e.*, that a rifle had been recovered during the investigation that potentially belonged to Riddick. Defense counsel was concerned about this newly discovered evidence and its admissibility and raised these concerns with the court, and in response **ADA Williams** offered not to introduce the

464. The information in this section is taken from various sources. *See, e.g., Comm. v. Riddick,* No. 3480 EDA 2016, 2017 WL 6568212 (Pa. Sup. Ct. Dec. 26, 2017); Apr. 13, 2021 Ltr. from P. Cummings to R.Williams re: CIU Review of *Comm. v. Eric Riddick* (CP-51-CR-0141361-1992) ("April 2021 CIU Letter"); Comm. Ltr. Br. re: "*Comm v. Eric Riddick, CP-51-CR-01431361-1992, 4/30/21 PCRA Status Listing and Possible Negotiated Settlement,*" (Phila. Ct. Comm. Pl. Apr. 23, 2021); May 4, 2021 Ltr. from P. Cummings to Hon. Lucretia C. Clemons re: Comm. v. Eric Riddick, CP-51-CR-0141361-1992; PCRA Listed 6/2/2021 (Judge DiClaudio Recused Himself on 5/4/2021); Julie Shaw, "Philly Man is Released From Prison After Serving 29 Years for Murder," May 28, 2021, Philadelphia Inquirer.

465. April 2021 P. Cummings Ltr. (citing Riddick trial transcript).

rifle at trial. **ADA Williams** did not make any further disclosures about the rifle, including whether any testing had been conducted on it.

Riddick was convicted of first-degree murder and sentenced to life imprisonment.

Riddick's Failed PCRA Petitions

Riddick filed several PCRA petitions challenging his conviction. In his second petition, he retained a firearms examiner who opined that Riddick could not have fired the shots that killed the victim, because the shots had come from a gun held by a person standing at ground level, not from someone standing on a balcony fifteen feet above the sidewalk—where witnesses claimed to have seen Riddick. Although the petition was eventually denied, at least one Superior Court judge wrote separately to note the failure of the PCRA to "facilitate justice in this case, where it is clear to all that it is likely that an innocent man sits behind bars...."[466]

The CIU Investigation

The CIU agreed to investigate Riddick's case and learned that the rifle that police seized near the crime scene—which they believed belonged to Riddick—had undergone firearms testing, and that the prosecution had a copy of the test results and property receipt for the rifle in the DAO trial file, which showed that the rifle was prone to jamming and was fully loaded when it was discovered near the crime scene shortly after the murder occurred.

CIU prosecutors also found a handwritten note from the homicide detective on the case to **ADA Williams** asking him to subpoena the firearms analyst who inspected and tested the rifle. The CIU determined that **ADA Williams** did not disclose these test results to defense counsel when he made his mid-trial disclosure that a rifle had been recovered. Nor did **ADA Williams** subpoena the firearms analyst who conducted testing on the rifle. The CIU determined that had the full scope of information about the rifle been disclosed, defense counsel would have been able to argue that Riddick was not the shooter, because the gun that police believe belonged to him was not operable and was in fact fully loaded when it was found.

Riddick's Negotiated Plea

The CIU conceded that Riddick was deprived of his right to a fair trial but did not consent to dismissing the charges against him, because the investigation found credible evidence suggesting that he may have been involved the crime. In 2021, the CIU offered Riddick a reduced plea to third-degree murder, and Riddick pleaded no-contest and was released from prison immediately on time served.

Arkel Garcia (2021)[467]

Arkel Garcia was convicted of second-degree murder and sentenced to life imprisonment. After Garcia was convicted and sentenced, the lead detective on his case, Detective Philip Nordo, was accused of using illegal interrogation tactics with witnesses and suspects, including by sexually coercing or assaulting them in police interrogation rooms, and giving benefits to informant and witnesses with whom he may have had intimate relationships, including by putting money into their prison commissary accounts. The Office began an investigation into the allegations against Detective Nordo, and the CIU later confirmed that the Office had knowledge of the allegations against Detective Nordo as early as 2005, when IA investigators referred a complaint to the Office regarding Nordo's sexual assault of a witness in an interrogation room.

The CIU agreed to investigate his conviction because of Detective Nordo's involvement in the case. The CIU confirmed that the prosecution did not inform defense counsel of Nordo's pattern of misconduct, including the 2005 allegation of sexual assault. It also found that Detective Nordo gave false and misleading testimony at Garcia's trial. Based on these findings, the Office moved to vacate Garcia's conviction in June 2021, and the charges against him were dismissed shortly thereafter.

The Criminal Investigation

In November 2013, Christopher Massey was killed when an assailant tried to steal his headphones. Before he died, Massey was able to say that he did not recognize the shooter. Police collected video footage showing Massey walking down the street before he was shot, as well as video footage showing the

466. *Riddick,* 2017 WL 6568212, at *6 (P.J.E. Bender, conc.).

467. The information in this section is taken from various sources. *See, e.g.,* Parties' Agreed Statement of Facts and Joint Stipulations of Fact ("CIU Garcia Joint Stipulations"), Resp't Comm.'s Answer to PCRA Pet. ("CIU Garcia Answer"), *Comm. v. Garcia*, CP-51-CR-0003438-2014 (Phila Ct. Comm. Pl. May 28, 2021); "Arkel Garcia," National Registry of Exonerations; Chris Palmer, "As a Fired Philly Homicide Detective Awaits Trial on Rape Charges, More of His Cases are Getting Overturned," Philadelphia Inquirer, June 4, 2021.

shooter approaching Massey. None of the footage showed the shooter's face. The footage was also of poor quality, and the cameras' line of sight was sometimes obstructed.

Detective Nordo questioned various people in the neighborhood about Massey's murder. Nordo tried to get Witness-1, who was Arkel Garcia's friend, to inculpate himself. Witness-1 was detained for two days before he was released from custody, and after his release, Detective Nordo continued to contact Witness-1, even though he did not provide any information about Massey's death. Detective Nordo also spoke with a second witness ("Witness-2") and showed him video footage of the suspect. As noted above, although the video quality was poor and the suspect was sometimes obscured, Witness-2 somehow identified Garcia from the video. Witness-2 also said that Garcia had been robbing people in the neighborhood. After this interview, Witness-2 became a confidential informant for the narcotics unit, and Nordo used him to make controlled drug buys as part of a larger effort to find the gun used in Massey's killing.

After Witness-2 identified him, Garcia was brought in for questioning and held overnight in an interrogation room until the next morning, when Nordo questioned him alone for roughly 65 minutes before giving him *Miranda* warnings. During the interrogation, Garcia supposedly confessed to killing Massey. After Garcia confessed, Nordo asked then-Detective Nathanial Williams[468] to come into the room to witness Garcia formally write out his confession. Detective Nordo also videotaped Garcia reading his confession aloud. According to his confession, Garcia and two other men followed Massey from a nearby convenience store into an alley, where he was shot. Garcia detailed the route he took as he traveled to Massey. Garcia then identified the person who shot Massey and he said that the clothing he was wearing during his interrogation was the same clothing he wore during the crime.

Garcia's confession conflicted with the surveillance video police obtained. For instance, although Garcia said he and two other men followed Massey from the convenience store, the video did not show anyone in the store. Video footage from the alley also showed only one assailant following Massey. When police investigated the person who Garcia said shot Massey, they found he could not have been involved, because he had recently been shot himself, and his injuries were serious enough that he required a colostomy bag, making him physically incapable of participating in the crime. Garcia's clothing also did not match the clothing worn by the assailant. Garcia's top had a prominent logo on the front, while the assailant on video was wearing a plain top with no logo on the front. Lastly, Garcia's route that he claimed he took to get to Massey conflicted with the route taken by the assailant as shown on video.

The Trial

Garcia's trial began in February 2015, and **ADA Brendan O'Malley** prosecuted the case. The prosecution's primary evidence was Garcia's confession, which defense counsel attacked as inaccurate and coerced. When Detective Nordo testified, he addressed defense counsel's argument by claiming that when he began questioning Garcia, he did not even think he was a suspect. Nordo testified that it was only roughly one hour into the interview—when he claimed Garcia was giving him false information while also providing specific information about aspects of the crime known only to the killer—that he began to think Garcia was involved. Notably, although Witness-2 identified Garcia as the assailant shown on video, the prosecution opted not to call him as a witness. They also opposed defense counsel's requests for information about Witness-2, including a request to identify him.

Defense counsel presented alibi witnesses, including his mother, to account for Garcia's whereabouts during the murder. On cross-examination, **ADA O'Malley** played portions of recorded jail phone calls between Garcia and his mother. The portions of the calls that **ADA O'Malley** played left the impression that Garcia's mother thought he resembled the assailant shown on video footage.

Garcia was convicted of second-degree murder and sentenced to life imprisonment.

The CIU Investigation

The CIU investigated Detective Nordo's conduct during the investigation of the Massey murder and found several instances of misconduct. First, it found facts suggesting that Nordo behaved improperly with Witness-1 and Witness-2. Witness-1 reported that Nordo sexually propositioned him, and that after his interrogation ended, Nordo continued to contact him, even though he had no information on the murder. The CIU reviewed some of these communications from Nordo, which left the impression that Nordo appeared to be interested in a sexual relationship with

468. Nathanial Williams is no longer employed by the Philadelphia Police Department. Williams lied to Internal Affairs investigators about his improper use of classified information and then tried to cover up his lie by fabricating evidence that he placed in a homicide file. In November 2019, Williams was arrested and charged in connection with his misconduct. *See* CIU Garcia Joint Stipulations at 26-27, ¶¶ 66-68.

Witness-1. In some of these communications, Nordo referred to his interrogation of Garcia and suggested that he also tried to sexually assault and/or coerce Garcia into a sexual encounter. Detective Nordo signed many of his emails to Witness-1 with "LLR," which stood for "love, loyalty, and respect." In one of his final communications with Witness-1, he offered to pick him up from prison and take him to a hotel to have sexual intercourse with a woman. Following this offer, Witness-1 told his mother about it, and she told him to cut off communication with Detective Nordo.

The CIU found that Detective Nordo also solicited Witness-2 for sex after he was incarcerated on an unrelated matter. When Witness-2 was incarcerated in jail, he and Nordo spoke over the phone, and their calls were recorded. The CIU reviewed these call recordings, where Nordo offered Witness-2 reward money and help with his own probation violations if he would cooperate against Garcia. In other calls, Detective Nordo asked Witness-2 to keep an open mind about their relationship and complained about Witness-2's lack of loyalty. Detective Nordo would also shift the discussion to sex, accusing Witness-2 of faking interest in him and then backing off.[469] Detective Nordo also tried to lure Witness-2 to a hotel room under the premise of offering him reward money.[470]

Based on their review of the H-File, CIU prosecutors also concluded that Detective Nordo gave false and misleading testimony about Garcia's interrogation. As noted above, Nordo testified that he did not initially think of Garcia as a suspect at the start of the interview. However, when the CIU reviewed the H-File, prosecutors found a hardcopy of Garcia's mugshot, which had been printed *before* his interrogation, and which contained handwritten notes indicating that Witness-2 identified Garcia as a possible shooter in Massey's death.[471]

CIU prosecutors were also critical of the prosecution's decision to withhold information about Witness-2. As previously noted, the prosecution refused to disclose information about Witness-2 and opposed defense counsel's attempt to discover his identity, arguing that it disclosure was not required because Witness-2 was not going to testify at Garcia's trial. However, the CIU noted that the prosecution failed to assess whether they had an obligation to find and disclose favorable information about Witness-2, regardless of whether he would be a witness, because it have impacted the defense's investigation or trial preparation or led to the discovery of favorable information.

Lastly, the CIU was critical of **ADA O'Malley's** strategic decisions and his actions with respect to Garcia's jail calls. For instance, **ADA O'Malley** acknowledged during trial that Garcia's confession contradicted the video footage police collected. But instead of considering whether this meant that Garcia's confession was false or that there were problems with the interrogation, the CIU noted that **ADA O'Malley** turned these contradictions into circumstantial evidence of Garcia's guilt, by arguing that the falsehoods were proof that Garcia was guilty, because he intentionally lied to protect himself and blame others. When the CIU reviewed the jail calls that **ADA O'Malley** used to cross-examine Garcia's mother, they found that the selected portions of the calls he played were misleading—and that when the CIU listened to the calls in their entirety, Garcia's mother was saying that she *did not believe* Garcia resembled the suspect on the video. Lastly, the CIU noted that **ADA O'Malley** did not produce these jail calls during the normal course of pretrial discovery and instead disclosed them once trial was already underway, giving defense counsel little time to adequately listen to them and review them.

Garcia is Exonerated

The CIU conceded that Garcia was entitled to a new trial, and they moved to dismiss the charges against him shortly thereafter. Shortly after his exoneration, Garcia filed a civil lawsuit against the city and the Philadelphia Police Department.

469. In calls, Nordo said "keep an open mind…you know what I'm saying?" *See id.* at 13, ¶ 42. In other calls, Nordo complained that the CI was not being loyal to him and again shifted the discussion to sex, saying "[y]ou always interested, and…then you kinda back off of it, you now what I mean? You know whatchu, I don't know what you're so shy about." *See id.* at 16, ¶ 45.

470. After Witness-2 was released from custody, he was quickly reincarcerated for killing a person. Witness-2 tried to contact Nordo twice after his arrest, but Nordo cut off communication with him, and Witness-2 never received any reward money. *See id.* at 22, ¶ 51.

471. The handwritten notes read "From A 19th C/I Poss. Shooter," along with the case number of the Massey investigation. *See id.* at 26, ¶ 65.

Curtis Crosland (2021)[472]

Curtis Crosland was tried twice for murder. After his first conviction was overturned due to constitutional error, he was retried and convicted of second-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his conviction after he filed a federal habeas petition alleging *Brady* violations. After its investigation corroborated Crosland's allegations, the CIU conceded that Crosland was entitled to relief. In June 2021 his habeas petition was granted and the charges against him were dismissed shortly thereafter.

The Criminal Investigation

In 1984, Il Man Heo was working at a Philadelphia grocery store when he was killed. Before his death, witnesses recalled seeing an unknown man in the store. The man called Heo "Tony" and demanded money from him. Witnesses described the suspect as 5'5" and wearing a jacket, hat, and scarf wrapped around his face, but no one recognized him.

The case went cold until March 1987, when police arrested Rodney Everett on a parole violation stemming from domestic violence and gun charges. Following his arrest, Everett offered to cooperate. He told police that Crosland confessed to murdering Heo. According to Everett, Crosland told him he was wearing a jacket, scarf, and cap and that after shooting Heo, he panicked and fled without stealing anything. Everett also said he had seen Crosland with a gun before but did not know what kind of gun Crosland used in Heo's murder. Everett also said Michael Ransome was with Crosland during the murder, and he agreed to testify at Crosland's preliminary hearing.

The First Trial

Crosland went to trial in 1988, and **ADA Joel Rosen** prosecuted the case. By the time of trial, Everett had invoked his Fifth Amendment right against self-incrimination and refused to testify. The prosecution tried to offer Everett's testimony from the preliminary hearing, but defense counsel objected because Everett had not been fully cross-examined about his own criminal history at the hearing. In response, **ADA Rosen** offered to stipulate that Everett had been incarcerated for robbery and had been arrested on a potential parole violation at the time he spoke with police. However, **ADA Rosen** did not disclose the underlying facts that led to Everett's arrest. The court then ruled that the prosecution could read Everett's preliminary hearing testimony to the jury.

ADA Rosen also called Dolores Tilghman as a witness, because she claimed to have heard Crosland talking with two other men about Heo's murder. Prior to testifying at Crosland's trial, Tilghman testified before a grand jury in a separate murder investigation, where she was questioned by **ADA Rosen.** At some point during her grand jury testimony, Tilghman had mentioned Crosland and Heo's murder, so **ADA Rosen** turned over this portion of her grand jury testimony to defense counsel. When defense counsel reviewed her testimony, he objected because the transcript appeared incomplete. **ADA Rosen** told both defense counsel and the court that pertained to Crosland had been disclosed, and that the remainder of Tilghman's grand jury testimony was not relevant to Crosland's case.[473] Defense counsel accepted that representation and did not request further review by the court.

At trial, Tilghman testified that Crosland was afraid that his cousin would give police information about the murder because there was a cash reward being offered. On cross-examination, Tilghman admitted she was unsure whether Crosland was expressing fear for himself or for Michael Ransome, who was allegedly also involved in the murder. Tilghman eventually admitted she did not recall the conversation well and did not even know which of the three men was speaking about the murder.

472. The information in this section is taken from various sources. *See, e.g.*, Comm. Br. for Appellee, *Comm. v. Crosland*, No. 3541 EDA 2015, 2016 WL 7647910 (Pa. Sup. Ct. Aug. 24, 2016); *Comm. v. Crosland*, No. 3541 EDA 2015, 2017 WL 118093 (Pa. Sup. Ct. Jan. 12, 2017); Comm. Resp. to Mot. for Relief Under Fed. R. Civ. P. 60(b), *Crosland v. Vaughn*, No. 03-1459 (E.D. Pa. Dec. 2, 2014); Resp. to Pet'r. Traverse and Supplemental R. of Newly Discovered Evidence ("Law Division Response"), *Crosland v. Vaughn*, No. 03-1459 (E.D. Pa. Apr. 15, 2016); Resp. to Pet'r. Objections, *Crosland v. Vaughn*, No. 03-1459 (E.D. Pa. Apr. 3, 2018); Mem. in Support of Pet'r. Mot. Pursuant to 28 U.S.C. § 2244 for Order Authorizing District Court to Consider Second or Successive Pet. for Writ of Habeas Corpus ("Crosland Habeas Petition"), *Crosland v. Comm. of Pennsylvania*, No. 21-cv-00476 (E.D. Pa. Feb. 1, 2021); Ltr. from Comm. of Pennsylvania to Hon. Anita B. Brody Encl. Ltr. from Hon. S. Robins New ("Hon. Robins New Letter"), *Crosland v. Comm. of Pennsylvania*, No. 21-cv-00476 (E.D. Pa. May 4, 2021); Comm. Resp. to Pet. for Habeas Relief ("CIU Crosland Response"), *Crosland v. Comm. of Pennsylvania*, No. 21-cv-00476 (E.D. Pa. May 28, 2021); Explanation and Order ("Crosland Order"), *Crosland v. Comm. of Pennsylvania*, No. 21-cv-00476 (E.D. Pa. June 22, 2021); "Curtis Crosland," National Registry of Exonerations; Samantha Melamed, "A Philly Man Was Cleared of Murder After 34 Years By Evidence That Was in the Police File All Along," Philadelphia Inquirer, June 25, 2021l Caroline Anders, "He Spent 34 Years in Prison. Evidence on File for Decades Exonerated Him Last Month," Washington Post, Aug. 1, 2021.

473. The trial court offered to conduct a review of the grand jury testimony, but defense counsel accepted ADA Rosen's representation that all relevant materials had been produced. *See* Crosland Habeas Petition at 9-10, ¶ 29 (citing trial transcript).

Crosland was convicted of second-degree murder and sentenced to life imprisonment. However, the Pennsylvania Supreme Court reversed Crosland's conviction after it found that the prosecution's use of Everett's preliminary hearing testimony violated Crosland's constitutional right to confront witnesses.

The Retrial

The Office retried Crosland in January 1991, and **ADA Shelley Robins New** prosecuted the case. Everett was again called as a witness and given immunity in exchange for his testimony. However, he continued to recant and even denied testifying at Crosland's preliminary hearing or giving a statement to police. The prosecution could not locate Tilghman for the second trial, so her testimony from the first trial was read to the jury. After initially deadlocking, the jury convicted Crosland of second-degree murder, and he was sentenced to life imprisonment.

The Law Division Aggressively Defends the Conviction

Crosland spent decades challenging his conviction. Prior to the CIU taking his case, he filed petitions in filed petitions in both state and federal court. The Law Division opposed all these petitions and argued that Crosland's claims lacked any factual support. For instance, when Crosland filed a federal habeas petition arguing that the Commonwealth failed to disclose Everett's motive to cooperate with police, **ADA Max Kaufman**, then-Supervisor of the Law Division's Federal Litigation Unit, dismissed Crosland as a "serial filer who has burdened the state and federal courts with a succession of *baseless pleadings* over decades."[474]

The CIU Investigation

After Crosland filed a federal habeas petition, the CIU agreed to investigate his conviction and found favorable information about Everett and Tilghman that had not been disclosed to defense counsel prior to trial. Starting with Everett, the CIU found a PAS documenting a failed polygraph test that police gave to Everett after he claimed to have heard Crosland confess to murdering Heo. The CIU also learned that, at some point after he implicated Crosland, Everett backtracked and told police that Frank Turner shot Heo. Finally, the CIU found a letter that Everett wrote to homicide detective Dominic Mangoni, in which Everett boasted that his "work is the best, because it will verify in essence that no lawyer of [Crosland's] or [Frank Turner] can say that your office or the district attorney's office offered me any deals."[475] Everett wanted to "work out a plan"[476] and suggested wearing a wire around Turner to "confirm more than just the Korean killing."[477]

The CIU also learned that Everett had testified in a separate murder trial, where he admitted to falsely accusing Crosland (and another man) of murdering John Lamb in order to avoid being charged with the murder himself. Everett's false accusation in that case resembled the accusations he made against Crosland in this case. Once again, none of this information had been disclosed to defense counsel prior to trial.

With respect to Tilghman, the CIU reviewed the entirety of her grand jury testimony and found that she admitted under oath to falsely accusing Michael Turner of murder. Tilghman testified that she had made up the accusation because she was mad at Turner, and that she was later so upset at what she had done that she tried to commit suicide. She also testified that when she tried to tell police her accusation was false, they threatened to arrest her unless she gave another statement implicating Turner and his cousin. The Office apparently took Tilghman's testimony seriously—the CIU discovered that the Office tried to charge Tilghman with a crime based on her grand jury admissions.

The CIU noted that **ADA Rosen** had questioned Tilghman before the grand jury and was thus personally aware of her admission that she falsely accused someone of murder, yet when asked by defense counsel for the remainder of Tilghman's grand jury testimony, he represented that rest of it was not relevant to Crosland's case. CIU prosecutors also noted that **ADA Rosen** made selective disclosures with respect to Tilghman's grand jury testimony: he disclosed the portion of her testimony that corroborated Tilghman's expected trial testimony (and thus strengthened his case), but he did not disclose her admission to making false accusations, which would have undermined her credibility (and thus weakened his case).

Finally, CIU prosecutors found alternate suspect information that had not been disclosed. The PAS in the H-File indicated that police investigated Michael Ransome, whom Everett claimed was present when Crosland allegedly killed Heo. Ransome matched the general description of the shooter and lived near Heo's store, and police began a background investigation on

474. Law Division Response at 1 (emphasis supplied).

475. CIU Crosland Response at 10.

476. *Id.*

477. *Id.*

Ransome and conducted surveillance on him. The second suspect police investigated was Crosland's cousin, Frank Turner. A PAS dated three months after Crosland became a suspect contained information that Frank Turner was the "alleged shooter in the HEO case."[478]

Judge Robins New's Statement About the Crosland Retrial

As part of its investigation, the CIU asked to speak with **Robins New**, who had since become a judge on the Philadelphia Court of Common Pleas, about her recollection of the Crosland retrial. **Judge Robins New** responded in a February 2021 letter, which she asked to be placed in the DAO file and filed with the federal district court. In her letter, **Judge Robins New** said she had "no independent recollection of the Curtis Crosland case,"[479] noting that she tried the case thirty years ago. She stated that her general practice was to turn over the entire "Homicide File,"[480] which she called the "H-File."

She objected to the CIU's conclusion that the Commonwealth withheld critical impeachment and exculpatory information, because no one spoke with her about the case. She also criticized the CIU's findings to the extent they rested on Everett and Tilghman. **Judge Robins New** noted that "uncooperative witnesses"[481] like Everett and Tilghman were "the norm in almost every Homicide case,"[482] and that witnesses "rarely agree with previous statements or testimony they have given and most often deny what has been recorded."[483] Finally, she described Crosland's habeas petition as "speculation, hypotheticals and innuendo,"[484] and she stated that Crosland's "assert[ion] [of] innocence"[485] was not a "basis for overturning a trial verdict."[486] She observed that Crosland was just like most incarcerated people who are convicted of homicide and who "maintain their innocence,"[487] and that this claim of innocence did not give Crosland's habeas petition "more weight."[488]

Elsewhere, **Judge Robins New** argued that the evidence was insufficient to overturn the jury's verdict, and that the "after discovered evidence"[489] from "alleged witnesses from thirty years ago"[490] was not credible. She questioned how these witnesses had clear recollections of a murder that occurred so long ago, and that at any rate it was "mere speculation"[491] to predict how the verdict would have changed if those witnesses had testified at trial. Then, she hypothesized that it was just as likely that these witnesses, "[l]ike most homicide witnesses…would in all likelihood have refused to come to court, been uncooperative and denied anything they had previously stated."[492]

Judge Robins New did not cite any controlling case law on the disclosure of favorable information, or the legal standard that applies when considering the impact of withheld favorable information on a trial. As noted elsewhere in the Report, the case law does not ask courts to "speculat[e]" about how the verdict would have changed. Rather, the case law asks whether there is a reasonable probability of a different result, *i.e.*, whether the omitted favorable information undermines confidence in the outcome.

Office Policies: Grand Jury Files and the H-File

During its investigation, the CIU reviewed the DAO trial file for both of Crosland's trials. Prosecutors did not find a copy of Tilghman's grand jury testimony in **ADA Robins New's** trial file, which led them to conclude that **ADA Rosen** never notified her of or provided a copy of Tilghman's testimony when the case was handed over to **ADA Robins New**. The CIU also concluded that it was unlikely that **ADA Robins New** searched grand jury materials for any impeachment information on Tilghman, because the Office did not have a policy or practice requiring prosecutors to search grand jury materials for favorable information.

478. *Id.* at 8.
479. Hon. Robins New Ltr. at 1.
480. *Id.*
481. *Id.*
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.* at 2.
490. *Id.*
491. *Id.*
492. *Id.*

The CIU also reviewed **Judge Robins New's** statements about her discovery practices when she was a trial prosecutor. As noted above, they reviewed **Judge Robins New's** letter, in which she described her general practice was to turn over the "H-File" to defense counsel. They also reviewed testimony she gave in a different post-conviction proceeding, wherein she referred to disclosing the "H-File." Based on the substance of her letter and her testimony in the prior proceeding, CIU prosecutors determined that **Judge Robins New's** description of the "H-File" was actually a reference to the "H-Binder," which was created by police and given to prosecutors to prepare for trial—and did not contain the full set of documents contained in the H-File. The CIU was also aware that the Office used to rely on the police to create the H-Binder and to review the H-File for relevant documents, and that prosecutors generally did not independently review the H-File themselves. Thus, the CIU concluded it was unlikely that the PAS regarding Everett and alternate suspects was included in the H-Binder or disclosed to defense counsel.

Crosland is Exonerated

Following its investigation, the CIU conceded that Crosland was entitled to relief. United States District Judge Anita Brody granted the federal habeas petition, writing that "[t]he CIU's thorough investigation and the Commonwealth's subsequent admission is a fulfillment of the prosecutor's enduring duty to seek truth and a prime example of *doing justice*...I accept the Commonwealth's concession and will grant Crosland's petition."[493]

Jerome Loach (2021)[494]

Jerome Loach was convicted of criminal conspiracy stemming from an armed home invasion committed by two other individuals and sentenced to 25-to-50 years' imprisonment because of prior felony criminal convictions. After he was convicted, Loach obtained information showing that the prosecution misrepresented cell phone evidence that was used to connect Loach to his co-conspirators. Loach filed a PCRA petition detailing the misrepresentations, and the PCRA court ordered a hearing on his claims.

Once proceedings were underway, the PCRA court requested the CIU's involvement in the case. Due to the timing of the CIU's involvement, it conducted an abbreviated review of Loach's conviction and found that he was deprived of his right to a fair trial but did not conclude that Loach was innocent. Accordingly, the CIU conceded that Loach's conviction should be vacated but did not indicate that the charges should also be dismissed. Instead, it offered Loach the option to plead guilty to a de-mandatorized offense, *i.e.*, to make the offense no longer subject to a mandatory minimum term of imprisonment.

Loach ultimately rejected the CIU's offer. In 2020, the PCRA court vacated his conviction. The Office dismissed the charges against Loach in 2021.

The Criminal Investigation

In 2009, three women were the victims of a home invasion armed robbery in Philadelphia. The women told police they answered a knock on their door from someone pretending to be a pizza deliveryman. He and another man then forced their way into the house at gunpoint and asked where the boyfriend of one of the women was. They soon left without taking anything.

When police responded to the women's 911 call, they saw Sopheap Phat and Jessie Higgins fleeing the scene, and they arrested both men. Police recovered a gun holster from Higgins and a gun in the alley where Higgins had been running. The women identified Phat and Higgins as the men who forced their way into their home. They also said that during the home invasion, Higgins answered a phone call and then told Phat it was time to leave. One woman also said a third male perpetrator had been there, and that she thought one of the other women knew this third man. Phat later told police that the third man's nickname was "Rome."

Phat pleaded guilty to reduced charges and agreed to cooperate, while Higgins pled guilty but did not cooperate. Phat told police that he worked at a barbershop run by Jerome Loach, that Loach was involved in the home invasion, and that Loach was the person he referred to as "Rome." He said Loach persuaded him to commit the robbery to pay off a debt, that Loach had been present during the robbery and that he supplied Phat with a gun. Phat also said that Loach texted with Higgins during the crime.

493. Crosland Order at 2 (emphasis in original).

494. The information in this section is taken from various sources. *See, e.g.*, Conversation with P. Cummings; PCRA Hearing Testimony ("Loach PCRA Hearing Transcript"), *Comm. v. Loach*, 51-CR-0006738-2010 (Phila. Ct. Comm. Pl. July 24, 2020); "Jerome Loach," National Registry of Exonerations; Samantha Melamed, "Free After a Decade in Prison, Philly Man Says Police Faked Evidence in His Case," Philadelphia Inquirer, Aug. 6, 2021.

The Trial

Loach went to trial in 2011, and **ADA Joseph McCool** prosecuted the case. None of the women from the home invasion identified Loach. **ADA McCool** called Phat as a witness, but he recanted on the stand and said that Loach did not participate in the crime and was innocent. To link Loach to the crime, **ADA McCool** relied on cell phone records and testimony from Detecrtive Christopher Tankelewicz, who examined Higgins' and Loach's cell phones. Detective Tankelewicz manually inspected Higgins' phone and then memoralized his findings in a report, which included an analysis of Higgins' call log. According to Detective Tankelewicz, the call log showed 25 calls between Higgins and a phone that was registered to Loach's wife (the "Loach-affiliated phone"), and he also testified that he found a text message from the Loach-affiliated phone to Higgins' phone in the hours before the home invasion. Cell phone records for Phat's phone also showed that it made two calls to the Loach-affiliated phone, including one that occurred during the home invasion. Based on the totality of these records, **ADA McCool** argued that the frequency and timing of the communications pointed to Loach as a co-conspirator in the robbery.

Loach said he had an alibi for the night of the crime—he had been in a play performance at a church in South Philadelphia. When Loach's first defense counsel did not investigate his alibi, he replaced her with new counsel. However, because his first counsel had not given adequate notice about the alibi evidence, defense counsel informed Loach that he would not be able to present any alibi evidence at trial, and the jury ultimately did not hear any of this evidence.

Loach was convicted of criminal conspiracy but acquitted of all other charges. He was sentenced to 25-to-50 years' imprisonment due to his prior criminal convictions for armed robbery and assault.

The Prosecution Misrepresented Cell Phone Evidence

Loach challenged his conviction and managed to obtain cell phone records for his own phone and Higgins' cell phone. The records contradicted the prosecution's arguments and characterization of the cell phone evidence that was used to link Loach to his co-conspirators. First, cell phone records showed that Higgins' phone was registered to his wife, and that the prosecution misrepresented the phone as belonging to Higgins, both when Detective Tankelewicz testified and when he submitted his report. Second, cell phone records for Loach's own phone indicated that his phone did not have text capabilities, which again contradicted Detective Tankelewicz's testimony and his report indicating that he found a text between Higgins and Loach.

The CIU's Limited Investigation

Loach filed a PCRA petition alleging in part that defense counsel was ineffective for failing to adequately investigate the cell phone evidence. The Law Division initially opposed Loach's petition, claiming that other cell phone records showed communications between Loach and Phat on the day of the home invasion, and that these records also suggested that Higgins' phone number had been masked in Loach's phone through call-forwarding.

The PCRA court ordered an evidentiary hearing on the petition. After the hearing was underway, the court requested the CIU's involvement in the case. Because the CIU got involved "pretty late in the process,"[495] it only conducted a limited review of the trial record. The CIU ultimately concluded that Loach was deprived of a right to a fair trial but did not take the position that Loach was "actually innocent of a crime...."[496] While the CIU cited the cell phone records that Loach obtained as supporting the conclusion that the prosecution violated *Napue* through the presentation of false and misleading evidence, because the CIU was also aware of other cell phone evidence suggesting that Loach had communicated with Phat and Higgins in the lead up to the robbery and had possibly masked Higgins' number, the CIU unable to conclude that Loach was innocent.

The PCRA Court Grants Relief

At a hearing before the PCRA court, the CIU offered to let Loach plead to a de-mandatorized offense, *i.e.*, to remove the imposition of a mandatory minimum sentence of imprisonment. Loach, however, declined to accept any plea offer and instead asked the PCRA court to issue a ruling on his PCRA petition. The PCRA court later held that Loach's petition was meritorious and vacated his conviction. Its holding was based in part on defense counsel's ineffectiveness for failing to object to "numerous instances where the Commonwealth misrepresented the record by presenting evidence, false testimony, and argument indicating that petitioner conspired with Higgins and Phat..."[497]

495. Loach PCRA Hearing Transcript at 12.

496. *Id.* at 13.

497. *Id.* at 46.

The PCRA court also found that "[t]here was a *Brady* violation regarding the phone records,"[498] because the Sprint phone records for Higgins' phone were not turned over to the defense.

Loach's Charges are Dismissed

Roughly a year after the PCRA court vacated his conviction, the Office dismissed the charges against Loach, citing insufficient evidence to be able to prove Loach's guilt beyond a reasonable doubt.

Loach filed a civil lawsuit against the city and the detectives involved in his case. In February 2023, the lawsuit was settled for $300,000.

Lamar Ogelsby (2021)[499]

Lamar Ogelsby was convicted of first-degree murder and sentenced to life imprisonment. After his conviction, he filed post-conviction petitions in state court alleging that the prosecution suppressed favorable information about key prosecution witnesses and elicited false evidence at trial. In 2019, the Pennsylvania Attorney General (the "AG's Office") assumed control of the litigation from the Law Division, due to potential conflicts of interest. The AG's Office continued to oppose relief.

After losing in state court, Ogelsby shifted his efforts to his federal habeas petition. Most recently, he sought permission to amend his petition to include additional allegations that the prosecution suppressed favorable information and permitted key witnesses to give false and misleading testimony. The AG's Office opposed the amendment on the ground that Ogelsby's amended claims lacked merit. However, the federal district court disagreed and permitted Ogelsby to add these additional allegations. In reaching this conclusion, the district court observed that the facts, if true, suggested that the prosecution permitted a key witness to give false testimony.

The Criminal Investigation

In December 2006, Robert Rose was shot to death on a Philadelphia street. Shortly before he was killed, Rose was with Troy Hill ("Troy"), the brother of his girlfriend, Tamia Hill ("Tamia"). Tamia said that Rose had been in a dispute with Lamar Oglesby because he sold Rose a car that turned out to be a lemon. Tamia claimed that on the night of the murder, she heard gunshots, and then found Rose lying in the street. Police also spoke with Troy's brother, Khalif Hill ("Khalif") who lived near the shooting, but Khalif said he did not see anything. Police also took a statement from Sean Harris, who identified Christopher Stewart as the shooter.

Three years after Rose's murder, Troy was arrested on federal criminal charges for a string of gunpoint robberies. His federal sentence carried a lengthy mandatory minimum sentence, so Troy decided to cooperate, which obligated him to provide information about other criminal incidents, including Rose's murder. He said he was with Rose when he was killed, and that Rose was high on drugs and complaining about the car. Rose then began to assault and steal money from people who supposedly sold drugs for Ogelsby. Troy said he was trying to get Rose to leave when he saw Ogelsby and Michael Gibbons run up to Rose and begin shooting at him with a machine gun and a small firearm, respectively.

Khalif separately agreed to cooperate after he was arrested on felony drug charges while on probation for aggravated assault. Khalif said he was home when he heard gunshots and ran to his window, and he saw Ogelsby and Gibbons shooting Rose. Khalif said Ogelsby had a long firearm that resembled a machine gun and Gibbons had a black handgun. Khalif also said that the shooting stemmed from Rose buying a bad car from Ogelsby.

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498. *Id*. at 48.

499. The information in this section is taken from the following sources. *See, e.g.*, Br. for Appellant, *Comm. v. Ogelsby*, No. 3048 EDA 2013 (Pa. Sup. Ct. Apr. 14, 2014); Comm. Br. for Appellee, *Comm. v. Ogelsby*, No. 3048 EDA 2013 (Pa. Sup. Ct. Oct. 7, 2014); Appellant's Reply Br. and Supplemental Reproduced R., *Comm. v. Ogelsby*, No. 3048 EDA 2013 (Pa. Sup. Ct. Oct. 7, 2014); *Comm. v. Ogelsby*, No. 3048 EDA 2013, 2014 WL 10558206 (Pa. Sup. Ct. Nov. 25, 2014); Op. ("PCRA Opinion"), *Comm. v. Ogelsby*, CP-51-CR-0005339-2012 (Phila. Ct. Comm. Pl. Apr. 12, 2017); Br. for the Appellant, *Comm. v. Ogelsby*, No. 749 EDA 2017 (Pa. Sup. Ct. Sept. 12, 2017); Br. for Appellee, *Comm. v. Ogelsby*, No. 749 EDA 2017, 2018 WL 4282026 (Pa. Sup. Ct. May 2, 2018); App. Reply Br., *Comm. v. Ogelsby*, No. 749 EDA 2017 (Pa. Sup. Ct. May 30, 2018); *Comm. v. Ogelsby*, No. 749 EDA 2017, 2018 WL 4290654 (Pa. Sup. Ct. Sept. 10, 2018); Pet. for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. Nov. 27, 2019); Pet'r Br. in Support of His Pet. for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 ("Ogelsby Habeas Corpus Brief"), *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. June 29, 2020); Resp. to the Pet. for Writ of Habeas Corpus and Mem. of Law, *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. Oct. 1, 2020); Corrected Mot. for Leave to Amend Habeas Pet. While Federal Proceedings are Stayed; or, in the Alternative, to Lift Stay for the Purpose of Allowing Am., *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. June 14, 2021); Second Am. To Habeas Pet. and Consolidated Mem. of Law, *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. June 14, 2021); Resp. to Second Mot. to Amend and Stay the Pet. for Writ of Habeas Corpus, *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. June 22, 2021); Pet'r Reply to Resp. to Pet'r Mot. to Amend his Habeas Corpus Pet'n, *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. June 28, 2021); *Ogelsby v. Ferguson*, No. 19-cv-5598, 2021 WL 2935987 (E.D. Pa. July 13, 2021); Pet'r Lamar Ogelsby's Am. Pet., *Ogelsby v. Ferguson*, No. 19-cv-5598 (E.D. Pa. July 14, 2021).

After Troy and Khalif implicated Ogelsby and Gibbons, police went back to speak to Harris, who was by now incarcerated on his own criminal charges. When he spoke with police again, Harris told police that Ogelsby shot Rose.

The Trial

Ogelsby went to trial in 2013, and **ADA Andrew Notaristefano** prosecuted the case. He called Khalif, Troy, and Harris as witnesses, and all of them had credibility issues. For instance, Khalif recanted at the preliminary hearing and continued to recant at trial. The prosecution then relied on *Brady-Lively* to introduce Khalif's police statement as substantive evidence for the jury to consider. When Troy testified, he acknowledged that he only cooperated after his own arrest on federal charges. To bolster his credibility, **ADA Notaristefano** elicited testimony from Troy that he had received his federal sentence *before* he spoke with police about Rose's murder. The prosecution later argued that the timing of Troy's sentence meant that he could not have hoped for leniency or any special benefits because he was already serving his sentence and was instead testifying because it was the right thing to do. Harris admitted that when he spoke with police three days after Rose's shooting, he identified Christopher Stewart as the shooter, and that he only identified Ogelsby after he was arrested on his own charges. At no time during his testimony did Harris mention any benefits or promises from the Office in exchange for his testimony.

Defense counsel argued that Troy was biased against Ogelsby because Ogelsby had beaten him up. To establish this, he called Khalil Gardner to testify that Troy shot him outside a housing complex where Ogelsby's grandmother lived, and that Ogelsby became angry about the shooting because of its proximity to his grandmother. According to Gardner, Ogelsby and Troy got into a fight, which Troy lost, leaving him angry and humiliated. Gardner also testified that he received threats over social media from Khalif after Ogelsby was arrested. Gardner testified that he received the threats on his cell phone, but his phone was dead, so he turned it over to the prosecution for further inspection.

During closing arguments, **ADA Notaristefano** tried to sow doubt about Gardner's testimony. He attacked Gardner as a "last-minute" [500] witness who was "parachute[d] in" [501] and was lying about being shot by Troy. He also suggested that the Gardner's shooting never happened, rhetorically asking, "do we even know what happened?"[502] and "was there a police report?"[503] The prosecution also argued that Gardner's cell phone was "conveniently…dead,"[504] "doesn't work,"[505] and "can't be looked at,"[506] suggesting that Gardner was lying about being threatened. The prosecutor did not discuss what efforts, if any, were made to have Gardner's cell phone inspected.

Ogelsby was convicted of first-degree murder and sentenced to life imprisonment.

Ogelsby Loses in State Court

Ogelsby challenged his conviction in a series of direct appeals and post-conviction petitions. For instance, on direct appeal, he alleged that the prosecution made misrepresentations about Gardner's cell phone. According to Ogelsby, the prosecution never tried to analyze Gardner's phone after they took it from him at trial. Ogelsby also alleged that **ADA Notaristefano** falsely implied that Gardner made up the shooting when he knew it existed. Specifically, after suggesting to the jury that Gardner was lying about being shot, **ADA Notaristefano** admitted that he had a police report about the shooting. The trial court described **ADA Notaristefano** as "skirt[ing] the line of professional responsibility"[507] but declined to correct the record or order a new trial. The Pennsylvania Superior Court upheld the trial court's ruling.

In a PCRA petition, Ogelsby alleged that the prosecution withheld favorable information about Khalif and Troy. Ogelsby alleged that the police promised not to charge Khalif with felony drug distribution in exchange for his cooperation. Although the PCRA court conceded that this exculpatory information was not disclosed before trial, it held that Ogelsby was not entitled to relief because he did not present evidence showing that "the prosecutor knew of Khalif's agreement with police at the time of trial…."[508] The PCRA court did not explain why the prosecutor's

500. Ogelsby Habeas Corpus Brief at 99.
501. *Id.*
502. *Id.* at 21.
503. *Id.*
504. *Id.* at 21, 99.
505. *Id.*
506. *Id.*
507. *Ogelsby*, 2014 WL 10558206, at *9 (quoting trial court opinion).
508. PCRA Opinion at 15.

personal knowledge mattered, or how this analysis could be squared with well-established Supreme Court law holding that the knowledge of the police is imputed to the prosecutor for purposes of *Brady* disclosures.

Ogelsby also alleged that the prosecution did not disclose the police report detailing Troy's shooting of Gardner, which would have corroborated Gardner's testimony and provided support for Ogelsby's argument that Troy was a biased witness with a motive to lie. The PCRA court found that the Commonwealth "clearly violated its duty under *Brady*"[509] but still refused to grant Ogelsby a new trial, because the police report did not make it more probable that Troy killed Rose. However, this was not what Ogelsby was arguing, *i.e.*, he as not arguing that the police report would implicate Troy as the true assailant. Instead, Ogelsby was arguing that the police report was material because it corroborated his argument, as well as Gardner's testimony, that Troy was biased against Ogelsby because he shot Gardner and then got beat up by Ogelsby.

Ogelsby appealed the PCRA court's ruling, and the AG's Office conceded that the court made several errors. First, it conceded that the promise to Khalif was favorable information that was never disclosed, and that it did not matter if the prosecutor was personally unaware of the police's promise, because it still constituted suppression. Second, it conceded that the police report detailing Gardner's shooting was favorable information that was not disclosed. However, despite these concessions, the PCRA court's denial was upheld on appeal.

Ogelsby then filed a third PCRA petition[510] alleging, among other things, that the prosecution failed to disclose that Harris received favorable treatment in a pending criminal matter in exchange for his cooperation. Ogelsby alleged that at the time Harris spoke with police, he had a violation of probation hearing over allegations that he assaulted the mother his child and tried to suffocate her, and that he had not reported to probation for eight months. At this hearing, Harris announced that he was a witness in a homicide case, which led **ADA Melissa Francis** to reschedule the hearing to verify Harris' claim. The next day, **ADAs Francis** and **Notaristefano** exchanged emails about Harris, and six days later Harris returned to court, where the detainer was lifted and Harris was immediately released. DAO notes from this hearing indicate that it was off the record and that Ogelsby's trial prosecutor was to be contacted about relocating Harris. The PCRA court found these allegations sufficient to merit an evidentiary hearing, but it ultimately denied Ogelsby relief, and the Superior Court upheld the denial.

"Plausible Evidence" of Misconduct

Ogelsby filed a federal habeas petition and eventually sought permission to amend his petition to include new claims. The new claims alleged that the prosecution (i) elicited false testimony about the timing of Troy's federal sentence and his cooperation with Philadelphia police, and (ii) withheld the fact that Harris received favorable treatment in his own pending criminal matter in exchange for his cooperation against Ogelsby.

The AG's Office argued that the amendments should be denied because they lacked merit and failed to state *Brady* violations. The federal court, however, disagreed. The court parsed Ogelsby's new allegations and noted Troy's testimony that (i) he was sentenced in the summer of 2009 and (ii) he spoke with Philadelphia detectives in October 2010. The court contrasted Troy's testimony with the docket entries from Troy's federal criminal case—which showed that he was sentenced in May 2011, over seven months after he spoke with Philadelphia police. The court then observed that if the docket entry was accurate, this suggested that the prosecution elicited false testimony from Troy and then capitalized on this testimony when it emphasized that Troy had nothing to gain because he had already been sentenced. In allowing Ogelsby to add this claim, the district court noted the "well-established"[511] prohibition against the knowing use of perjured testimony to obtain a conviction and cautioned that although it was not making any factual determinations at this stage of the proceedings, "it suffices to conclude that [Ogelsby's] claim, based upon the false testimony of [Troy] Hill, repeated by the prosecutor to the jury at closing, is not 'clearly futile.'"[512] The federal court also found that the allegations supported an inference that Harris received favorable treatment at his VOP proceedings and permitted him to amend his federal habeas petition to include these allegations.

Ogelsby's federal habeas petition, which had been stayed during state court proceedings on the third PCRA petition, is now active and pending as the date of publication.

509. *Ogelsby*, 2018 WL 4290654, at *5 (quoting PCRA Opinion).

510. Ogelsby filed a second PCRA petition alleging that the prosecution failed to disclose a $20,000 reward given to Harris after he testified against Ogelsby, and he submitted an affidavit from Harris wherein he recanted his trial testimony. However, this PCRA petition was also denied.

511. *Ogelsby*, 2021 WL 2935987, at *9.

512. *Id.*

Albert Washington (2021)[513]

Albert Washington was convicted of third-degree murder and sentenced to 18-to-40 years in prison. After preparing for trial, Washington ultimately pleaded guilty to third-degree murder on the morning of jury selection. However, because the parties had engaged in pretrial discovery and substantial trial preparation, the Office was aware that defense counsel intended to argue justification and/or affirmative defenses at trial.

The CIU agreed to investigate Washington's conviction based on Detective Philip Nordo's involvement in the investigation. The CIU found that the prosecution withheld favorable information relating to Washington's justification argument and/or affirmative defenses. Although this favorable information should have been disclosed, it did not fully exonerate Washington. Accordingly, the CIU offered Washington a negotiated plea to voluntary manslaughter and a lesser sentence of 6-to-20 years to more accurately reflect his role in the offense. Washington remains in prison for an unrelated offense.

The Eve-of-Trial Plea

Washington was accused of murdering Malik Powell-Miller, the leader of a drug trafficking organization. Powell-Miller and his organization had a reputation for violence, and defense counsel notified the prosecution that he intended to argue justification and/or affirmative defenses arising from Washington's shooting of Powell-Miller. However, the trial ultimately did not go forward, and Washington pled guilty to third-degree murder on the morning of jury selection.

The CIU Investigation

ADA Gwen Cudjik prepared the case for trial, and the CIU found notes indicating that she spoke with detectives about possible justification and/or affirmative defenses, including whether Washington had been threatened by Powell-Miller or his associates. When **ADA Cudjik** discussed Washington's possible defenses, Detective Nordo appeared to endorse the viability of Washington's legal strategy: he confirmed that Powell-Miller was a gang member while Washington was "too retarded to be in a gang."[514] Notably, the notes the CIU found were not in the DAO trial file for Washington but were instead found in a different case file. When the CIU reviewed the DAO trial file for Washington's case, they did not find any documentation of **ADA Cudjik's** discussions with detectives about Washington's justification arguments and/or affirmative defenses, which led them to conclude that this information had not been disclosed to defense counsel prior to Washington's plea.

The CIU also reviewed the H-File and found additional information that corroborated Washington's justification argument and/or affirmative defenses. The information included documents suggesting Powell-Miller had a reputation for violence, such as a "Heavy Gun Mugshot" and evidence that Powell-Miller's brother had access to weapons. This was relevant to the case because before the victim was killed, he was with his brother, and they had both approached Washington. The H-File also contained information that Powell-Miller and his family had been falsely implicated as suspects in a homicide, which was also relevant as to why they were threatening Washington. None of this information appeared to have been provided to defense counsel during pretrial discovery. Finally, the CIU acknowledged that Washington's PCRA counsel presented evidence, which was not made public in PCRA filings, that Detective Nordo had contacted Washington's family, and that these communications supported Washington's justification defenses.

Washington's Negotiated Plea

Based on the undisclosed favorable information bearing on Washington's justification defenses, as well as information that Detective Nordo was in contact with Washington's family, the CIU offered Washington a reduced plea to voluntary manslaughter and 6-to-20 years imprisonment. He remains incarcerated on a separate offense.

513. The information in this section is taken from various sources. *See, e.g.*, Comm. Ltr. Brief ("CIU Letter Brief"), "*Comm. v. Albert Washington, Status of Negotiated PCRA Disposition: 7/28/21-504,*" CP-51-CR-0009363-2015 (Phila. Ct. Comm. Pl. July 28, 2021).

514. CIU Letter Brief at 2.

Jehmar Gladden (2021)[515]

Jehmar Gladden, Terrance Lewis, and Jimel Lawson were convicted of second-degree murder and sentenced to life imprisonment. The CIU agreed to investigate Gladden's conviction after the case against Lewis, fell apart. Lewis had challenged his conviction in federal court, and a federal district court opined that Lewis was likely innocent, because the only evidence against him came from an unreliable, uncorroborated eyewitness who had taken drugs shortly before she witnessed the murder—but it nevertheless held that it could not grant Lewis relief under the federal habeas statute. Several years after the district court issued its opinion, the CIU conceded in state court that Lewis was entitled to a new trial and dismissed the charges against him.

In Gladden's case, the CIU conceded that the eyewitness to the murder was not reliable, and that favorable information about that witness had not been disclosed to Gladden's counsel. However, this information did not fully exonerate Gladden, so the CIU offered him a negotiated plea to third-degree murder and a lesser sentence of 10-to-20 years imprisonment. In August 2021, Gladden was released from prison on time served.

The Criminal Investigation

In August 1996, Hulon Bernard Howard was murdered in his home over a drug debt. Howard's acquaintance, Lena Laws, was at his house the night of the murder and gave police multiple statements about the crime. Laws said she had been alone at the house smoking crack cocaine when Howard returned with "Omar" and "Denise." Shortly thereafter, three men came to the house to collect money from Howard. Two of the men were armed, and one of them had a shotgun. The men robbed everyone before one of them shot Howard. After the shooting, Laws ran to a nearby house to call 911 and when she returned, Omar and Denise were gone. When police responded, Laws told them she recognized the three assailants as "Stink," "JR," and "Mellow." She said Stink fired a shotgun into the ceiling, and Mellow had a handgun and shot Howard in the stomach.

Six months later, police showed Laws three separate photo arrays, and she identified Terrance Lewis as Stink but was unable to identify anyone else. One month after she identified Lewis, Laws looked at a different photo array and identified Jehmar Gladden, and then a month after that, she identified Jimel Lawson. Police also identified Denise and interviewed her. Denise identified Lewis, Gladden, and Lawson as the three men who killed Howard, but she gave a different account of the murder. Denise said that Omar gave her a ride to Howard's house but did not go inside with her, and that when she walked in, Laws was not alone—she was with another man who Denise did not recognize.

The Trial

Gladden, Lewis, and Lawson went to trial in 1999, and **ADA John Doyle** prosecuted the case. **ADA Doyle** opted not to call Denise as a witness and instead relied exclusively on Laws to provide an account of Howard's murder, even though her testimony conflicted with the other evidence in the investigation and with other statements she gave police. For instance, although she told police one assailant fired his shotgun into the ceiling, the police did not find any evidence that a gun was fired inside the house. Laws also told police that Howard was shot in the stomach, but the medical examiner concluded that he was shot in the back. In her initial statement to police, Laws said that Howard returned to the house with Omar, but at trial, Laws denied saying that and testified that Omar was already with her at the house when Howard returned. Laws also admitted that she was addicted to crack cocaine and had smoked it shortly before she witnessed the murder.

During closing arguments, **ADA Doyle** sought to rehabilitate Laws' credibility. He acknowledged that Laws was wrong when she said a shotgun was fired in the house, but he pointed out that the noise from racking a shotgun sounded a lot like a shotgun blast. He also argued that Laws' belief that Howard was shot in the stomach was not enough of a mistake for the jury to doubt her testimony. Finally, he argued that because Laws was a regular drug user who had only smoked a little crack cocaine that night, her perception was not as affected by the drug because she had built up a tolerance to it. Prior to making this argument, **ADA Doyle** did not present any expert testimony on the effects of smoking crack cocaine and whether it affected regular users differently.

Gladden, Lewis, and Lawson were convicted of second-degree murder and sentenced to life imprisonment.

515. The information in this section is taken from various sources. *See, e.g.*, Comm. Ltr. Br., "*Comm. v. Jehmar Gladden, CP-51-CR-1010312-1997, Potential Negotiated Settlement for PCRA Listed on 7/19/2021 Courtroom 1001,*" (Phila Ct. Comm. Pl. July 13, 2021); *Gladden v. City of Philadelphia*, No. 21-4986, 2022 WL 605445 (E.D. Pa. Feb. 28, 2022); *Lewis v. Wilson*, 748 F. Supp. 2d 409 (E.D. Pa. 2010); "Terrance Lewis," National Registry of Exonerations; UNDISCLOSED, State v. Terrance Lewis, Episodes 1-5 (2017).

Lewis is Likely Innocent... But is Denied Relief

Lewis filed a federal habeas petition arguing that he was innocent, and the federal court granted an evidentiary hearing on this claim. At the hearing, Gladden testified that on the night of the murder, he was at Howard's house to sell drugs. He also testified that he knew Lewis, and Lewis was not at the house during the murder. Gladden further testified that he had told this information to his defense counsel before trial but was advised not to disclose what he knew to preserve his own defense.

Kizzy Baker also testified at the federal evidentiary hearing. Baker was a newly discovered witness who had been on the street near Howard's house the night of the murder, and she saw three men enter and leave Howard's house around the time he was killed. Baker testified that she knew Lewis from the neighborhood, and he was not one of the three men she saw. Finally, although he was not called as a witness, co-defendant Lawson submitted an affidavit stating that he did not know Lewis, had never sold drugs with him, and only met him after they were charged with Howard's murder.

The federal district court credited Gladden and Baker's testimony and concluded that Lewis was likely innocent. It also criticized the prosecution's case, noting that it rested entirely on Laws, who had a crack cocaine addiction and had taken the drug shortly before she witnessed the shooting. The district court catalogued numerous inconsistencies and errors in Laws' statements to police and concluded that she was not a credible witness. However, the district court denied Lewis' petition, because even though he was likely innocent, the federal habeas statute did not provide him an avenue to relief.

The CIU Investigation

The CIU agreed to investigate Lewis' conviction because he was a juvenile when he was sentenced to life imprisonment and was thus entitled to a resentencing review due to a recent Supreme Court ruling about juvenile life sentences. As part of the investigation, CIU prosecutors reviewed the H-File and found information documenting a police interview with an unidentified witness. Although the witness' identity was not included in the interview notes, based on the timing and substance of the interview, as well as a PAS summarizing the interview, the CIU concluded these notes were likely taken during an interview with Laws that was never formally documented. During this interview, Laws identified Hakim Sadeh Muhammed as "Stink"—not Lewis. She also said Muhammed had a GPS ankle bracelet, suggesting he had been arrested and was on supervision. The CIU was unable to find any further information on Muhammed in the H-File and concluded that police did not try to further identify Muhammed or corroborate Laws' statement.

At Lewis' resentencing hearing, the CIU informed Philadelphia Court of Common Pleas Judge Barbara McDermott of its findings, and she agreed to vacate his conviction immediately. The CIU then dismissed the charges against him.

Gladden's Negotiated Plea

Based on the evidence the CIU uncovered regarding (i) Laws' undisclosed interview identifying another man as "Stink;" (ii) Gladden's testimony at Lewis' habeas hearing; and (iii) the overall weakness of the case, the CIU agreed to vacate Gladden's conviction. Because Gladden admitted to being at the scene and admitted that he was there to sell drugs, the CIU offered him a negotiated plea to third-degree murder. Gladden was then released on time-served in 2021.

Arthur "Cetewayo" Johnson (2021)[516]

Arthur "Cetewayo" Johnson was convicted of first-degree murder and sentenced to life imprisonment. The CIU agreed to investigate his case after questions were raised about the police interrogations of the witnesses who implicated Johnson. The investigation revealed that the police improperly interrogated these witnesses, and the prosecution made misleading arguments at trial. Because this newly discovered information did not fully exonerate Johnson, the CIU offered Johnson a negotiated plea to third-degree murder and a lesser sentence of 10-to-20 years imprisonment. In August 2021, Johnson was released from prison on time-served.

516. The information in this section is taken from various sources. *See, e.g.*, Comm. Ltr. Brief, "*Comm. v. Arthur Johnson – Potential Negotiated Settlement for PCRA Listed for Status on 8/02/2021 Courtroom 1001,*" CP-51-CR-0110791-1971 (Phila. Ct. Comm. Pl. Aug. 1, 2021); Samantha Melamed, "After 50 Years in Prison – 37 in Solitary Confinement – Philly Man's Conviction is Vacated," Aug. 11, 2021, Philadelphia Inquirer; Scott Shackford, "A Philly Man Who Spent 37 Years of a 50-Year Prison Sentence in Solitary Confinement Has Been Freed," Aug. 12, 2021, Reason.

The Criminal Investigation and Trial

In October 1970, Jerome Wakefield was shot and killed as part of a rumored dispute between the Seybert Street and Moroccan gangs. After the shooting, police questioned former Seybert Street gang member Sylvester Brame. Brame said he did not know anything about the shooting, and that he had been with his brother and Alexander "Ace" Payne, traveling to different locations, and hanging out with girls.

Police picked up Ace for questioning the afternoon after the shooting. Ace's mother was with him but was not allowed to witness or participate in the interview. Police held Ace for over thirty hours and took at least four different statements from him, which evolved over the course of his lengthy detention. In his first statement, Ace told police essentially what Sylvester said—that he did not know anything about the shooting. Then, at some point during the evening, detectives claimed Ace made an "oral admission." An hour after the so-called "oral admission," detectives wrote out Ace's unsigned admission and then let him speak with his mother for roughly twenty minutes. After that, they took a third statement from him, which was a "formal" statement supposedly taken in his mother's presence. Ace read and signed this statement nearly two hours after midnight. Ace's interrogation then continued for roughly four more hours into the early morning, when detectives took a fourth supplemental statement from him.

According to Ace's second and third statements, Arthur Johnson punched the victim, and Phillip Michaels shot and killed him. In his fourth supplemental statement, Ace changed his account, claiming that Gary Brame shot the victim. According to this account, Ace claimed that he initially implicated Michaels because he did not want to snitch on anyone who was there. When asked why he would identify Johnson if he was trying not to snitch, his written response stated that he thought everyone already knew Johnson was involved. Johnson was then picked up and interrogated by police, and he confessed to stabbing the victim after Brame shot him. At the time police interrogated him, Johnson was unable to read or write, and a Philadelphia School District witness later testified that Johnson had a low IQ and was deemed to have an intellectual disability.

After Ace identified Brame and Johnson as the assailants, Brame pleaded guilty and was sentenced to 5-to-15 years in prison. Johnson went to trial in 1971. At trial,[517] Ace identified Johnson as one of the killers. Johnson was convicted of first-degree murder and sentenced to life imprisonment.

The CIU Investigation

The CIU reviewed the timeline of Ace's interrogation and concluded that he was kept at the Homicide Division for 26 hours and did not complete his formal statements until 30 hours after being detained. He was also 15 years-old when he was interrogated and had been prevented from speaking with his mother. The CIU determined that the circumstances of Ace's interrogation had also been withheld from Johnson's defense counsel, who was thus unable to challenge the credibility of the interrogation and the statements that Ace made.

The CIU also concluded that the trial prosecutor[518] made misleading arguments. At trial, defense counsel pointed out that the prosecution had not called Brame as a prosecution witness, even though he supposedly committed the murder with Johnson. During closing arguments, the trial prosecutor argued that Brame could not have been called as a witness against Johnson because it would have violated Brame's Fifth Amendment right against self-incrimination. However, Brame had pleaded guilty before Johnson's trial, and at the hearing, the court explained that by pleading guilty, Brame was *waiving his right against self-incrimination* and could be called as a witness against Johnson. The trial prosecutor was also personally aware of Brame's waiver because they handled Brame's plea hearing.

Johnson's Negotiated Plea

Considering the questionable interrogations and suspect statements, as well as the misleading arguments made at trial, the CIU offered Johnson a reduced plea to third-degree murder and was released on time served. At the time of his release, Johnson had served 50 years in prison, and 37 of those were spent in solitary confinement.

517. We were unable to identify the trial prosecutor who prosecuted Johnson's case.

518

Ricardo Natividad (2022)[519]

Ricardo Natividad was convicted of multiple offenses arising from a carjacking and a murder. He challenged his convictions in both state and federal court and was eventually able to obtain a federal court order entitling him to limited discovery on his allegations. The Office produced discovery suggesting that the prosecution suppressed information about an alternate suspect and an eyewitness to the murder. Natividad then filed a PCRA petition in state court based on this newly discovered information, but the state courts rejected his claims. Several years later, the CIU agreed to investigate Natividad's conviction.

The CIU filed briefing in federal court conceding that Natividad was entitled to a new trial, and the federal court vacated his conviction. Natividad then entered a negotiated plea to robbery and third-degree murder. He remains incarcerated on those charges.

The Criminal Investigation

In November 1996, Michael Havens was driving his dark blue Lincoln in Philadelphia when he was carjacked and robbed by two men, one of whom was holding a revolver with a distinctive rubber grip. The men eventually forced Havens out of his car, and he walked to a store to report the crime. Later that same night, local town watchman Robert Campbell was shot and killed at a gas station. A couple who lived across the street heard a gunshot and saw a man in a red plaid jacket running away from Campbell, who was falling backward. The couple watched the man run to the driver's side of a car that they described as either a black or dark blue Lincoln. The couple described the shooter as darker skinned than the victim. Two days after the carjacking and murder, Havens' car was found abandoned and burned. Police recovered a work bag and work jacket from the trunk of the car, but the jacket was not retained as evidence, so police never confirmed if it belonged to Havens or one of his assailants.

The Trial

Natividad went to trial for the carjacking and murder in 1997, and **ADA Richard Sax** prosecuted the case. He presented evidence that after the carjacking and murder, Natividad gave a revolver to Keith Smith, who later turned it over to the police. Havens testified that Natividad was the man who carjacked him and who was holding the gun with the distinctive grip. Havens also identified the gun that was given to Smith as the gun Natividad used in the carjacking, even though that gun did not have a rubber grip (and ballistics testing ultimately excluded it as the weapon later used to kill Campbell).

Byron Price testified that on the night of Campbell's murder, Natividad picked him up in a black Lincoln. Price said they drove to a gas station and Natividad got out of the car, after which Price heard a gunshot and saw Natividad running back holding a revolver. Price asked what happened and Natividad said he shot a man because the man drew a gun on him. Price also identified the gun given to Smith as the gun Natividad was holding. However, when Price initially described the gun to police, he did not mention any rubber grips, and he also told police the gun was a .38 special before police corrected him that the murder weapon was a .357 Magnum. On cross-examination, Price admitted that the prosecution promised not to charge him as an accessory to murder in exchange for his testimony.

Price's ex-girlfriend Natasha Catlett testified that she called a tip line that was offering a reward for information about the crimes, and when Natividad learned about this, he told her they should split the reward money, and that there was no evidence tying him to the murder. Robert Golatt testified that Natividad and Price drove up to him in a navy Lincoln Continental a few days after the murder, and he got into the car with them. According

519. The information in this section is taken from various sources. *See, e.g., Comm. v. Natividad*, 650 Pa. 328 (2019); (Phila. Ct. Comm. Pl. Aug. 9, 2012); Mot. for Disc. and Consolidated Mem. of Law ("September 2010 Discovery Motion"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Sept. 28, 2010); Resp't Answer to Mot. for Disc. ("Law Division Response to September 2010 Discovery Motion"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Dec. 8, 2010); Pet'r Supplemental Mot. for Disc. And Accompanying Mem. of Law ("February 2013 Supplemental Discovery Motion"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Feb. 4, 2013); Mot. for Extension of Time to File Resp. to "Supplemental" Mot. for Disc. ("Law Division Response to February 2013 Supplemental Discovery Motion"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Feb. 20, 2013); Mot. to Supplement and Amend Pet'r Pet. for Writ of Habeas Corpus by a Prisoner in State Custody Pursuant to 28 U.S.C. § 2254; and Consolidated Mem. of Law ("Supplemental Habeas Motion"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. June 12, 2013); Reply in Supp. of Mot. to Supplement and Amend Pet. for Writ of Habeas Corpus ("Reply in Support of Supplemental Habeas Motion"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. June 18, 2013); Pet'r Mot. to Compel Compliance with Previous Court Order and for Disc. And Accompanying Mem. of Law ("Motion to Compel"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Nov. 27, 2013); Resp. to Pet'r Mot. to Compel Compliance with Previous Court Order and for Discovery ("Law Division Response to Motion to Compel"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Dec. 12, 2013); Transcript ("Natividad Federal Habeas Hearing Transcript"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Feb. 27, 2014); Second Supplement to Pet. for Writ of Habeas Corpus ("Second Supplemental Habeas Motion"), *Natividad v. Beard,* No. 08-449 (E.D. Pa. Feb. 22, 2019); Mem. of Law in Supp. of Amended Pet. for Writ of Habeas Corpus ("Memorandum in Support of Amended Habeas Petition"), *Natividad v. Wetzel,* No. 08-449 (E.D. Pa. Oct. 21, 2019); Ans. To Pet. For Writ of Habeas Corpus ("CIU Natividad Answer"), *Natividad v. Wetzel,* No. 08-449 (E.D. Pa. June 15, 2021); Stipulation ("CIU Natividad Stipulation"), *Natividad v. Wetzel,* No. 08-449 (E.D. Pa. June 15, 2021); *Natividad v. Beard,* No. 08-449, 2021 WL 3737201 (E.D. Pa. Aug. 24, 2021); Guilty Plea Colloquy, *Comm. v. Natividad*, CP-51-CR-0703121-1997 (Phila Ct. Comm. Pl. Feb. 8, 2022); Negotiated Guilty Plea Order of Sentence, *Comm. v. Natividad*, CP-51-CR-0703121-1997 (Phila Ct. Comm. Pl. Feb. 9, 2022).

to Golatt, Natividad said the victim drew a gun on him, so he shot him. Eugene Wilson testified that Natividad boasted about the murder to a crowd of roughly fifteen people, saying that he killed the town watchman. Wilson said he pulled Price aside to ask what happened, and Price told him about Campbell's murder.

In November 1997, Natividad was convicted of first-degree murder and other offenses and sentenced to death.

A New Eyewitness and a "Prime Suspect"

Natividad challenged his convictions simultaneously in state and federal court, and his counsel was able to obtain limited federal court-ordered discovery. The Office produced documents relating to the town watchman's murder, which included handwritten police notes from an interview with a "John Maculla," who said that he "[t]old manager on Sunday that he was on lot+-saw incident," and that the "[d]oers left in [station wagon]+got tag."[520] Natividad's counsel used this note to identify "John Maculla" as John McCullough. McCullough then submitted a sworn declaration that he was at the gas station when he saw two men approach the victim, and that one man was holding a gun. McCullough said he heard gunshots and saw the two men run to a nearby car. Significantly, McCullough also said that he used to work at a summer program for at-risk youth and met Natividad there, and that Natividad was not one of the two men he saw. These police notes were never disclosed to defense counsel before trial.

The production also included witness statements about Rolston Ricardo Robinson, aka "Rob," whom police investigated as a potential suspect in the town watchman's murder. Police learned that at the time of the murder, the town watch was in a dispute with people selling drugs out of two houses in the town, and that threats had been made against the town watch. Police received a tip that a man called "Rob" was the possible shooter, and they surveilled the houses and identified someone that matched Rob's description going in and out of one house. Eventually, the police convened a task force to investigate Rob and his associates.

Police also spoke with multiple witnesses who claimed Rob confessed to shooting Campbell or being in the area around the time the shooting occurred. Joseph Rutherford said he had a dispute with Rob over a drug purchase, and Rob threatened to "do [him] like he did Bob [Campbell] down at the gas station"[521] and later threatened him with a gun. Rutherford also told police he thought Campbell's death was related to a dispute over drug activity, and that he had seen Rob driving a black Lincoln. Cynthia Smith said that the night Campbell was killed, Rob came to a house she was at and turned on the news, which aired a story about Campbell's murder. Rob told Smith he was at the gas station where the murder occurred. Four days later, Smith asked Rob if he killed Campbell, and he said he did, because Campbell was a snitch.

Michael Cupaiuolo, the owner of the houses where drugs were allegedly sold, told police that Rob admitted to being at the gas station when Campbell was shot and was close enough to Campbell to have seen a gun and handcuffs hanging on Campbell's belt. An unidentified woman who was at the house also told police that roughly ten minutes before the shooting, she was at the gas station and saw Rob in his silver Acura. Police also interviewed Rob, who said he was at a club when the shooting happened, but that he stopped by the gas station because he saw Campbell lying on the ground and police in the area. He said he was only there for a couple minutes and described Campbell as a white male who was lying on the ground with blood near his shoulders. He also said he saw a gun and holster on Campbell's waist. Rob claimed he heard a woman say that the assailants left in a black Lincoln. Despite multiple witnesses indicating that Rob confessed to the town watchman's murder, none of this information was disclosed to defense counsel prior to trial.

Mixed Results in State and Federal Court

Counsel used the information obtained in federal court-ordered discovery to file a PCRA petition in state court alleging that the prosecution suppressed favorable information. The PCRA court held a hearing on these claims but ultimately denied Natividad relief. Natividad appealed, and the Pennsylvania Supreme Court upheld the denial. The state high court sided with the Law Division and held that Natividad's claims were either time-barred or did not amount to a *Brady* violation. The found that the claim based on the Maculla note was time-barred, because Natividad should have recognized earlier that the note contained favorable information. However, the court did not explain how Natividad should have understood that the note about "John Maculla" referred to John McCullough and what he saw, given that the note misspelled McCullough's name and did not indicate that McCullough knew Natividad and said he was not the assailant.

520. Memorandum In Support of Amended Habeas Petition at 17.

521. *Natividad*, 2021 WL 3737201 at *7.

The state high court evaluated the information about Rob and conceded that it was favorable because it implicated someone else in the murder. However, it held that the information was not material, because the information did not undermine the other overwhelming evidence of Natividad's guilt. In reaching this conclusion, the Pennsylvania Supreme Court acknowledged ongoing criticism from federal courts in the Third Circuit over how it evaluated *Brady* "materiality."[522] Specifically, the court wrote that the Third Circuit had criticized its "treatment of certain aspects of federal precedent regarding *Brady* and its progeny."[523] However, after acknowledging this critique, the court sharply noted that it was not obligated to follow the Third Circuit, because it was "bound by decisions of the U.S. Supreme Court, not the opinions of the *inferior federal courts*."[524]

The "Inferior Federal Court" v. The Pennsylvania Supreme Court

After SCOPA rejected his appeal, Natividad returned to federal court and supplemented his habeas petition with the newly discovered information about McCullough and Rob. Around the same time, the CIU began investigating Natividad's conviction. At the conclusion of its investigation, the CIU filed a motion conceding that Natividad was entitled to habeas relief, because the Pennsylvania Supreme Court had misapplied the law when it denied Natividad relief. The district court undertook its own review and agreed with the CIU. In particular, the district court criticized the state high court's holding that the Maculla note was time-barred, noting that the Maculla note did not itself contain favorable information that should have put Natividad on notice of his claim. Instead, the favorable information was not found until *after* counsel further investigated and identified McCullough. As such, there was no reason to believe Natividad knew or should have known the note was favorable.

The district court also held that the statements about Rob were favorable because they supported a mutually exclusive theory of the case: that someone else other than Natividad killed Campbell. Had this information been disclosed, defense counsel could have presented an alternate, competing theory of the murder, and the jury would have been able to assess both narratives and determine which witnesses were most credible. However, because the prosecution withheld this information about Rob, the jury was denied the opportunity to fairly and objectively assess all the facts. The district court thus concluded that Natividad had been "unconstitutionally found guilty and sentenced to death."[525] Notably, the district court concluded that the Pennsylvania Supreme Court had (yet again) used the wrong legal test: it described the court's materiality analysis as hinging on the "sufficiency of the evidence, specifically, the strength of the remaining inculpatory testimony,"[526] which was precisely the test that the Supreme Court had rejected.

In its opinion, the federal district court also criticized the Law Division's conduct throughout Natividad's thirteen-year-long federal proceedings, describing prosecutors as "vehemently [fighting] discovery" and "argu[ing] against relief,"[527] even though court-ordered discovery had yielded favorable information about John McCullough and Rob. For instance, **ADA David Glebe** initially opposed Natividad's discovery requests as an improper attempt to force open-file discovery, and he asked the federal court to prohibit further discovery. After the "John Maculla" note was produced, which suggested that the prosecution had withheld favorable information, the Law Division did not respond to habeas counsel's repeated requests for additional discovery, forcing them to file a formal discovery motion. In response, **then-Chief of Federal Litigation ADA Thomas Dolgenos** told the court and counsel that there was nothing more to disclose, because the prosecution had produced all favorable material. (**ADA Dolgenos** also said that he could not give a specific timeframe for any additional responses because of Law Division staffing shortages and scheduling conflicts.)

When the district court granted the discovery motion, the Law Division responded by disclosing just six additional pages of discovery. Habeas counsel alleged that this production was also incomplete and filed yet another motion to compel a complete production. Once again, the Law Division insisted that it had turned everything over: **ADA Molly Selzer Lorber** argued that the prosecution had "fully, and in good faith"[528] engaged in years of voluntary discovery, and now there was "simply

522. SCOPA acknowledged Jimmy Dennis' case, in which the Third Circuit, sitting *en banc*, granted Dennis habeas relief and criticized the state courts for applying a "sufficiency of the evidence" test to gauge materiality. *See Natividad*, 650 Pa. at 370, n. 18.

523. *Id.*

524. *Id.* (emphasis added).

525. *Natividad*, 2021 WL 3737201 at *14.

526. *Id.* at *11.

527. *Id.* at *1.

528. Law Division Response to Motion to Compel at 2.

nothing more"[529] to turn over, and she asked the court to prohibit further discovery. During a hearing on the motion to compel, **ADA Dolgenos** also emphasized the Office's good faith and argued that any further discovery requests would be repetitive, because they covered files that were already searched, in which the prosecution had "*not found anything*."[530] The district court granted Natividad's motion to compel, and when counsel gained direct access to the entire H-File, they discovered multiple witness statements about Rob's confession to murdering the town watchman—which was contradicted the Law Division's repeated statements that they had searched the files and had turned over everything exculpatory, and that there was simply nothing left to disclose.

After detailing the Law Division's conduct, the district court observed that the Law Division did not disclose information about Rob until ordered to do so some "six years after the start of *Brady* discovery in [the habeas] case and seventeen years after Natividad's conviction."[531] While the district court acknowledged the CIU's concession of relief, it observed that this concession did not "erase all that came before"[532]—namely, the Law Division's opposition to discovery and repeated representations that it had produced all favorable information.

Natividad Pleads to Reduced Charges

In February 2022, Natividad pleaded guilty to, among other things, kidnapping, and robbery and was sentenced to 25-to-50 years' imprisonment. He remains incarcerated.

Derrill Cunningham (2022)[533]

Derrill Cunningham was convicted of first-degree murder and sentenced to life imprisonment. After his conviction, he filed a PCRA petition seeking a new trial. While conducting a review of Cunningham's PCRA allegations, the Law Division learned that Detective James Pitts was involved in the investigation, and that he allegedly assaulted a key prosecution witness in the courthouse lobby during Cunningham's trial. The Law Division provided PCRA counsel with this information and then referred the case to the CIU for further investigation. The CIU provided open file discovery to PCRA counsel and investigated, the assault allegations.

Upon receiving discovery from the Office, Cunningham amended his PCRA petition to allege Pitts' general pattern and practice of coercing statements from witnesses and suspects and his physical assault of the prosecution witness in Cunningham's case. The CIU then conceded that Cunningham was entitled to a new trial. In June 2022, the PCRA court granted Cunningham's PCRA petition.

The Homicide Unit subsequently offered Cunningham an open plea, *i.e.*, an agreement whereby Cunningham pleads guilty to a specific charge but leaves the sentencing decision to the court. As of the date of publication, no agreement has been reached, and his case remains pending.

The Criminal Investigation

In 2011, William Tyler was found shot to death on a Philadelphia street. According to the police investigation, Derrill Cunningham killed him due to lingering animosity over a fight between the two men. Before the shooting, Cunningham had approached Richard Fox while he was with Chelsea Johnson, who was waiting to pick up food at a nearby restaurant. Angel Rozier, Patricia Brown, Atiya Turner, and Daryl Edwards were also in the area socializing on the street. Cunningham asked Fox for his firearm, and after some hesitation Fox handed it to him. Cunningham then concealed it under his hoodie and began walking toward Tyler. Fox followed behind and saw Cunningham shout at Tyler to get his attention before shooting him in the forehead. Fox then fled to his car.

After hearing gunshots, Johnson, Brown, Turner, and Rozier got into Turner's car and drove away from the scene to a nearby gas station. Johnson eventually demanded to return to the area to pick up her food, and when they did, Johnson saw Tyler's body

529. *Id.*

530. Natividad Federal Habeas Hearing Transcript at 22 (emphasis added).

531. *Natividad*, 2021 WL 3737201 at *8.

532. *Id.* at *14.

533. The information in this section is taken from various sources. *See, e.g., Comm. v. Cunningham*, No. 2832 EDA 2014, 2016 WL 1367411 (Pa. Sup. Ct. Apr. 6, 2016); Comm. Ans. to the Second Am. Pet. for Relief Under the Post-Conviction Relief Act ("CIU Cunningham Answer") *Comm. v. Cunningham*, CP-51-CR-0003737-2013 (Phila Ct. Comm. Pl. Nov. 16, 2021); Op. (Carpenter, J.), *Comm. v. Cunningham*, CP-51-CR-0003737-2013 (Phila Ct. Comm. Pl. June 13, 2022); Philadelphia Inquirer, "Special Report: The Homicide Files," Dec. 26, 2021.

on the ground. Both Brown and Turner called 911, and EMTs and police responded to the scene, where they found Tyler's body and treated Johnson after her shock at finding Tyler dead.

Once Johnson was released by paramedics, Fox called her and asked her to meet him, Cunningham, and Edwards in West Philadelphia. Johnson along with Rozier, Brown, and Turner, went to meet them. While waiting for Johnson, Cunningham told Fox and Edwards that he had gotten into a bar fight with Tyler several days before the shooting, and that he [Cunningham] "had to do what he had to do."[534] When the group arrived, Cunningham told them that he shot Tyler because it looked like Tyler was reaching for something. Before the group dispersed, Cunningham also told Fox that he threw away the gun.

Police later spoke with Johnson, Fox, Rozier, Turner, and Brown, and all of them supposedly identified Cunningham as the shooter. Cunningham was later arrested in Buffalo, New York, and waived extradition back to Philadelphia.

The Trial

Cunningham went to trial in 2014, and **ADA Deborah Watson-Stokes** prosecuted the case. She called both Johnson and Brown to testify about what they saw and what they told police. However, both witnesses recanted and described being coerced and threatened by a detective later identified as Detective Pitts.[535] For instance, Johnson said she only saw Cunningham with a gun and did not see the actual shooting, but when she told police this, they told her she was lying and that she was going to go to prison. Johnson further testified that police told her she could go home if she just signed her statement. Brown similarly testified that Pitts called her a "gangbanging bitch"[536] and a "black bitch"[537] and got so close to her face that he spit on her while he was yelling at her.

During a break in the trial, when Brown was still under oath and had not yet concluded her testimony, she was in the courthouse lobby with her daughter when she claimed that Pitts walked by her and hit her. Brown immediately contacted police to file a complaint about the incident, and when she returned to the courtroom, Brown also informed the trial judge (outside the presence of the jury), the Honorable Linda A. Carpenter of the Philadelphia Court of Common Pleas, that Pitts had physically assaulted her.

Judge Carpenter took immediate action in response to Brown's allegation, including speaking separately with Brown and Detective Pitts and obtaining and viewing surveillance video footage from the courthouse lobby where the incident took place. After the court took these steps, the trial continued, and Brown concluded her testimony. However, the jury never heard about Pitts' assault allegations because defense counsel did not ask Brown about it.

Cunningham was eventually convicted of, among other things, first-degree murder and sentenced to life imprisonment.

Judge Carpenter's Rule to Show Cause

After Cunningham was sentenced, Judge Carpenter filed a rule to show cause against Detective Pitts as to whether he should be held in contempt of court. In her written judicial opinion, she made specific factual findings based on her review of the courthouse video footage, including the following:

- The court found that the video footage was "not inconsistent with" [538] Brown's allegations;
- The court found that a factfinder reviewing the video could plausibly interpret the video as confirming Brown's allegations or confirming that while no physical contact was made, Pitts swung at Brown "in a physically aggressive and intimidating manner;"[539]
- The court determined that, based on the video, there was an "arm swinging motion" made by Pitts that appeared to be "direted towards…Brown and…Brown immediately reacted to the apparent conduct;"[540] and
- The "administration of justice"[541] dictates that no witness should be subject to conduct or tacit communication within the courthouse that could potentially inferfere with their testimony or make them feel intimidated.

534. *Cunningham*, 2016 WL 1367411, at *2.

535. The witnesses in Cunningham's case described conduct like that described by witnesses in the Obina Onyiah case, which also involved Detective Pitts. ADA Watson-Stokes was aware of these allegations because she prosecuted the case against Onyiah, which occurred before Cunningham's trial.

536. Philadelphia Inquirer, "Special Report: The Homicide Files."

537. CIU Cunningham Answer at 18, ¶ 96.

538. *Id.* at 5, ¶ 20.

539. *Id.*

540. *Id.*

541. *Id.* (quotations omitted).

The court ordered the video footage to be preserved, and a copy of the court's rule to show cause was served on **ADA Ed Cameron**, who was then a supervisor in the Homicide Unit. When the CIU began its investigation, they could not find any record of the DAO referring the matter to IA, and IA has no record of receiving any referral from the Office.

Future proceedings on the court's rule to show cause were conducted under seal, and Judge Benjamin Lerner of the Philadelphia Court of Common Pleas eventually dismissed the contempt charge.

Cunningham Files a PCRA Petition

Cunningham filed a PCRA petition alleging, among other things, that counsel was ineffective for failing to adequately cross-examine Brown. When the Law Division began evaluating Cunningham's petition, they discovered that Pitts was involved in the investigation of Tyler's murder and that Brown had accused Pitts of assaulting her during trial. Accordingly, the Law Division provided PCRA counsel a Police Misconduct Disclosure Packet for Pitts and ultimately referred Cunningham's case to the CIU for an investigation.

The CIU Investigation

The CIU attempted to verify whether Pitts assaulted Brown during the trial. This was complicated by the fact that the courthouse video footage had been lost, and despite efforts to locate it, including interviewing a retired judge and **ADA Watson-Stokes,** the CIU was unable to find it. Instead, the CIU interviewed multiple witnesses who viewed the video footage to determine what it likely depicted.

The CIU interviewed Brown, who said that Pitts (whom she described by his physical features, including a distinctive scar on the back of his head) called her names and threatened her that she was not leaving the interrogation room unless she signed her statement. Brown said that when he told her to sit down, he did so by pushing her on the shoulder, and that he got so close to her face that he spat on her when he yelled. She said she was intimidated and signed what was put in front of her, but she reiterated that she did not see the shooting and did not see Cunningham get a firearm and walk off toward the victim.

In describing the courthouse assault, Brown said she was sitting with her daughter on a window ledge in the lobby when she saw the detectives walking toward her. She said that Pitts hit her shoulder "real hard,"[542] and that she did not see him make contact because when he began to approach her, she turned to continue talking with her daughter, and that the next thing that happened was that she was "going backwards."[543] Brown said she had a "panic attack"[544] after Pitts hit her.

The CIU also spoke with a DAO detective who was involved in retrieving the video footage from the courthouse. The DAO detective recalled that he gave the footage to an ADA in the Special Investigations Unit ("SIU"), although he could not recall the name of the ADA. In describing his recollection of the video, he said he reviewed the video with the SIU ADA and saw an altercation in the courthouse lobby. The DAO detective did not know who was involved, but he saw one person "thr[o]w their arm back."[545] The detective also demonstrated that the arm-throwing motion was swinging backward, but he could not tell whether the swing was with a fist or open hand because of the poor video quality. He also said that the aggressor was "close"[546] to Brown, and that he did not think contact was made, because he did not recall seeing Brown get hit or fall backwards, but that it had been so long that he could not be certain of what he saw.

The CIU interviewed **ADA Watson-Stokes,** who recalled viewing the video very closely and watching it more than once, expecting to see a "definitive punch"[547] but instead seeing a "small flinch"[548] from Pitts, along with some arm movement. **ADA Watson-Stokes** also tried to determine if physical contact was made by trying to see how far apart Brown and Pitts were. **ADA Watson-Stokes** also opined that in retrospect she was now able to place the incident in better context, and as a result she thought Brown's allegation was more credible than she initially believed at the time. She recalled telling Brown that people who are credible take certain steps when reporting an incident or crime, and Brown took those steps.

542. *Id.* at 18, ¶ 100.
543. *Id.*
544. *Id.*
545. *Id.* at 8, ¶ 41.
546. *Id.* at 8, ¶ 43.
547. *Id.* at 9, ¶ 51.
548. *Id.*

Given that Brown took those "credible" steps immediately by filing a complaint with the police, it is not clear why **ADA Watson-Stokes** did not initially find her credible. Moreover, witnesses in Cunningham's case described conduct by Pitts that was similar to what witnesses described in the Obina Onyiah case, which was also investigated by Detective Pitts and prosecuted by **ADA Watson-Stokes**. In that case, Onyiah was charged with murder and tried in May 2013, roughly a year before Cunningham's trial. Given **ADA Watson-Stokes'** involvement in that case, she also was ostensibly aware of these allegations against Pitts at the time of Cunningham's trial.

The CIU spoke with the Deputy Sheriff from the courthouse, and he was the only witness who claimed that the video footage did not show any altercation. He recalled Judge Carpenter's request that he report back to see whether there was any type of altercation shown on the video surveillance, and he told CIU prosecutors that he recalled seeing all the parties and did not see any signs of anyone pushing anyone else. He elaborated that when he said he did not see any signs of a push or shove, he meant that he did not see the person who was hit turn their head around to say something or otherwise respond, which he would have expected if any assault took place. When the CIU asked him about Judge Carpenter's specific findings in the rule to show cause, including her reference to an "arm swinging motion," he said he did not know what she was talking about, and that it "surely wasn't in the video that we provided."[549]

The CIU also spoke with a Philadelphia Police Department Sergeant about an incident report he prepared in response to Brown's complaint. He said that PPD general policy was for a supervisor to respond and take an incident report if a detective was involved, and he identified the report he prepared as involving Brown, He also told Brown to file a complaint with IA if she was complaining about conduct involving an on-duty police officer. The Sergeant could not recall specifically what happened but recalled an incident involving an off-duty detective and a domestic partner—before then saying that his recollection might have been incorrect.[550]

The CIU Takes Pitts' Testimony

As part of the PCRA discovery process, PCRA counsel sought to examine Pitts under oath. He initially subpoenaed Pitts to testify at an evidentiary hearing, but Pitts did not show up at the scheduled hearing date—despite the subpoena having been served.[551] After the hearing date was rescheduled (due to, among other things, the COVID-19 emergency), the parties agreed to take Pitts' deposition testimony instead. At his deposition, Pitts denied Brown's allegations in their entirety, and he denied that the video showed him hitting or attempting to hit or strike Brown in any way. However, when he was asked to describe what the video did show, he became argumentative and resisted describing the video. At the conclusion of the deposition, the CIU reviewed Pitts' testimony and submitted it as evidence during the PCRA evidentiary hearing.

When the CIU reviewed Pitts' testimony, they found him not credible and as such did not credit his version of events. For instance, the CIU noted Pitts' belief that the PCRA proceedings were Judge Carpenter's attempt to "punish[] me. I think she would do whatever was in her power to hurt me and harm me as I believe she's doing somewhat sort of right now."[552] When he was asked to elaborate on why Judge Carpenter was trying to hurt or harm him, Pitts responded by criticizing Judge Teresa Sarmina, a *different* judge who handled a *different* case. In that case, Judge Sarmina had ordered a new trial for Dwayne Thorpe in *Commonwealth v. Thorpe* after finding that Pitts engaged in a pattern and practice of coercive and abusive interrogation techniques, and during his deposition, Pitts accused both Judge Carpenter and Judge Sarmina of being racist. Specifically, he said that "[p]eople have their own opinions about other people of different races and other people of different ethnicities or what somebody should or shouldn't be able to do because of their color or what they must be doing because of their color or size or whatever have you. It's not on me to guess why somebody would do evil things, or things, you know, that they do."[553]

Finally, in evaluating Pitts' credibility, the CIU also noted that he attacked the CIU prosecutor who took his deposition testimony. During one line of questioning, Pitts said, "[y]ou ask me why I'm worried. I'm worried about you. I don't know you. I'm worried about anybody that's trying to allege that I did anything

549. *Id.* at 9, ¶ 49.

550. Detective Pitts' had a number of IA complaints against him, and the Deputy Sergeant's recollection is similar to one of the IA complaints that was lodged against Pitts by his then-wife, who was also a PPD officer, who complained that Pitts assaulted her in their home when they were in the process of divorcing. *See* Obina Onyiah Case Summary.

551. Pitts later claimed that he had not received the subpoena requiring his attendance at the initial evidentiary hearing date. *See* CIU Cunningham Answer at 11, n. 7.

552. CIU Cunningham Answer at 19, ¶ 104.

553. *Id.* at 19-20, ¶ 105.

in appropirate. Like I said, I'll own it if I'm paranoid."[554] Notably, the CIU prosecutor had not asked Pitts about whether he was worried about anything—only if he had anything additional he wanted to say about Judge Carpenter.

The CIU Concedes that Cunningham Deserves a New Trial

The CIU conceded that Cunningham was entitled to a new trial due to a host of reasons. First, it noted that the trial prosecutor failed to disclose Pitts' IA file, which included three "sustained" instances of misconduct, *i.e.*, three instances where IA investigative conclusions rejected Pitts' explanations for the incidents.[555] Second, it noted that the prosecution did not disclose that Brown had promptly complained to the police department about Pitts' alleged assault, and that a Sergeant prepared a report about Brown's complaint.

The CIU's concession of relief was also based on its investigation of Brown's assault claim and its conclusion that Pitts "physically menaced [Brown] in an intimidating manner during [Cunningham's] trial."[556] In its filing conceding Cunningham's right to a new trial, the CIU noted the relationship between Brown's description of being assaulted and intimidated in the courthouse lobby and Pitts' general behavior as detailed in his IA file, which suggested a pattern and practice of physical threats and intimidation to get witnesses to say what he wanted. The CIU also noted that although Brown's allegation was serious, defense counsel failed to present this information to the jury, and the DAO apparently did not refer the incident to IA.

The PCRA Court Grants Relief

In June 2022, the PCRA court granted Cunningham a new trial, finding that his defense counsel was ineffective, including because he failed to cross-examine Brown about her allegation that Pitts assaulted her in the courthouse lobby, which in turn prevented the jury from properly evaluating her testimony. The PCRA court also found that defense counsel's various failures amounted to cumulative prejudice suffered by Cunningham, and that a new trial was thus warranted. Notably, despite the CIU's concession that a *Brady* violation occurred, the PCRA court's ruling rested solely on a finding of ineffective assistance of counsel.

Cunningham's Retrial is Pending

After Cunningham was awarded a new trial, the Homicide Unit made an "open plea" offer to Cunningham, which would leave the sentencing decision to the court. As of the date of publication, Cunningham had not yet accepted the offer, and his case remains pending.

Marvin Hill (2023)[557]

Marvin Hill ("Marvin") was convicted of third-degree murder and other offenses following a bench trial and sentenced to 16½-to-43 years' imprisonment. After he was sentenced, the lead detective on his case, Detective Philip Nordo, was accused of using illegal interrogation tactics with witnesses and suspects, including sexually coercing or assaulting them in police interrogation rooms, and giving benefits to informant and witnesses with whom he may have had intimate relationships, including by, among other things, putting money into their prison commissary accounts.

The Office investigated the allegations against Detective Nordo, and the CIU later confirmed that the Office had knowledge of the allegations against Nordo as early as 2005, when Internal Affairs investigators referred a complaint to the Office regarding Nordo's alleged sexual assault of a witness in an interrogation room. The CIU agreed to investigate Hill's conviction because of Detective Nordo's involvement in the case, and it confirmed that the prosecution did not inform defense counsel of Nordo's pattern of misconduct, including the 2005 allegation of sexual assault. Separately, the CIU also found that the prosecution failed to disclose favorable information suggesting that Marvin could not have committed the shooting because he was standing at a nearby store when it occurred.

554. *Id.* at 20, ¶ 107.

555. The CIU also had to file a Correction to the Record Filed Pursuant to Rules 3.3 and 3.8 (Duty of Candor to the Court and Special Responsibilities of a Prosecutor) in Cunningham's case, because the same judge who was handling Cunningham's case had handled a prior jury trial for Eric Leaner. Pitts' conduct was also an issue in Leaner's case, and the Office had not made accurate representations about the contents of Pitts' IA file in the Leaner trial. *Id.*at 12-13, ¶¶ 68-73.

556. *Id.* at 7, ¶ 36.

557. The information in this section is taken from various sources. *See, e.g.*, Mem. Op. ("Superior Court Opinion"), *Comm. v. Hill*, No. 1535 EDA 2021 (Pa. Sup. Ct. Jan. 4, 2023); Comm. Br. for Appellee ("CIU Hill Brief"), *Comm. v. Hill*, No. 1535 EDA 2021 (Pa. Sup. Ct. June 13, 2022); Order and Op. ("PCRA Court Opinion"), *Comm. v. Hill,* CP-51-CR-0005356-2021 (Phila. Ct. Comm. Pl. June 24, 2021); Resp. Comm. Post-Hearing Br. Recommending Pet'r Be Granted a New Trial ("CIU Post-Hearing Brief"), *Comm. v. Hill,* CP-51-CR-0005356-2021 (Phila. Ct. Comm. Pl. June 1, 2021); Samantha Melamed, "A Philly Man is Freed, and 2 Others Win New Trials in Cases Tainted by Predator Detective," Philadelphia Inquirer, Jan. 19, 2023; "Marvin Hill," National Registry of Exonerations.

In 2021, after an evidentiary hearing on Marvin's PCRA petition, the CIU conceded that he was entitled to a new trial and filed briefing arguing, among other things, that the prosecution suppressed favorable information. Judge Barbara McDermott of the Philadelphia Court of Common Pleas, who presided over both the trial and the PCRA evidentiary hearing, denied all relief, holding in part that the alleged *Brady* material did not conclusively exclude Marvin's involvement in the shooting, and that defense counsel was not ineffective, because Marvin was not prejudiced.

Marvin appealed the denial of relief to the Pennsylvania Superior Court, arguing that the PCRA court was wrong on both the facts and the law. The Superior Court reversed and granted Marvin a new trial, based in part on the fact that (i) defense counsel was ineffective for failing to present evidence about Marvin's alibi and (ii) the PCRA court's findings were not supported by the record. It did not reach the merits of the claim that the prosecution failed to disclose favorable information.

The Criminal Investigation

In 2010, Stacy Sharpe was shot multiple times while he was walking down Cumberland Street in Philadelphia. After he was shot, he ran to a beer store on Broad and Cumberland Streets, where he encountered Jamil Frazier, who was also heading into the beer store. Right before he fell to the ground, Sharpe told Frazier that he had been shot. After Frazier saw that Sharpe was bleeding from his chest and leg, he called 911. Beer store employee Jimmie Washington—who recognized Sharpe from the neighborhood—called 911 shortly thereafter. He also saw Sharpe making a call on his cellphone after he fell to the ground. According to Computer Aided Dispatch records (the "CAD"), the first 911 call was received at 6:29:47 p.m., and a second 911 call was received at 6:29:51 p.m.

After the shooting, police took statements from multiple witnesses who either saw the shooting or interacted with Sharpe immediately after he was shot. Police interviewed Frazier, who said he had been walking down Cumberland to the beer store when he sensed someone behind him. He turned and saw two men walking behind him, one after the other. When he heard a gunshot, he took off running to the beer store, and when he got there, he heard two or three more shots, and shortly after that, he saw Sharpe running up to him. After Sharpe collapsed, Frazier saw the shooter run past the beer store in a westerly direction, and Frazier said he called 911. Frazier was later taken to police headquarters, where police showed him a male in a leather jacket, but Frazier said he was not the shooter.

Police also spoke with Washington, who said he heard gunshots and saw Sharpe come running towards the beer store. Washington said he saw blood on Sharpe's clothing and saw him lying on the ground talking on his cellphone, telling someone he had been shot. Washington said the police came and took Sharpe to the hospital, and that Washington took Sharpe's cell phone and gave it to Sharpe's uncle the next day. Detectives later obtained Sharpe's cell phone records, which showed that he called his grandmother's phone at 6:30 p.m.[558]

On the night of the shooting, police also spoke with Katerina Love, who lived roughly two blocks east of the beer store. Love had heard the first gunshot and then went to her third-floor bedroom window to see what was happening. She saw the shooter and described him as roughly 6 feet and wearing black pants, a black jacket with a red Polo horse logo, and a black hat with a similar logo. When police spoke with her again the next day, Love reiterated her description of the shooter, and said that she had seen the shooter on the day of the shooting at a nearby deli on Cumberland (the "Cumberland deli"), and he had been wearing the same clothing. Love said that after the shooting, the shooter continued moving away from her, in a westerly direction.

Love also said a neighbor was driving up the street when the shooting happened and that he had to stop his car, or he would have driven right into the crossfire. Police identified the neighbor as Vincent Carter and spoke with him. Carter said he was driving onto Cumberland and saw a man shooting at another man. Carter described the shooter as wearing a dark hoody, jeans, and a ski cap. He also said that the shooter ran west, past his car.

Detective Thorsten Lucke obtained video surveillance footage from the Cumberland deli from the night of the shooting. When Detective Lucke obtained the footage, he noted that the equipment had not been reset to account for daylight savings, and that the timestamps were off by "an hour and some seconds."[559] The video footage showed Marvin repeatedly entering and exiting the deli for roughly an hour prior to the shooting. According to the video images, Marvin was wearing blue jeans, boots, a black leather jacket, and a skull cap with a small white logo, which did not match the clothing Love said the shooter was wearing.

558. Sharpe's cell phone records showed only the hour and minute, not seconds, for incoming and outgoing calls. *See* CIU Post-Hearing Brief at 11, ¶ 47 n. 10.
559. *See* Superior Court Opinion at 19 (citing Detective Lucke's trial testimony).

The same video footage also showed Marvin and Tyree Alston walking in and out of frame in the moments immediately preceding the shooting. At 6:27:43 p.m., Marvin and Alston walked out of frame. At 6:29:15 p.m., Marvin walked back into the frame while talking on a cell phone, and at 6:29:19 p.m., Alston walked back into the frame. At 6:29:32 p.m., a woman later identified as Antoinette Bines pointed west down Cumberland Street, and Alston and Marvin were also shown looking and pointing in the same direction. Police later spoke with Bines, who said she was standing outside the Cumberland deli when the shooting happened, and that Marvin was with her. After speaking with police, Bines and her mother moved out of Philadelphia, and the parties were later unable to locate Bines to subpoena her for trial.

In January 2010, roughly a week after the shooting, police stopped Marvin and told him they had a warrant for his arrest. Marvin was taken to police headquarters and left overnight in an interrogation room. Marvin later claimed that he was held for three days before being released. Documents from the H-File, some of which were not disclosed to defense counsel, corroborate Marvin's account that police detained him and asked him to identify people shown on the deli surveillance video. It does not appear that police took a formal statement from Marvin during this detention period.

In April 2010, Philadelphia police again went to look for Marvin, as well as his brother, Michael Hill ("Michael"), and Alston. Police found Marvin and Michael together, and Detective Nordo transported Marvin to the police station, while Michael was transported separately. Michael gave a statement to Detectives Nordo and Lucke implicating Alston in Sharpe's murder. According to the statement, Marvin was outside the Cumberland deli when Sharpe walked by, and that after he walked by, Alston said he had to go and do something. Michael then watched Alston follow Sharpe down the street, pull out a gun, and begin chasing Sharpe while shooting at him. Michael claimed that the motive for the shooting was Sharpe owing money to Alston, and he said that after the shooting Marvin called to tell him that Alston shot Sharpe. Michael also told police that Marvin was wearing a black Polo jacket and black Polo hat with a brown Polo logo.

During this second detention, Marvin was held for nearly twenty-four hours before he was interrogated by Detective Nordo. According to his statement, Marvin said he was at the Cumberland deli with Michael and Alston, and that he saw Alston run after Sharpe and shoot at him. Marvin said that when the shooting started, he walked home because he did not want to get involved. He also said he called Michael to tell him what Alston had done. Marvin was once again released from police custody.

In May 2010, Detective Nordo interviewed Love, Alston, and Michael. He reinterviewed Love in a minivan at the intersection of Broad and Cumberland streets. According to Love's statement—the third she gave police—she identified Marvin as the person who shot Sharpe, and she confirmed that Marvin was wearing clothing with a Polo logo. When Nordo interrogated Alston, Alston allegedly said that he was with Marvin and Michael at the Cumberland deli when Marvin mentioned that someone owed him money for drugs, and he began walking up Cumberland Street while on his cell phone. Alston said he then watched Marvin shoot Sharpe, and that afterward Marvin walked back to the deli, and then he and Marvin walked together to Marvin's home. According to Alston, Marvin claimed he had to shoot Sharpe because he could not let him get away with keeping his drugs. Alston said that Marvin also called Michael and spoke to him. Alston described Marvin as wearing a black leather jacket and black skull cap and fur boots, while he (Alston) was wearing a blue sweat jacket and sweatpants.

When Nordo took a second statement from Michael, he allegedly admitted that he had lied in his first statement because he wanted to protect Marvin. Michael reiterated that he was at the Cumberland deli with Marvin and Alston, but this time he said that Marvin and Alston walked off together. Michael said he then saw Sharpe running and heard three gunshots, and that after the shooting Marvin called him to ask if he heard gunshots. Michael also said that the day after Sharpe's killing, Marvin admitted that he and Alston shot someone.

In February 2011, Marvin was arrested and charged with Sharpe's murder. He had been hiding from police before his arrest and was eventually located by the Fugitive Squad. After Marvin's arrest, Alston recanted his statement and wrote a letter to Marvin apologizing for his statement, which he said was false.

Before trial, the court held a suppression hearing regarding the admissibility of Marvin's statements. Marvin testified that he was picked up in April 2010 and held for over 21 hours before being interrogated by Nordo. He also testified that homicide detectives had previously detained him for three days in January 2010, but he did not present evidence to corroborate the January 2010 detention. Notably, the statement Marvin gave in April 2010 referred to an earlier statement he made—and when defense counsel asked for the prior statement, Nordo said it was not in the file and might be with the Central Detective Division. The

trial court ultimately suppressed Marvin's April 2010 statement but also ruled the prosecution would be allowed to present evidence of Marvin's flight."[560]

The Trial

Marvin went to trial in 2013, and **ADA Joanne Pescatore** prosecuted the case. (**ADA Pescatore** has since become Chief of Homicide at the DAO).[561] Marvin waived his right to a jury trial and was tried before Judge McDermott of the Philadelphia Court of Common Pleas. As noted above, because there were 911 calls reporting Sharpe's shooting, as well as video surveillance footage from the Cumberland deli that showed Marvin in front of the deli around the time of the shooting, the precise timing of the shooting was a key issue at tria

ADA Pescatore called Love, Alston, and Michael as witnesses, and all three recanted their statements. Love testified that she did not recall much about the shooting, and that she only identified Marvin under duress. Alston testified that he and Marvin were at the Cumberland deli and were shown on video at the time of the shooting, and that he only signed his statement because detectives threatened to charge him with murder. Michael also disavowed the content of his statements and denied that the signatures on the statements were his. **ADA Pescatore** also called Carter, who was driving down the street when Sharpe was shot. He testified to seeing the shooting and described the shooter's clothing. When he was shown still photos of Marvin that were pulled from the Cumberland deli surveillance footage, he said that the shooter was wearing a different hat and jacket than Marvin. For unknown reasons, Frazier and Washington were not called as witnesses, despite having interacted with Sharpe when he collapsed at the beer store.

After Michael recanted, **ADA Pescatore** called Detective Nordo to testify, pursuant to *Brady-Lively,* about Michael's statements. Detective Nordo also testified about his interrogation of Marvin, acknowledging that when Marvin was brought to the police station in April 2010, he was held for nearly 21 hours before he was questioned. Nordo claimed he found Marvin sitting at his desk but did not know where he had been for the prior period. In fact, no one could account for what happened to Marvin during this 21-hour period. (As noted above, these facts eventually led Judge McDermott to exclude Marvin's April 2010 statement.)

The precise time of the shooting was important, because depending on when it occurred, Marvin's appearance on video footage exculpated him. As noted above, the police and prosecution had CAD records and 911 call recordings showing the precise time the first and second 911 calls were received. These records indicated that the first and second 911 calls were received seconds apart, at 6:29:47 p.m. and 6:29:51 p.m., respectively, which meant the shooting must have occurred before then. (In addition, the prosecution team also had Sharpe's cell phone records showing that he made a call at 6:30 p.m., which further corroborated the timeline that Sharpe was shot *before* 6:30 p.m. and before the 911 calls were made).

However, despite the existence of these records, which pointed to the shooting occurring at or before 6:29 p.m., **ADA Pescatore** argued that Marvin shot the victim *after* 6:31:40 p.m., when he walked out of view of the deli camera, and that he then left the area and returned home. To support her theory, **ADA Pescatore** relied on the crime scene log and a compilation of the Cumberland deli surveillance footage, which showed Marvin walking out of view at 6:31:40 p.m. She edited the footage to slow it down and focus on Marvin's fur boot moving out of the frame at 6:31:40 p.m., ostensibly to emphasize that once he walked out of view, he went to shoot Sharpe.

Although the complete CAD records (the "Long CAD") were in the H-File, **ADA Pescatore** did not introduce these documents at trial. She also had the 911 call recordings, which had time stamps for when the calls were received, in her trial file, but she did not introduce the calls as evidence, either. However, **ADA Pescatore** apparently reviewed the 911 calls prior to trial and took notes on the calls—her notes were later found in the trial file and referenced the time stamps of these calls (6:29:47 p.m. and 6:29:51 p.m.), which contradicted her theory that Marvin shot the victim after 6:31:40 p.m.

Marvin's defense counsel, Gerald Stein, argued a different timeline of the shooting, telling the jury that because Marvin was shown on video in the seconds leading up to it, he was innocent of the crime. However, Stein did not rely on the Long CAD or the 911 call recordings to establish the time of the shooting, because the prosecution did not disclose this information to him prior to trial. Instead, Stein relied on a document that contained some, but not all, of the data in the Long CAD. This shorter version (the "Short CAD") showed the times when the 911 calls were *logged* into the dispatch system, which was later

560. *See* CIU Post-Hearing Brief at 41, ¶ 183.

561. *See* "Divisions, Units and Supervisors," Philadelphia District Attorney's Office.

than when the 911 calls were received. According to the Short CAD, the two 911 calls were logged into the system at 6:30:29 p.m. and 6:31:36 p.m. Accordingly, Stein argued that the shooting must have occurred *no later than* 6:30:29 p.m. Elsewhere in the Short CAD were two entries stating "REC" at 6:29:47 p.m. and "REC" at 6:29:51 p.m., which corresponds to the time the 911 calls were received. However, there was nothing in the Short CAD to explain what "REC" meant, and Stein apparently missed or ignored these entries and instead focused on the log time to argue to the judge that the shooting must have occurred "no later than 6:30:29 p.m."[562] Stein then pointed to the deli video footage to argue that Marvin was at the store immediately before the shooting and was thus innocent.

During closing arguments, **ADA Pescatore** argued that the times reflected in the Short CAD reports are not always accurate (even though she had previously stipulated to the accuracy of the Short CAD before trial). She maintained that Marvin shot Sharpe after 6:31:40 p.m. At no time did she disclose the contradictory information in her possession, including the Long CAD, the 911 call recordings in her trial file, and Sharpe's cell phone records, which indicated that the shooting occurred before 6:29:47 p.m.

Marvin was convicted of third-degree murder and sentenced to 16½-to-43 years' imprisonment.

The CIU Investigation

As part of its investigation, the CIU filed a motion to view the crime scene, and after the motion was granted, visited the crime scene with the court and PCRA counsel. When the parties visited Love's apartment, where she claimed to have seen the shooting from her third-floor apartment window, they concluded that it was unlikely she could have seen the shooter's face or the front of his clothing, including the Polo logos on his shirt and hat, because shell casings found at the scene indicated that the shooter had been facing away from her, toward the west, when he was shooting, and Love herself said the shooter continued to flee west away from her afterward.

The CIU also spoke with witnesses to the shooting, including Frazier, Washington, Carter, and Bines, whom CIU prosecutors were able to locate after she moved back to Philadelphia. Frazier's statement to the CIU largely mirrored what he told police, although he also told the CIU that the shooter was wearing a blue hoodie and described the clothing as bright-colored. Washington also repeated what he told police, as did Carter. Notably, none of the witnesses reported that the shooter ran back toward the beer store—all of them said that the shooter continued west past the store.[563] Bines spoke with the CIU prosecutors on more than one occasion and submitted an affidavit which stated that she was the woman shown on the deli video, and that she was standing outside with Marvin when the shooting occurred. She also expressed confusion as to how Marvin could have been convicted when he had been standing there with her when the crime was committed.

The CIU also reviewed the DAO trial file and H-File and found three undisclosed documents—the Long CAD, 911 call recordings, and Sharpe's cell phone records—that contradicted the prosecution's trial theory and supported Marvin's alibi that he was at the deli during the shooting. These documents either contained time records of when the 911 calls were received or enabled the parties to infer when the shooting occurred—all of which placed the shooting well before 6:31:40 p.m.

The CIU also found that the prosecution introduced false and misleading testimony when it successfully relied on *Brady-Lively* to introduce Michael's police statement. As noted above, Michael gave two statements to police where he said that he was at theCumberland deli when the shooting occurred and saw Marvin and Alston shoot Sharpe. However, Michael's statements were false. Video footage from the Cumberland deli showed Michael walk off camera at 5:58:59 p.m., and he did not reappear again until 6:41 p.m.—well after the shooting occurred. Michael's departure from the deli was not shown in the compilation video that **ADA Pescatore** introduced at trial, and she did not correct any portion of Michael's police statements. Although the raw video footage was disclosed to Stein, he did not attempt to introduce any parts of it at trial. Nor did he use the video footage to cross-examine Nordo when the prosecution relied on him to introduce Michael's police statements. When the CIU spoke with Michael, he said he had been at the deli before the shooting but left when he got a text from his girlfriend about dinner, and that when he returned, everyone was gone. The CIU also spoke with Michael's girlfriend, who corroborated his account.

562. *See* Superior Court Opinion at 12.

563. During the initial investigation, Love said the shooter eventually turned southbound, but in a later statement she suggested that he ran northbound. However, the crime scene visit suggested that Love would not have been able to see the direction the shooter went, because a bridge obstructed her line of sight from her window. *See* CIU Post-Hearing Brief at 16-17, ¶ 83.

Finally, the CIU determined that the full scope of Nordo's prior misconduct, as well as his misconduct in Marvin's case, was not disclosed. For instance, although Marvin testified that police detained him for three days in January 2010, certain documents corroborating Marvin's account were not disclosed to defense counsel prior to trial. Nor did the trial court hear about Nordo's sexual advances toward Marvin (which are discussed *infra*).

The Prosecution's Evolving Theory of Marvin's Guilt

Judge McDermott eventually held an evidentiary hearing where Stein and **ADA Pescatore** testified. In advance of the hearing on Marvin's PCRA petition, the CIU interviewed **ADA Pescatore** and shared with her its findings from the crime scene visit. **ADA Pescatore** also reviewed the trial transcripts and the DAO trial file. During the interview with the CIU, **ADA Pescatore** offered an entirely new theory of Marvin's guilt: she said Marvin shot Sharpe between 6:27:43 p.m. and 6:29:19 p.m., which corresponded to the video footage showing Marvin walking off frame (6:27:43 p.m.) and then reappearing at the deli (6:29:19 p.m.). This new theory contradicted what she argued at trial, when she said Marvin shot the victim after 6:31:40, and that he went home and did not return to the deli. In addition, this new theory also contradicted the one consistent fact across all the eyewitnesses' statements: that the shooter ran west on Cumberland street in the opposite direction and did not come back toward the deli. At the PCRA hearing, **ADA Pescatore** stuck with this new theory of Marvin's guilt. During questioning, she was forced to admit that her theory contradicted Love, Frazier, and Carter's statements, but she maintained that Marvin ran past the beer store and down 13th Street before looping back to the deli.

When the CIU analyzed **ADA Pescatore's** PCRA testimony, they noted that the street layout around the crime scene undercut her theory that Marvin could have committed the shooting and then ran back to the Cumberland deli within roughly a minute-and-a-half between 6:27:43 p.m. and 6:29:19 p.m. As previously noted, the parties had visited the crime scene and noted that there was a high wall that ran down the length of Cumberland and continued down 13th Street. This long wall meant that there were no cross-streets that would have allowed the shooter quick egress to circle back to the deli, and if the shooter had returned to the deli, he would have had to take a roundabout route that would have taken roughly 10 minutes to walk. Even if someone were to sprint this route, it was unlikely that they could have traversed this distance in under a minute-and-a-half. Nor did it appear that Marvin had been sprinting, as the video footage showed him stroll back into the frame, and he did not look out of breath or like he had been frantically running. In addition, the CIU noted that this new theory did not include the time it took to stop to fire at Sharpe. In short, **ADA Pescatore's** new theory meant that the Marvin would have had to stop to shoot Sharpe, then run nearly half a mile and return to the deli within a minute-and-a-half.

Marvin Reveals Nordo's Sexual Improprieties and Threats

At the PCRA hearing, Marvin testified and revealed for the first time that Nordo sexually propositioned him during his three-day detention. He said that Nordo made small talk and eventually shifted the conversation to talking about watching pornography, including gay pornography. Marvin said that he tried to laugh this off, but Nordo got serious and told him he needed to take this case seriously, because Nordo could make his life a living hell. Nordo also said he could make "this all go[] away,"[564] but that Marvin had to help him, and he asked if Marvin wanted his help. When Marvin said he did, Nordo got up and began massaging Marvin's shoulders and whispering to him that he could make "this all"[565] go away, while moving his hands down Marvin's chest. When Marvin said he did not "go that way,"[566] Nordo got angry and told him to sit down. Marvin then smacked Nordo's hands off his thighs, and Nordo said he was going to make Marvin's life a living hell and that Marvin would not see daylight again. Marvin also testified that he did not think anyone would believe him over the word of a homicide detective, so he did not tell his defense counsel what happened—but he did become fearful of the police after being stopped repeatedly, which was why he was hiding from them before his arrest.

The PCRA Court Denies Relief

Following the PCRA hearing, the CIU conceded that Marvin was entitled to a new trial because, among other things, the prosecution violated *Brady* when it failed to produce the Long CAD, the 911 call recordings, and Sharpe's cell phone records. In addition, PCRA counsel argued that Marvin received ineffective assistance of counsel, because when Stein relied on the Short CAD and the time the 911 call was logged, as opposed to when

564. *Id.* at 43, ¶ 194.
565. *Id.*
566. *Id.*

it was received, he advanced an inaccurate time frame, despite his own acknowledgment that the precise timing of the shooting was critical to Marvin's alibi.

Judge McDermott denied Marvin's PCRA petition. She rejected the CIU's *Brady* arguments, finding that the information was not material because it did not conclusively eliminate Marvin as a suspect. The court noted that even if it factored in the favorable information that was not disclosed, it did not preclude the possibility that Marvin committed the murder off camera and then raced back to the Cumberland deli via the back alleyway before appearing again on video footage. She also minimized the importance of the Cumberland deli video footage in establishing Marvin's alibi, writing that, according to Detective Lucke's trial testimony, the video footage "could be reflecting a time *up to one minute off* from the actual time memorialized on the video."[567] She also found no evidence that the prosecution "purposefully withheld"[568] the Long CAD.

Separately, Judge McDermott rejected the ineffective assistance of counsel claim. She disagreed that Stein could have or should have presented a different argument, or that his argument about when the shooting occurred was inaccurate. Instead, the court held that the new information would not have enabled Stein to offer a more accurate account of when the shooting occurred or to more precisely account for Marvin's alibi, again citing the fact that (i) Marvin could have snuck off camera to commit the murder and then returned to the deli via the back alleyway, and (ii) the deli footage could have been inaccurate by up to a minute. In short, she found that the new information presented by the CIU and PCRA counsel was consistent with what had already been established at trial, and that it did not do anything to preclude the possibility that Marvin could have snuck off, shot Sharpe, and then returned to the Cumberland deli after the shooting via the back alleyway all before 6:30 p.m., the latest time when Stein said the shooting had to have occurred.

The Superior Court Grants Relief

PCRA counsel appealed the denial of relief, and during these proceedings the CIU conceded that Judge McDermott made key findings of fact that were unsupported by the record. For instance, the court repeatedly held that there was an alleyway behind the Cumberland deli that Marvin could have used—but nothing in the record supported this finding, and at no time during the crime scene visit or the evidentiary hearing did the court indicate that it saw an alleyway. (Nor did Google Maps show an alleyway behind the Cumberland deli). Moreover, the Cumberland deli video footage undercut the court's hypothesis that Marvin could have sprinted through the alleyway, given that when Marvin reappeared on video in front of the deli, he did not appear out of breath or disheveled. Finally, when the court discounted the time stamps on the deli footage, this was based on a misinterpretation of Detective Lucke's testimony: contrary to the court's holding that the time stamp could be off by up to a minute, Detective Lucke testified at trial that the video was off by "an hour and some seconds. It was *not* an hour and minute."[569]

The CIU also noted that Judge McDermott applied a more exacting legal standard than what *Brady* required when she rejected Marvin's *Brady* claim. Instead of examining the undisclosed evidence to see if it would have undermined confidence in the verdict, the court essentially reweighed the evidence and required Marvin to disprove **ADA Pescatore's** new trial theory—one in which she hypothesized that Marvin killed Sharpe before returning to the deli. The court noted that because Marvin failed to prove he "was absent from the area of the shooting"[570] and "was otherwise incapable of committing the instant murder,"[571] the *Brady* claim failed. However, the CIU noted *Brady* did not require this level of proof, and instead only asked whether there was a reasonable probability that, had the favorable information been disclosed, the result of the proceeding would have been different. Likewise, when Judge McDermott pointed to the absence of any evidence that the prosecution purposefully withheld the full CAD report as grounds for dismissing the *Brady* claim, the CIU noted that this was also an incorrect legal standard, because *Brady* was not concerned with the good or bad faith of the prosecutor.[572]

On appeal, the Pennsylvania Superior Court overruled the PCRA court and granted Marvin a new trial. However, the court did not rule on the merits of the alleged *Brady* violations. Rather, the Superior Court held that Stein was ineffective for failing to conduct a reasonable investigation. It found that Stein's trial

567. PCRA Court Opinion at 16 (emphasis supplied).

568. *Id.* at 17.

569. *See* CIU Hill Brief at 28. (citing Detective Lucke's testimony) (emphasis in original).

570. *Id.* at 32.

571. *Id.* at 32.

572. The CIU also noted that, in reaching this conclusion, the PCRA court cited and relied on cases that were irrelevant, because they were not addressing *Brady* claims. *Id.* at 37-38.

argument that the shooting occurred no later than 6:30:29 p.m. was not accurate, and that had Stein undertook a reasonable investigation by reviewing the Short CAD more thoroughly, he would have cited the accurate 911 call times. The Superior Court's conclusion was based on the fact that the Short CAD contained the abbreviation "REC" next to the times when the two 911 were received at 6:29:47 p.m. and 6:29:51 p.m.[573] Although Stein testified at the PCRA hearing that he thought the 911 log time was sufficient to rely on, "instead of making an issue out of the time of the 911 calls,"[574] the Superior Court cited Stein's PCRA testimony, in which he acknowledged that he understood the "REC" notation in the Short CAD to refer to when the first 911 call was received. Given that the timing of the shooting was central to Marvin's case, the Superior Court faulted Stein for failing to utilize the time when the 911 calls were received to more precisely corroborate Marvin's alibi against the Cumberland deli surveillance footage. Separately, the court cited Stein's own trial argument that the time of the shooting was of "paramount importance"[575] to conclude that Stein's decision was unreasonable, and that he had no reasonable basis for relying on the 911 log time, as opposed to the time the 911 call was received.

Lastly, the Superior Court rejected the PCRA court's factual finding that Marvin could have used the back alleyway to return to the Cumberland deli, noting that the record did not contain any evidence to support this theory of the case. It similarly rejected the PCRA court's misstatement that the video footage could have been inaccurate up to one hour and one minute from the actual time, noting that this was based on a mischaracterization of Detective Lucke's testimony.

Marvin is Exonerated

In January 2023, the PCRA court vacated Marvin's conviction and ordered Hill to be released from prison. The Office dismissed the charges shortly thereafter.

After his release, Marvin filed a civil lawsuit against the City of Philadelphia and Nordo seeking compensation for his wrongful conviction. His lawsuit remains pending.

Lavar Brown (2023)[576]

Lavar Brown was convicted of first-degree murder and sentenced to life imprisonment. After his conviction, he filed a PCRA petition (the "First PCRA Petition") alleging in part that the prosecution failed to disclose favorable information about two cooperating witnesses and seeking discovery and an evidentiary hearing. The Law Division investigated Brown's allegations, including by reviewing the DAO trial file, and interviewing the trial prosecutors, the lead homicide detective, and at least one of the cooperating witnesses. This investigation yielded information suggesting that Brown's allegations were correct: the prosecution violated *Brady* by failing to disclose impeachment information regarding these witnesses. However, instead of disclosing its findings to PCRA counsel, the Law Division opted to continue suppressing the information and to aggressively defend the conviction. In various pleadings, the Law Division moved to dismiss the First Petition and opposed requests for discovery and a hearing. The PCRA court eventually held a limited evidentiary hearing on one of Brown's claims before it denied his petition entirely.

573. *See* Superior Court Opinion at 12.

574. *Id.* at 17 (citing Stein's testimony at PCRA hearing).

575. *Id.* at 16 (citing Stein's statement at trial).

576. The information in this section is taken from various sources. *See, e.g.*, Comm. Mot. to Dismiss ("Motion to Dismiss First PCRA"), *Comm. v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. June 17, 2009); Comm. Ltr. Br. in Opp'n to Def.'s Reply to Comm. Mot. to Dismiss, *Comm. v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Dec. 9, 2009); Comm. Supplemental Ltr. Br., *Comm. v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Apr. 7, 2010); Comm. Resp. to Def.'s Mot. for Disc., *Comm. v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Apr. 9, 2010); Comm. Post-Hearing Br., *Comm. v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Feb. 16, 2011); Op., (Sarmina, J.), *Comm. v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Apr. 24, 2012); *Comm. v. Brown*, No. 2939 EDA 2011, 2013 WL 11267531 (Pa. Sup. Ct. Apr. 9, 2013); Supplement and Amendment to Successor Pet. for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Filed on June 23, 2020 ("Brown Supplemental PCRA"), *Comm.v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. June 28, 2021); App. To Supplement and Amendment to Successor Successor Pet. for Writ of Habeas Corpus and for Collateral Relief from Criminal Conviction Filed on June 23, 2020 ("Brown Supplemental PCRA Exhibits"), *Comm.v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. June 28, 2021); Comm. Resp. to Pet. for Collateral Relief ("CIU-Law Division Response"), *Comm.v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Nov. 1, 2021); Comm. Exhs. To Resp. to Pet. for Collateral Relief ("CIU-Law Division Exhibits"), *Comm.v. Brown*, CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Nov. 1, 2021); Pet'r's Second Amendment and Supplement to Habeas Pet. Based on Newly Discovered *Brady* Evidence, *Brown v. Ferguson*, No. 14-cv-0626 (E.D. Pa. Sept. 9, 2021); Exhs. To Pet'r's Second Amendment and Supplement to Habeas Pet. Based on Newly Discovered *Brady* Evidence, *Brown v. Ferguson*, No. 14-cv-0626 (E.D. Pa. Sept. 9, 2021); Joint Stipulations of Fact, *Comm. v. Brown,* CP-51-CR-0407441-2004 (Phila. Ct. Comm. Pl. Nov. 8, 2022); Pet. for Exercise of King's Bench Jurisdiction, *Comm. v. Brown,* ___ EM 2023 (Pa. May 26, 2023); *Amicus* Filing of the Office of Att'y Gen. in Support of Victims' Families' King's Bench Pet., *Comm. v. Brown,* 32 EM 2023 (Pa. May 30, 2023); Samantha Melamed, "Philadelphia DA Says Prosecutors Hid Evidence For Years in a 2003 Murder Case," Philadelphia Inquirer, Nov. 15, 2021.

The Law Division's actions were not discovered until several years later, when PCRA counsel was given open-file discovery.[577] This led them to discover internal DAO memoranda, notes, and emails that corroborated Brown's allegations and revealed the Law Division's role in continuing to suppress favorable information. Upon finding this new information, PCRA counsel filed a supplemental petition (the "Supplemental PCRA Petition") including these new facts and supporting documents.

Shortly thereafter, the CIU and the Law Division agreed to jointly investigate Brown's conviction. This joint investigation corroborated Brown's allegations and uncovered additional favorable information that the Law Division did not disclose. In 2021, the CIU and the Law Division conceded that Brown was entitled to relief on his Suppelemntal PCRA Petition. In 2023, the PCRA court vacated Brown's conviction and granted him a new trial. It declined to hold an evidentiary hearing before reaching its conclusion.

After Brown won his PCRA petition, the victims' surviving spouses filed a Kings Bench Petition ("KBP") in Pennsylvania Supreme Court. The KBP sought to vacate the PCRA court's order as unreliable on the grounds that the PCRA petition was not subjected to sufficient judicial review in an adversarial proceeding. The Pennsylvania Office of the Attorney General filed an amicus brief in support of the KBP. The KBP remains pending.

Separately, the victims filed a motion seeking to stay Brown's retrial, which was denied. The retrial is currently scheduled for September 2024.

The Criminal Investigation and Trial

In January 2003, brothers Jamar and James Richardson planned to rob the Rite-Aid where Jamar worked. When their first attempt failed, they regrouped and came up with a new plan. The next day, they went back to the Rite-Aid, where Kiana Lyons and others served as lookouts while Christopher Kennedy went into the store to rob it. Once inside, Kennedy shot and killed the store manager and stole cash from the safe. Kennedy was arrested as he left through the rear of the store, holding cash and the murder weapon. Police later arrested the Richardsons and Ronald Vann, and they questioned Kiana Lyons but did not arrest her. The Richardsons, Vann, and Lyons all told police that Lavar Brown was involved in the attempted robbery and robbery-murder.

In 2004, Brown, Kennedy, and the Richardsons went to trial, and **ADAs Tom Malone** and **Bill Fisher** prosecuted the case. The strength of the evidence against the defendants varied. Kennedy was arrested leaving the scene, with both cash and the gun, and both he and the Richardson brothers confessed. However, the only evidence against Brown came from Lyons and Vann[578]—both of whom admitted their involvement and received immunity in exchange for their testimony. Defense counsel aggressively cross-examined Lyons and Vann in an attempt to discredit them as witnesses who would say anything to please the prosecution.

To bolster Lyons' credibility, prosecutors sought to introduce her January 2004 statement to police as a prior consistent statement. To do so, prosecutors had to show that her statement was accurate and not the product of undue influence, so they asked Lyons questions about how she ended up talking with police. Lyons testified that the first time she spoke with police was January 2004 and that prior to that time, no one from the prosecution or her defense counsel gave her any information about the investigation. She did not mention any police interviews or interactions prior to January 2004, and the prosecution did not ask her about any pre-January 2004 contact with police. Detective David Baker testified that he tried to speak to Lyons in November 2003 but was rebuffed until they ended up talking in January 2004. He also said that he did not provide her or her defense counsel with any information about the investigation. Based on Lyons' and Baker's testimony, the prosecution was able to admit Lyons' January 2004 statement.

Vann testified and was extensively cross-examined about the multiple different statements he gave police, including the fact that he did not implicate Brown until his final statement. Vann acknowledged his immunity agreement but claimed that, aside from the agreement, he had not received any other benefits or promises from the prosecution in exchange for his testimony. Vann also admitted he had open criminal cases for gun-point robbery and drug distribution, but he was adamant that the prosecution did not promise him any help with these cases, although he himself hoped for leniency. Vann did not mention

577. Under DA Krasner, the Office changed its discovery policies to permit open-file discovery through post-conviction proceedings.

578. The Richardson brothers identified Brown as being involved, but because they did not testify at trial in their own defense, their statements were redacted to exclude reference to Brown, in accordance with *Bruton v. United States*. The jury was also instructed that the statements could not be used as evidence against Brown. *See* CIU-Law Division Response at 10, ¶ 23 n. 5.

whether he had previously cooperated in other police investigations or prosecutions, and the prosecution did not ask him any questions about it.

Brown was convicted of first-degree murder and sentenced to life imprisonment.

Ronald Vann's Lenient Sentence

After Brown was convicted, Vann pleaded guilty on his open criminal cases and was sentenced. **ADA Malone** testified at the plea hearing, describing Vann's "outstanding"[579] cooperation, and noting that, due entirely to Vann, Brown was charged and convicted. **ADA Malone's** testimony was notable, because it contradicted or conflicted with Vann's trial testimony on two key points. First, at the plea hearing, he admitted to making a pre-trial promise to help Vann with his criminal cases when he said, "*up until the trial*...there had been no discussions between me or anyone else with Mr. Vann about anything *other than the fact that* he [Malone] would let the sentencing court know of the quality, nature, and extent of his cooperation." [580] This contradicted Vann's trial testimony, where he denied that the prosecution made any promises or offered any benefits to him beyond his immunity agreement. Second, **ADA Malone** described Vann's cooperation in a separate case against Kareem Ali. However, Vann was silent about his cooperation history and any benefits he might have received. (Nor had this cooperation been disclosed to Brown's defense counsel).

At the plea hearing, the court reviewed Vann's sentence, noting it would be more lenient than what was statutorily prescribed, because the Office had agreed to "de-mandatorize" [581] his case and would not be requesting the mandatory minimum 5-to-10-year sentence on the gunpoint robbery charge. The court also noted the Office's "highly unusual" [582] decision to allow Vann to remain out on bail for the holidays until his sentencing hearing.

Vann was eventually sentenced to 3- to-6-years for both cases. After the sentence was handed down, the Office consented to Vann filing a petition for a sentence reduction, which was then granted. Vann was subsequently resentenced to just 2.5- to 5-years, and he was allowed to serve his time in a county prison, rather than a state prison.

The First PCRA Proceedings: *Brady* and *Napue* Allegations

In 2009, Brown filed his First PCRA Petition alleging that the prosecution withheld impeachment information about Lyons and Vann and failed to correct their false and misleading testimony. With respect to Lyons, Brown alleged that the prosecution withheld the fact that Lyons first met with police in December 2003—not January 2004, as she claimed at trial—and at this initial meeting, she gave an untruthful statement that police and prosecutors did not believe was true.

With respect to Vann, Brown (i) cited **ADA Malone's** testimony at Vann's plea hearing as evidence that the prosecution withheld their promise to help Vann with his criminal cases, which was made *before* Vann testified, and (ii) alleged that the prosecution withheld Vann's history of cooperation in multiple other investigations, which suggested a pattern wherein Vann turned on others when he got into trouble.

By the time PCRA counsel filed the First PCRA Petition, they knew that Vann had cooperated in other investigations, and that this had not been disclosed before trial. They learned this information because the Law Division inadvertently disclosed a portion of Vann's cooperation when they gave PCRA counsel a courtesy copy of the discovery that had been turned over before Brown's trial. PCRA counsel compared their courtesy copy to the copy of discovery received by Brown's defense counsel, and they found that the two productions were not identical: the courtesy production contained a memorandum detailing Vann's lengthy cooperation history, while the memorandum found in the trial production had been redacted, and the redactions were done entirely in white, so there was no way for Brown's defense counsel to have known that the document had been altered.

The Law Division Aggressively Defends the Conviction

ADA Cari Mahler was assigned to respond to the First PCRA Petition. In pleadings seeking dismissal of the petition and opposing discovery and an evidentiary hearing, **ADA Mahler** defended Brown's conviction and denied allegations that the prosecution suppressed favorable information.

579. *See* Brown Supplemental PCRA Exhibit 1 (R. Vann Notes of Testimony, Dec. 16, 2004).

580. *Id.*

581. *Id.*

582. *Id.*

With respect to Lyons, **ADA Mahler** repeatedly argued that she never gave a statement at the December 2003 proffer. **ADA Mahler** called her "an uncooperative witness"[583] and emphasized that Lyons "stated **nothing** to police…that was exculpatory or constituted material impeachment information."[584] In sum, **ADA Mahler** implied that when police and prosecutors tried to speak with her in December 2003, Lyons refused to share what she knew. Elsewhere, **ADA Mahler** attacked the lack of evidence regarding what Lyons might have said at the December 2003 proffer. When she responded to Brown's discovery request, she stated that the Commonwealth had no "recordings, transcripts, or other documents referencing any statements made by"[585] Lyons. After the PCRA court held an evidentiary hearing on what Lyons might have said, **ADA Mahler** argued that the "best evidence"[586] of what was said came from Lyons' defense counsel Jamie Funt's notes, and that Funt himself admitted that he could not specifically recall what was said. Finally, she argued that because Brown "produced **nothing** to show that [] Lyons said **anything**"[587] at the proffer that constituted *Brady* material, his claim should be dismissed.

ADA Mahler also denied the the *Brady* allegations regarding Vann. Initially, she argued that **ADA Malone's** plea hearing testimony was "vague,"[588] and pointed to other aspects of the plea hearing transcript to argue that Vann "was not promised anything at all until after the trial."[589] Later, she treated the timing of **ADA Malone's** promise to Vann as uncertain, arguing that "*to the extent that* [ADA] Malone told [] Vann before defendant's trial that—if asked—he would tell Vann's sentencing judge" about his cooperation, this did not constitute impeachment material that had to be disclosed.[590] Separately, she argued that the Commonwealth had "other reasons"[591] to agree to Vann's lenient sentence, including the fact that (i) no gun was recovered from the gunpoint robbery, and Vann denied having a gun; and (ii) his service in county prison was due to threats made against Vann and concern for his safety if he were sent to state prison.

In response to PCRA counsel's discovery requests regarding Vann's cooperation history, **ADA Mahler** argued that Vann's cooperation in other cases was not relevant, and that the discovery requests were an "overbroad" "fishing expedition."[592] While she did produce some information to PCRA counsel, the documents contained "extensive redactions"[593] which she had cleared with Law Division Supervisor **ADA Ronald Eisenberg**. The redacted information referenced Vann's involvement in possibly seven gun-point robberies, and that he cooperated in six of those robberies.[594] Ultimately, **ADA Mahler** only disclosed Vann's cooperation in a case against Kareem Ali—which was already public knowledge, because **ADA Malone** cited the Ali case when he testified at Vann's plea hearing. With respect to the rest of Vann's cooperation history, **ADA Mahler** argued that it did not need to be disclosed because it was "of the very same quality as the impeachment evidence used against"[595] Vann on cross-examination.

The First PCRA Petition is Denied

The PCRA court granted an evidentiary hearing limited to determining whether Kiana Lyons gave a statement at the December 2003 proffer. Lyons' defense counsel, Jamie Funt, was the only witness called to testify. Funt recalled that Lyons only gave a short statement before **ADA Malone** paused the meeting to let Funt know that "he didn't believe" Lyons, and that they "had some information that…she was more involved than what she was saying."[596] Funt also said that **ADA Malone** showed him a portion of Ronald Vann's statement describing Lyon's role in the crime, and that after this development he (Funt) asked to end the proffer session. At the conclusion of the hearing, the

583. *See* Law Division Motion to Dismiss First PCRA at 49.
584. *See* Law Division Post-Hearing PCRA Brief at 27 (emphasis in original).
585. *See* Law Division Response to First PCRA Discovery Requests at 4.
586. *See* Law Division Post-Hearing PCRA Brief at 27.
587. *Id.* at 27-28.
588. *See* Law Division Motion to Dismiss First PCRA at 33.
589. *Id.* (emphasis in original).
590. *See* Law Division Supplemental Motion to Dismiss First PCRA at 1.
591. *Id.* at 11 n.5.
592. *See* Law Division Response to First PCRA Discovery Requests at 5.
593. *See* Brown Supplemental PCRA Exhibit 19 (Email btwn ADAs Mahler and Eisenberg, Apr. 8, 2010).
594. *See* Brown Supplemental PCRA at 27-28, ¶60.
595. *See* Law Division Sur-Reply to First PCRA at 3 (emphasis in original).
596. *See* Comm. Post-Hearing Br. at 14 (citing Funt testimony).

PCRA court found no evidence that Lyons gave a statement at the December 2003 proffer and dismissed the entirety of the First Petition.

In dismissing the First PCRA Petition, the PCRA court accepted the Law Division's arguments regarding Vann and dismissed these claims without a hearing, finding no evidence of any promise or benefit offered to Vann.

The Law Division Suppressed Favorable Information

After the First PCRA Petition was denied, DA Krasner took office and directed prosecutors to provide open-file discovery in post-conviction proceedings. As a result, PCRA counsel was able to review the Law Division files relating to the First PCRA Petition, which included **ADA Mahler's** internal memoranda, emails, and notes. When PCRA counsel reviewed the files, they learned that **ADA Mahler** had investigated the allegations from the First PCRA Petition—including speaking with trial prosecutors, detectives, and Kiana Lyons—and that she had found favorable information that corroborated Brown's allegations. However, instead of disclosing this information, **ADA Mahler** denied Brown's allegations and opposed the First PCRA petition. After reviewing the DAO files, PCRA counsel filed a supplemental PCRA (the "Supplemental PCRA"). The Supplemental PCRA contained allegations about **ADA Mahler's** internal investigation and the specific favorable information that she found—but did not disclose. These facts are discussed in detail below.

Kiana Lyons' Untruthful December 2003 Statement

During the First PCRA Proceedings, **ADA Mahler** spoke with **ADAs Malone** and lead Homicide Detective Baker about Kiana Lyons' December 2003 proffer. Both men told her that Lyons gave a statement at the December 2003 proffer that they did not think was true. **ADA Malone** said Lyons gave a statement that was not consistent with what the Commonwealth knew or what it wanted to hear, and that he was not going to take down a statement that was less than truthful, and Lyons was trying to give half a story.[597] Elsewhere, **ADA Malone** said Lyons gave "less than [the] whole story" and was "trying to tell ½ a story."[598] Detective Baker also recalled that Lyons gave an inconsistent statement that police knew was not true, and he recalled sharing information about the investigation with Lyons' defense counsel so that counsel would understand why the police wanted to talk to Lyons in the first place. [599]

ADA Mahler also sent DAO detectives to interview Lyons about her recollection of the December 2003 proffer. Lyons gave detectives a written statement in which she stated that she "wasn't telling the truth then, just bits and pieces."[600] She also recalled that Detective Baker refused to write down what she was telling them, because he told her he did not believe she was telling the truth and that he would not take a statement from her until she was ready to be truthful.[601] **ADA Mahler** kept a copy of this signed statement in the Law Division file.

Notably, **ADA Malone's** statements to **ADA Mahler** conflicted with what he and **ADA Fisher** argued at trial, when they sought to admit Lyons' January 2004 statement. **ADA Malone** seemed to recognize this: he told **ADA Mahler** he "could not believe" [602] that **ADA Fisher** argued that January 2004 was the first time Lyons spoke with police. **ADA Malone** thought he was either not in court when **ADA Fisher** made this argument, or that he (**ADA Malone**) was not "in his zone,"[603] which caused him to miss this argument. **ADA Malone** also implied that **ADA Fisher** needed supervision during the trial: he recalled the trial judge saying she was "glad" [604] **ADA Malone** was there to "keep Bill [Fisher] intact."[605] In another discussion with **ADA Mahler**, **ADA Malone** apologized to her and said he needed to buy her a drink.[606]

ADA Mahler also scrutinized prosecutors' trial representations about the January 2004 proffer. She reviewed **ADA Fisher's** trial arguments and wrote a timeline of the Commonwealth's communications and interactions with Lyons leading up to

597. *See* Brown Supplemental PCRA Exhibit 25 (C. Mahler Handwritten Notes, undated).
598. *See* Brown Supplemental PCRA Exhibit 27 (C. Mahler Handwritten Notes, May 12, 2009).
599. *See* Brown Supplemental PCRA Exhibit 18 (C. Mahler Memorandum re: Telephone Call with ADA Ponterio, Apr. 7, 2010).
600. *See* CIU-Law Division Exhibit 3 (K. Lyons Statement, Nov. 29, 2010).
601. *Id.*
602. *See* Brown Supplemental PCRA Exhibit 30 (C. Mahler Handwritten Notes, undated).
603. *Id.*
604. *Id.*
605. *Id.*
606. *See* Brown Supplemental PCRA Exhibit 17 (C. Mahler Handwritten Notes, undated).

the January 2004 proffer.[607] She also asked **ADA Malone** why nothing from the December 2003 proffer had been turned over and whether it should have been. **ADA Malone** responded that it was no different than a conversation with an uncooperative witness.[608]

ADA Mahler eventually raised her concerns about the December 2003 proffer in multiple meetings and email communications with supervisors in the Office. She met with her supervisor, **PCRA Chief ADA Robin Godfrey**, and had what she called an "unusual" [609] discussion that referenced the need to avoid an evidentiary hearing because it would be "bad!" and raised the possibility of conceding that nothing was turned over and arguing that any non-disclosure was immaterial.[610] Her notes also asked whether the Office should offer a deal to Brown's co-defendant Kennedy.[611]

When **ADA Mahler** met with **Homicide Chief ADA Anne Ponterio**, she flagged "discrepancies" [612] in Detective Baker's recollection of Lyons' December 2003 proffer. **ADA Mahler** noted that when Detective Baker spoke with her, he said that Lyons gave an inconsistent version of events that police knew was false, and that he showed Lyons' defense counsel information to demonstrate that she was not being truthful. But when Detective Baker spoke with **ADA Ponterio**, Baker described Lyons as just not ready to talk, and that he and defense counsel only spoke about what they both already knew regarding the case. **ADA Ponterio** raised the possibility that Baker's statement changed because he just had "more time to think about it,"[613] and that what really mattered was what Baker would say under oath at a hearing. **ADA Mahler** then wrote that she was "baffled" [614] by the situation.

ADAs Mahler also met with **ADAs Godfrey, Ponterio**, and **Deputy Homicide Chief ADA Ed Cameron** to discuss the "fruitless"[615] December 2003 proffer and the prosecution's representations that January 2004 was the first time Lyons gave a statement. In an email, **ADA Mahler** pointed out that neither Lyons nor Detective Baker mentioned the December 2003 proffer during their respective testimonies, and the December 2003 proffer letter was never turned over in discovery even though it was in the DAO trial file.[616] In response, **Homicide Deputy Chief Ed Cameron** opposed disclosing any information about the December 2003 proffer. He responded that nearly all cooperators started off being untruthful when they first talked to law enforcement,[617] and the "best" [618] detectives were the ones who did not take any notes or write down "the obvious lies"[619] and instead only wrote down statements once cooperators were ready to tell the truth.[620] **ADA Cameron** also stated that the Office's Homicide Unit never informed defense counsel about this practice. **ADA Cameron** did not explain or expand on whether this practice complied with the prosecution's duty to disclose favorable information, such as a witnesses' false statements or lies.

In that same email, **ADA Cameron** seemed most concerned with how to address the trial representations made by **ADAs Fisher** and **Malone** and how to respond to what Lyons' defense counsel, Jamie Funt, might say at a future evidentiary hearing. He asked what Funt would testify to and whether it would conflict with what **ADAs Fisher** and **Malone** said, but he did not address whether any discrepancy between the two sides would raise questions about the prosecution's conduct or their decision to withhold information about the December 2003 proffer. Rather, **ADA Cameron** focused on Funt and floated the possibility of retaliating against him, observing that if Funt said "things to hurt us, we should not give him deals in the future.

607. *See* Brown Supplemental PCRA Exhibit 29 (C. Mahler Handwritten Notes, Jan. 20, 2010). ADA Mahler's notes refer to "Statemts to Court – By BF" and contain a short timeline of Lyons' proffer interactions. *Id.*

608. *See* Brown Supplemental PCRA Exhibit 27 (C. Mahler Handwritten Notes of Phone Conversation with ADA T. Malone, May 12, 2009).

609. *See* Brown Supplemental PCRA Exhibit 17 (C. Mahler Handwritten Notes, Jan. 20, 2010).

610. *Id.*

611. *Id.*

612. *See* Brown Supplemental PCRA Exhibit 18 (C. Mahler Memorandum re: Telephone Call with ADA A. Ponterio, Apr. 7, 2010).

613. *Id.*

614. *Id.*

615. *See* C. Mahler Handwritten Notes, Mar. 15, 2010 (on file with author).

616. *See* Brown Supplemental PCRA Exhibit 32 (Mar. 25, 2010 Email Chain Btwn. ADAs C. Mahler, R. Godfrey, A. Ponterio, and E. Cameron).

617. *See* Brown Supplemental PCRA Exhibit 37 (Email fr. ADA Cameron to ADAs Godfrey, Mahler, and Ponterio, Mar. 16, 2010).

618. *Id.*

619. *Id.*

620. *Id.*

Also, maybe we should send a Detective to go interview him."[621] After receiving **ADA Cameron's** email, **ADAs Mahler** and **Godfrey** emailed **Law Division Supervisor Ronald Eisenberg**, stating that they were "disturbed and offended,"[622] and that other colleagues shared their concerns and believed that **ADAs Fisher** and **Malone** should have disclosed the December 2003 proffer session. However, **ADA Eisenberg** thought that **ADA Cameron**'s arguments were "not completely irrational" and suggested that they needed to collectively resolve the conflict over the December 2003 proffer.[623]

Despite learning that Lyons gave an untruthful statement at the December 2003 proffer session, both from **ADA Malone** and from Lyons herself, the Law Division ultimately decided not to disclose any of this information. As previously discussed, **ADA Mahler's** pleadings made no mention of this information and instead argued that (i) Lyons did not make any statement, let alone an exculpatory one, and (ii) there were no documents or other information summarizing or relating to what Lyons might have said.

ADA Malone's Promise to Help Vann

ADA Mahler spoke with **ADA Malone** about his testimony at Vann's plea hearing and Vann's lenient sentence, and he confirmed that he promised to help Vann with his criminal cases, and that he made this promise before Brown's trial. **ADA Mahler** summarized this information in a memorandum to **ADA Godfrey**, writing that the "bottom line is that Tom [Malone] told me he said it and that *he said it before trial*—i.e., what he stated in the notes of testimony of Vann's guilty plea *is true*."[624] **ADA Mahler** also found additional evidence suggesting that Vann had been promised leniency: she found an email from **ADA Bill Inden**, who handled Vann's criminal cases, indicating that **ADA Malone** and Vann's counsel had worked out a deal.[625] **ADA Mahler** also found a memorandum from **ADA Keri Sweet,** written before Brown's trial, where Sweet observed that "detectives really want us to make Vann a deal so he testifies to everything he's said so far."[626]

Upon learning this information, **ADA Mahler** wrote a memorandum to **ADA Godfrey** raising the possibility that some of the Law Division's earlier pleadings were no longer accurate. For instance, she summarized the motion to dismiss, which argued that Vann did not receive any promises "until AFTER defendant's trial,"[627] and that **ADA Malone's** testimony at Vann's guilty plea "was vague." [628] Then, she noted that "[n]ow, we are backpedaling a bit" by conceding that **ADA Malone** did promise to help Vann. **ADA Mahler** also wrote that "the bottom line is that Tom told me he said it and that he said it *before trial*—i.e., what he stated in the notes of testimony of Vann's guilty plea is true."[629]

However, even though she acknowledged that **ADA Malone** made a pretrial promise to help Vann, **ADA Mahler** did not conclude that the Law Division had to disclose this new information about the timing of the promise to Vann; nor did she discuss whether the information constituted favorable information pursuant to *Brady*/*Giglio*. Instead, in the same memorandum, she asked **ADA Godfrey** whether they should concede that the prosecution made a pretrial promise to help Vann, or whether they should "just continue using the language "assuming arguendo it was prior to trial'" in their pleadings and let the issue be resolved at an evidentiary hearing, "should one be granted."[630] In other words, **ADA Mahler** asked whether the Law Division ought to continue advancing an argument that she knew was contradicted by what **ADA Malone** told her, and to wait to see if the issue would be the focus of a future evidentiary hearing that had not yet been granted (and that the Law Division opposed).

Separately, **ADA Mahler** sought advice from Office supervisors about how to explain Vann's lenient sentence. **Homicide Chief ADA Ponterio** suggested arguing that Vann's low sentence in county jail could be explained by (i) Vann's denial that he used a gun during the robbery, and police's failure to recover one from him during his arrest; and (ii) safety concerns if he were housed in state prison. [631] Based on her notes, **ADA Mahler** tried to find facts to support **ADA Ponterio's** suggested rationales—she

621. *Id*.
622. *See* Brown Supplemental PCRA Exhibit 40 (Email fr. ADA Mahler to ADA Eisenberg, Mar. 16, 2010).
623. *Id*.
624. *See* Brown Supplemental PCRA Exhibit 3 (C. Mahler Memorandum to R. Godfrey re: Draft Supplement in *Brown*, Undated) (emphasis supplied).
625. *See* Brown Supplemental PCRA Exhibit 4 (Email Chain Btwn. ADAs C. Mahler, E. Cameron, R. Godfrey, and A. Ponterio, Mar. 25, 2010).
626. *See* Brown Supplemental PCRA Exhibit 13 (Memorandum to File fr. ADA K. Sweet re: Def Ronald Vann, Feb. 20, 2003).
627. *See* Brown Supplemental PCRA Exhibit 3 (C. Mahler Memorandum to R. Godfrey re: Draft Supplement in *Brown*, Undated) (emphasis in original).
628. *Id*.
629. *Id*.
630. *Id*.
631. *See* Brown Supplemental PCRA Exhibit 34 (Email fr. ADA A. Ponterio to ADAs C. Mahler and R. Godfrey, Mar. 26, 2010).

researched Vann's criminal cases to see if a gun was recovered, and she looked at state prison inmate lists to see if anyone there could have been a threat to Vann.[632] In these communications, **ADA Mahler** did not raise the fact that the low sentence was due to **ADA Malone's** pretrial promise to help Vann with his criminal cases.

The Law Division ultimately chose not to disclose any information about **ADA Malone's** pretrial promise to help Vann. Instead, **ADA Mahler** filed pleadings arguing that the timing of any such promise was vague (despite **ADA Malone** telling her he made the promise before Brown's trial) and advanced **ADA Ponterio's** arguments that Vann's lenient sentence could have been due to the lack of a firearm recovered and safety concerns if he were housed in state prison (even though she possessed information from **ADA Malone** suggesting that this was not the case).

Ronald Vann's Undisclosed Cooperation History

As previously noted, PCRA counsel learned that Vann had cooperated in other investigations, and that this information had not been disclosed before trial, after they discovered a document listing Vann's cooperation history, which had been produced at trial with all-white redactions. When PCRA counsel requested discovery on this issue, **ADA Mahler** reviewed the DAO files to investigate Vann's "open cases and other cases he helped on."[633] She flagged a statement from Vann, in which he described a shooting he witnessed, with a post-it note that said, "not turned over,"[634] and she took notes on Vann's "open cases and other cases *he helped on*." [635]

She also emailed **Major Trial Unit Chief Mark Gilson** with a "*Brady* question"[636] about Vann's cooperation history. **ADA Gilson** responded that if Vann testified at a time when he had "bias, motive to fabricate, interest in the outcome of the case, [or] some expectation of favorable treatment or benefit,"[637] then this had "impeachment value"[638] and constituted "*Brady* material."[639] He also told her that if he was fully apprised of Vann's cooperation in other cases, he would have "erred on the side of caution"[640] and disclosed Vann's cooperation history.

However, when **ADA Mahler** discussed disclosure with **ADA Ponterio**, she said "no to all docs re: RV's cooperation" [641] and was only willing to consider disclosing Vann's cooperation in the Kareem Ali case, because Vann was an eyewitness to that crime, which led to an arrest, and because **ADA Malone** had already disclosed Vann's cooperation in that case.[642] But even then, **ADA Ponterio** still hesitated and wanted to consult with **Law Division Supervisor Ronald Eisenberg**.[643] Despite **ADA Ponterio's** pushback, **ADA Mahler** understood the legal argument for why the Vann's cooperation history should have been disclosed. During her conversation with **ADA Ponterio**, she "explained to Ann"[644] Vann's "motive to lie,"[645] as well as his "bias on behalf of the Commonwealth,"[646] and that his cooperation meant that "[t]he more he helps police, the more it could maybe help him out."[647] She also "told [Ponterio] about Supreme Court precedent, *U.S. v. Bagley, Kyles v. Whitley*, that discuss how Brady is not just favorable, but also material impeachment."[648]

Homicide Deputy Chief Cameron also opposed disclosure. He defended the prosecution team's redactions and cited the Office Homicide Unit's policy of "routinely"[649] withholding this

632. *See* Brown Supplemental PCRA Exhibit 35 (Email fr. ADA C. Mahler to ADA R. Godfrey, Mar. 26, 2010); Brown Supplemental PCRA Exhibit 36 (Affidavit of Probable Cause for Arrest of Ronald Vann, Undated).

633. *See* Brown Supplemental PCRA Exhibit 14 (C. Mahler Handwritten Notes, Undated).

634. *Id.*

635. *Id.*

636. *See* Brown Supplemental PCRA Exhibit 16 (Email fr. R. Gilson to C. Mahler, Mar. 3, 2010).

637. *Id.*

638. *Id.*

639. *Id.*

640. *Id.*

641. *See* Brown Supplemental PCRA Exhibit 18 (C. Mahler Memorandum re: Telephone Call with Ann Ponterio, Apr. 7, 2010).

642. *Id.*

643. *Id.*

644. *Id.*

645. *Id.*

646. *Id.*

647. *Id.*

648. *Id.*

649. *See* Brown Supplemental PCRA Exhibit 37 (Email fr. ADA Cameron to ADAs Mahler, Ponterio and Godfrey, Mar. 16, 2010).

type of information and of opposing all requests for information about a witness' cooperation in other cases. **ADA Cameron** justified this policy on the ground that disclosing cooperation in other cases would let defense counsel attack a cooperator's credibility by "trying the facts of other cases."[650] He also said that he advised police to take separate statements from cooperators when they provided information on other cases, and he argued that the "discovery rules"[651] let them withhold this information. He did not, however, explain how this policy, or his interpretation of the discovery rules, complied with Supreme Court case law that required prosecutors to disclose impeachment information, including information pertaining to bias or motive to curry favor with law enforcement.

Despite **ADA Mahler's** own understanding of *Brady*'s legal requirement that the prosecution disclose material impeachment information, she ultimately followed **ADA Ponterio** and **ADA Cameron's** wishes and did not disclose the bulk of Vann's cooperation history. As noted above, she produced heavily redacted documents and only disclosed Vann's involvement in the Kareem Ali case, and she argued that the bulk of Vann's cooperation need not be disclosed because it was cumulative of the information that was disclosed and that was used to cross-examine and impeach Vann at trial.

Newly Discovered Statements by Vann

The Supplemental PCRA Petition also contained a new allegation about Vann that had not previously been made in the First PCRA Petition, namely that the prosecution turned over three of Vann's police statements but suppressed a fourth statement in which he denied involvement in the earlier attempted robbery. This fourth statement was untrue, because Vann later admitted to police that he knew about the attempted robbery, and he ultimately testified at trial about Brown and others' involvement in it. The fourth statement also suggested that the prosecution elicited misleading testimony from Vann, because at trial they asked him to review only the three statements that were disclosed and did not mention this fourth statement or ask him about it.

PCRA counsel also flagged an anomaly with Vann's fourth statement: Philadelphia police had typed two, nearly identical versions of this fourth statement. Both statements were four pages long, and the first three pages were identical. However, in one version of the statement, the fourth and final page ended with instructions to Vann that he could amend his statement if he recalled additional information. It was then signed by Vann and the police at 12:42 p.m.[652] In the second version of the statement, the fourth and final page contained additional type-written questions and answers about the attempted Rite-Aid robbery, including Vann's false denials that he did not know anything about it. This version was also signed by Vann and the police, but the time was 1:07 p.m.[653] It is unclear why the police created two different versions of Vann's statement.

The second newly-raised allegation was that Vann falsely accused Kenneisha Paige of involvement in the Rite-Aid robbery-murder, and this false accusation was not disclosed to defense counsel. Police investigated this allegation and determined that Paige could not have been involved, because she had been incarcerated at a juvenile facility at the time of the crime. Police documented their findings in an internal memorandum, with one officer expressing reluctance to "drag"[654] Paige in for questioning if Vann "was lying,"[655] given that "he is the only one that mentioned her."[656] The Supplemental PCRA Petition argued that this false accusation bore on Vann's credibility and should have been disclosed, and that when **ADA Mahler** produced heavily redacted documents about Vann's prior cooperation, she redacted Vann's false accusation against Paige.

The CIU and Law Division Concede Brown's Right to a New Trial

The CIU and Law Division undertook a joint investigation of the allegations in the Supplemental PCRA Petition. They reviewed the DAO file, which led them to find additional documents that were not disclosed, including Lyons' statement to DAO detectives where she admitted to being untruthful at the December 2003 proffer. Based on this review, the CIU and Law Division conceded that Brown was entitled to relief, because (i) trial prosecutors suppressed favorable information about Lyons and

650. *Id.*

651. *Id.*

652. *See* Brown Supplemental PCRA Exhibit 15 (R. Vann Statement, Jan. 21, 2003).

653. *Id.*

654. *See* Brown Supplemental PCRA Exhibit 20 (Memorandum to K. Judge, July 14, 2003).

655. *Id.*

656. *Id.*

Vann and permitted them to give false testimony, and (ii) Law Division prosecutors continued to suppress this information throughout litigation on the First PCRA Petition.

With respect to Lyons' statement to DAO detectives, the CIU and Law Division noted that **ADA Mahler** sent detectives to interview Lyons days before the evidentiary hearing on the First PCRA Petition, and that she had a copy of Lyons' statement in the DAO file but never disclosed it to PCRA counsel. Lyons' statement was important, because it differed from the PCRA hearing testimony that was eventually given by her defense counsel, Jamie Funt. Unlike Funt, who could not recall specifics of the proffer, Lyons told detectives that she gave an untruthful statement at the December 2003 proffer, and that it was cut short because the police and prosecutors believed she was lying. Lyons' statement also rendered inaccurate earlier Law Division filings made by **ADA Mahler,** in which she stated that "[t]he Commonwealth has no recordings, transcripts[,] or other documents referencing any statements made by Ms. Lyons on December 12, 2003."[657] Despite possessing Lyons' statement, **ADA Mahler** never corrected this filing.

Brown's Conviction is Vacated... For Now

After Supplemental PCRA proceedings were underway, the victims' families, represented by **Louis Tumolo**, moved to intervene in the litigation. (**Tumolo** is a former ADA who prosecuted Sherman McCoy for murder, which resulting in a wrongful conviction that was later vacated by the CIU.) The families argued, among other things, that DA Krasner had a conflict, and that as a result the Office should be disqualified from participating in the proceedings. The PCRA court permitted the families to intervene solely to litigate the disqualification issue, before ultimately denying the motion to disqualify. The PCRA court later granted the Supplemental PCRA Petition, relying on the parties' Joint Stipulations to grant relief without holding an evidentiary hearing.

After the PCRA court's ruling, the victims' families filed a Kings Bench Petition ("KBP") in Pennsylvania Supreme Court. The KBP argued in part that Brown's PCRA petition was not subject to sufficient judicial review in an adversarial proceeding, because the Office conceded relief, and that as a result the PCRA court's order was unreliable. The Pennsylvania Office of the Attorney General filed *amicus* briefing in support of the KBP and conducted its own investigation into Brown's Supplemental PCRA Petition. The PAAG was represented by **Hugh Burns,** a former ADA who worked in the Law Division and held senior positions in the Office before DA Krasner was elected. In subsequent briefing, the PAAG argued that the Office's concessions of fact were not based on conclusive evidence and lacked evidentiary support. Both the victims and the PAAG asked the Pennsylvania Supreme Court to reverse the PCRA court's order. The Office and Brown filed briefing opposing the KBP, which currently remains pending.

Shortly after filing the KBP, the victims also filed a motion seeking to stay Brown's retrial, which was denied. The case is currently scheduled for trial in September 2024.

657. *See* CIU-Law Division Response at 43-44, ¶103.

Neftali Velasquez (2023)[658]

Neftali Velasquez was convicted of first-degree murder and sentenced to life imprisonment. In 2018, the CIU agreed to investigate his conviction after Velasquez filed a PCRA petition alleging that the prosecution suppressed favorable information and relied on false testimony to convict him. The CIU conceded that Velasquez was entitled to relief and filed a motion detailing their investigative conclusions, but Philadelphia Court of Common Pleas Judge Genece E. Brinkley declined to accept the CIU's findings and instead denied relief on the bulk of Velasquez's claims. The case was subsequently assigned to Philadelphia Court of Common Pleas Judge Lilian Ransom, and she vacated Velasquez's conviction and granted him a new trial. In 2023, the Office moved to dismiss the charges against him, and Judge Charles Ehrlich of the Philadelphia Court of Common Pleas granted the motion.

The Criminal Investigation

In 2012, Domingo "June" Rivera was shot and killed outside a Philadelphia bar. June had been at the bar with Wendy Quiles and another woman and had spoken with Raphael Rodriguez and Jonathan Rodriguez (no relation to each other). He then walked out to smoke a cigarette, where he was shot. Quiles had also been outside smoking and saw the shooting. In her initial statement to police, she said the shooter was a shorter man in a black t-shirt, but she also said she could not see well because it was dark. However, when she spoke with police months later, Quiles identified a photograph of Neftali Velasquez as the shooter. Roughly two years after the murder, Quiles met with **ADA Nicholas Liermann** and recanted her identification, claiming that she only picked Velasquez's photograph because police told her she had to pick someone from the array. Aside from disavowing her identification, Quiles otherwise accurately described the crime scene to **ADA Liermann**. **ADA Liermann** drafted a memorandum detailing his meeting with Quiles, which he labeled as protected from disclosure by the attorney work product doctrine. Despite claiming work product privilege over the memorandum, **ADA Liermann** later discussed his thoughts andh impressions of Quiles with defense counsel.

Police spoke with Raphael, who said he, Jonathan, and a friend named "Nefti" were at the bar when June came in with two women. Raphael said that June and Jonathan did not get along, and that the two men had argued. Raphael later identified Velasquez from a photograph as the person who shot June. Jonathan gave a similar statement to police. He said that June was mean and difficult, and that he had been at the bar when June was killed. Jonathan also told police he saw Velazquez shoot June, and he identified Velasquez from a photograph.

The Trial

Velasquez went to trial in 2016, and **ADA Brett Furber** prosecuted the case. At trial, Quiles, Rafael, and Jonathan all recanted. Quiles denied identifying Velasquez as the shooter, and she testified that it was too dark to see anything. When confronted with her initial police statement, she said she only picked Velasquez's photograph because police told her she had to pick someone. **ADA Furber** cross-examined her about meeting with **ADA Liermann**, and Quiles admitted that she was able to see enough to accurately describe the crime scene, but she also testified that she told **ADA Liermann** she could not see the shooter's face.

At his request, Raphael had been given immunity in exchange for his testimony. But even with immunity, he recanted and testified that the shooter was not present in the courtroom, and that Velasquez was not the shooter, because the shooter was fatter and had more hair. Rafael also denied that the "Nefti"

658. The information in this section is taken from various sources. *See, e.g., Comm. v. Velazquez,* No. 3084 EDA 2016, 2017 WL 2655095 (Pa. Sup. Ct. June 20, 2017); First Am. Pet. for Relief Under the Pa. Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et seq.* ("First Amended PCRA Petition"), *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Jan. 17, 2019); Ltr. fr. CIU to K. Schwartz re: Neftali Velasquez Post-Conviction Brady Notice, Oct. 18, 2019; Supplement to First Am. Pet. for Relief Under the Pa. Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et seq.*, *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Nov. 25, 2019); Second Supplement to First Am. Pet. for Relief Under the Pa. Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et seq.*, *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Nov. 10, 2020); Third Supplement to First Am. Pet. for Relief Under the Pa. Post-Conviction Relief Act, 42 Pa. C.S. § 9541 *et seq.* ("Third Supplement to PCRA Petition") *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Dec. 14, 2020); Comm. Answer to Counseled PCRA Petition ("CIU Velasquez Answer"), *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Jan. 20, 2021); Decl. of Fortunato Perri Esq., *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Mar. 28, 2021); PCRA Hearing Transcript, *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Mar. 31, 2021); Comm. Ltr. Br. re: *Commonwealth v. Neftali Velasquez*, PCRA – Law Regarding *Brady* and Work Product Privilege and Plea and Sentencing Notes of Testimony for Rafael Rodriguez ("CIU Letter Brief"), *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. June 22, 2021); PCRA Hearing Transcript ("August 2021 PCRA Hearing Transcript"), *Comm. v. Velazquez,* CP-51-CR-0010833-2013 (Phila. Ct. Comm. Pl. Aug. 18, 2021); Chris Palmer, "The Philly Judge Who Jailed Meek Mill Has Had All Her Criminal Cases Reassigned, Kicking Off a Legal Battle," Philadelphia Inquirer, Dec. 21, 2022; Samantha Melamed, "A Philly Man is Freed, and 2 Others Win New Trials in Cases Tainted by Predator Detective," Philadelphia Inquirer, Jan. 19, 2023; Chris Palmer, "A Philly Man was Cleared of Murder Charges Because of Ties to 2 Disgraced Ex-Homicide Detectives," Philadelphia Inquirer, July 24, 2023.

he mentioned in his police statement was Neftali Velasquez. Instead, Rafael said that he was referring to someone else he knew with the name "Nefti," and that he only began using the name "Neftali" because police told him that was the shooter's name. He said he signed his name under Velasquez's photograph and wrote the name "Neftali" because police told him to do it. Rafael also testified that when he was picked up by police, they physically assaulted him.

On cross-examination, Rafael admitted that he had been accused of murder when he lived in Puerto Rico, but he pointed out that 16 other people had also been accused, as well. He did not mention whether he had been convicted of murder, and **ADA Furber** did not ask any follow-up questions or otherwise attempt to clarify Rafael's testimony. Rafael also testified that he had a drug case, and that he had been sentenced to 5- to 10-years for attempted murder—a relatively low sentence that he claimed had nothing to do with his cooperation against Velasquez. During closing arguments, defense counsel tried to impugn Rafael's credibility by arguing that he had been "charged" [659] of murder in Puerto Rico.

Jonathan testified that he was high on the night of the shooting and could not remember what happened. He said police picked him up for questioning and held him at the Homicide Unit for 19 hours. Jonathan also said he felt pressured by detectives, who threatened to charge him with murder. He admitted that he gave a statement and identified Velasquez's photograph, but that he only did so because the police asked him if he knew Velasquez. Jonathan also admitted that he was on probation for selling drugs and had been picked up on a probation violation when police questioned him.

After all the prosecution witnesses recanted, **ADA Furber** introduced their prior police statements pursuant to *Brady-Lively* and had police officers testify about the circumstances of their interviews. **ADA Furber** acknowledged that both Jonathan and Rafael brought "significant baggage with them into the courtroom,"[660] but he argued that their police statements were also consistent with, and corroborated, each other, which meant the jury should believe them. Lastly, he spent considerable time emphasizing Quiles' testimony, describing her as an independent eyewitness with no motive to make things up. **ADA Furber** argued that up until trial, Quiles' statements had always been "consistent and corroborated,"[661] and that the first time she ever recanted was at trial, because she was afraid of having to publicly identify Velasquez.

Velasquez was convicted of first-degree murder and sentenced to life in prison.

The CIU Investigation

After Velasquez was convicted, the CIU provided open-file discovery to PCRA counsel and agreed to investigate his case. The investigation revealed that the prosecution failed to turn over favorable information regarding Rafael, Jonathan, and Quiles that could have been used to impeach them, and that Rafael gave false and misleading testimony.

The CIU found that the prosecution did not disclose Rafael's criminal history from his time in Puerto Rico, which listed his convictions for voluntary homicide, using an unlicensed firearm, and drug distribution. The CIU found this failure notable, because Rafael had begun disclosing aspects of his Puerto Rico criminal history when he testified, thus putting the prosecution on notice that he might have a criminal record in Puerto Rico. The CIU also found evidence that **ADA Furber** was personally aware of Rafael's murder conviction: the DAO trial file contained **ADA Furber's** handwritten notes from a meeting with Rafael, which referenced the fact that Rafael "[d]id 8 of 12 in P.R. for murder" and was "[r]eleased in 2011."[662] This information, which contradicted Rafael's trial testimony that he was merely accused of murder with 16 other people, was not disclosed. Nor did **ADA Furber** ask Rafael to clarify or correct his testimony when he only mentioned being accused of murder.

The investigation also found that Rafael gave false and misleading testimony about his 5-to-10-year sentence for attempted murder.[663] When the CIU investigated this conviction, they learned that multiple police officers saw Rafael shoot the victim five times on a busy commercial and residential street corner, and that he began racking his firearm to continue shooting before police began to chase him. The shooting was also captured on video. Despite the severity of the crime and the multiple

659. Third Supplement to PCRA Petition at 18.

660. CIU Velasquez Answer at 8-9, ¶ 30.

661. *Id*. at 8, ¶ 29.

662. Third Supplement to PCRA at 15-16.

663. The CIU was unable to verify or disprove Rafael's claim that he had no cooperation agreement with the Office and received no benefits or promises of leniency, because the DAO trial file for Rafael's case was lost. *See* CIU Letter Brief at 6.

eyewitnesses, Rafael was given a mitigated sentence under a negotiated plea agreement which, according to him, had nothing to do with his cooperation against Velasquez. Once again, the CIU found evidence that **ADA Furber** had personal knowledge that Rafael wanted help on this charge: the DAO trial file contained **ADA Furber's** handwritten notes from a meeting with Rafael, where he wrote, "HELP w/ OPEN CASE."[664] After trial, Rafael executed a sworn declaration in which he stated he was facing decades in prison for the attempted murder charge and received a mitigated sentence in exchange for agreeing to cooperate against Velazquez.

With respect to Jonathan, the prosecution failed to disclose the circumstances of his detention by police. Jonathan told a defense investigator that he was picked up by police on a probation violation. He recalled being held for roughly 18 hours, during which time the police told him, "you help us and we will help you."[665] After giving police a statement, they released him immediately, despite previously telling him he was not free to leave because he had violated his probation. Probation and pretrial services records from that period suggest that the Detective Philip Nordo was looking for a pretext to hold Jonathan. According to these records, Nordo said Jonathan was a key witness in a homicide investigation and asked both agencies to hold him on that basis—but both agencies declined to do so without legal cause. The CIU concluded that, based on Jonathan's unexplained detention and immediate release, the police tried and failed to find a legal ground to hold him—and then detained him anyway by falsely representing that he had a probation violation. The CIU also had concerns about Detective Nordo's involvement in Jonathan's detention, because he used similar tactics in at least one other case that led to an exoneration.

Turning to Quiles, the CIU noted **ADA Furber's** argument that Quiles had consistently identified Velasquez up until trial, and that she was only recanting at trial because she was afraid to identify Velasquez in open court. However, this was not accurate: as **ADA Liermann** documented in his memorandum, Quiles had recanted during a meeting that occurred before trial. **ADA Furber** failed to disclose this information, and **ADA Liermann** claimed the entire memorandum was protected from disclosure by the attorney work product doctrine, including Quiles' statements.

The CIU researched case law on the contours of the attorney work product doctrine and whether it trumped a defendant's constitutional right to due process and disagreed with **ADA Liermann's** invocation of the work product doctrine. They also filed briefing with the PCRA court detailing the relevant case law. Specifically, they noted that the state rules of criminal procedure explicitly exempted *Brady* information from the work product privilege's protection, and they also cited federal case law holding that *Brady* and constitutional law trump the work product doctrine. Moreover, the CIU also noted that the Office was entitled to waive the work product doctrine, and it observed that **ADA Liermann** had already done so when he selectively conveyed his own thoughts and impressions of Quiles' recantation to defense counsel.

Judge Brinkley Denies Relief

The CIU disclosed its investigative findings to PCRA counsel, who filed a series of amended PCRA petitions for a new trial. Philadelphia Court of Common Pleas Judge Genece Brinkley heard arguments on the petition and ruled from the bench to deny relief. Judge Brinkley found that the work product doctrine covered **ADA Liermann's** memorandum, but she did not cite any case law or otherwise offer any substantive legal analysis for her conclusion. Nor did she directly address the CIU's letter brief or its legal analysis concluding otherwise.

Judge Brinkley also declined to order an evidentiary hearing on the circumstances of Jonathan's detention. Although Detective Nordo reached out to probation and pretrial about detaining Jonathan, she gave this fact little weight because Jonathan never ended up being detained by these agencies. Instead, Judge Brinkley emphasized that Nordo was not one of the arresting officers and did not play a major role in the investigation. Furthermore, even though Detective Nordo had engaged in similar behavior in James Frazier's wrongful conviction, Judge Brinkley criticized the CIU for "assuming" that Frazier's case was like Velazquez's case, noting that both cases had their "own set of facts."[666] However, when the CIU and PCRA counsel pointed out that the only way to determine whether Frazier and Velasquez's cases were similar was by holding an evidentiary hearing, Judge Brinkley declined to do so. Instead, Judge Brinkley granted a hearing on whether the prosecution suppressed Rafael's criminal history and dismissed the rest of the claims.

664. Third Supplement to PCRA at 3-4 (emphasis in original).

665. First Amended PCRA Petition at 38.

666. August 2021 PCRA Hearing Transcript at 30-31.

Velasquez is Exonerated

Following Judge Brinkley's ruling in Velasquez's case, the Philadelphia Court of Common Pleas became concerned about whether she was adequately performing her judicial duties, including showing up to court on time and managing her case load. Judge Brinkley's criminal cases were subsequently reassigned, and lawyers and judges who reviewed Judge Brinkley's cases found that she appeared to impose illegal sentences, allowed sentences to run past their maximum date, and failed to timely address cases remanded to her by higher courts.[667]

Velasquez's case was subsequently reassigned to Judge Lillian Ransom of the Philadelphia Court of Common Pleas, and she granted him a new trial after finding that Nordo tried to use the probation department to hold Jonathan, and that when probation refused to comply with his request, Nordo "simply held him for 23 hours until he gave a statement."[668] Shortly thereafter, the Office moved to dismiss the charges, stating that Detective Nordo's misconduct, as well as Detective James Pitts' involvement in taking a witness statement in the case, raised questions about the integrity of the investigation. The motion to dismiss was granted by Judge Charles Ehrlich of the Philadelphia Court of Common Pleas.

Ronald Thomas (2023)[669]

Ronald Thomas was convicted of first-degree murder and sentenced to life imprisonment. After Thomas was sentenced, one of the detectives on his case, Detective Philip Nordo, was accused of using illegal interrogation tactics with witnesses and suspects, including sexually coercing or assaulting them in police interrogation rooms, and giving benefits to informant and witnesses with whom he may have had intimate relationships, including by, among other things, putting money into their prison commissary accounts. The Office investigated the allegations against Detective Nordo, and the CIU later confirmed that the Office had knowledge of the allegations against Detective Nordo as early as 2005, when Internal Affairs investigators referred a complaint to the Office regarding Nordo's alleged sexual assault of a witness in an interrogation room.

The CIU agreed to investigate his case because of Detective Philip Nordo's involvement in the investigation. The investigation confirmed that the trial prosecutor did not disclose the full extent of Nordo's misconduct to defense counsel and made statements that minimized and mischaracterized the substance and duration of Nordo's misconduct. At the conclusion of its investigation, the CIU conceded that Thomas was entitled to a new trial.

After winning a new trial, Thomas' defense counsel filed a motion to bar retrial on Double Jeopardy grounds. This motion was opposed by the Office's Homicide Unit, which was now handling Thomas' case. The Homicide Unit argued that any *Brady* violation did not trigger the Double Jeopardy prohibition on retrying Thomas, because the violation was not reckless and did not involve prosecutorial overreaching. After losing before the trial court, Thomas appealed to the Pennsylvania Superior Court. The Law Division opposed Thomas' motion, and in March 2022, the court upheld the trial court's denial of relief.

After winning the appeal, the Law Division subsequently realized that their filings contained factual misstatements. After consulting with CIU prosecutors and ADA Matt Stiegler, the Law Division filed a motion seeking to correct the record and asking for a rehearing on Thomas' Double Jeopardy motion. In the filing, the Law Division described two unintentional misstatements of material fact that it made during arguments on the Double Jeopardy motion, and it noted that at least one of these misstatements formed the basis for the court's ruling.

The motion for rehearing is currently pending, as is Thomas' retrial.

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667. Palmer, "The Philly Judge Who Jailed Meek Mill."

668. Melamed, "A Philly Man is Freed."

669. The information in this section is taken from various sources. *See, e.g., Comm. v. Thomas*, No. 1121 EDA 2013, 2015 WL 6457805 (Pa. Sup. Ct. Oct. 2, 2015); Br. for the Commonwealth as Appellee ("Law Division Brief"), *Comm. v. Thomas*, CP-51-CR-0013001-2010, 2020 WL 3030650 (Pa. Sup. Ct. Feb. 5, 2020); Mem. Op., *Comm. v. Thomas*, No. 2898 EDA 2018, (Pa. Sup. Ct. June 3, 2020); Comm. of Pennsylvania's Answer Re: Nordo's Misconduct and its Nexus to this Case ("CIU Thomas Answer"), *Comm. v. Thomas*, CP-51-CR-0013001-2010 (Phila. Ct. Comm. Pl. May 20, 2021); Comm. of Pennsylvania Ltr. Br. ("Homicide Unit Letter Brief"), Nov. 1, 2021, *Comm. v. Thomas*, CP-51-CR-0013001-2010 (Phila. Ct. Comm. Pl.); Thomas Hearing Transcript ("February 2022 Hearing Transcript"), *Comm. v. Thomas*, CP-51-CR-0013001-2010 (Phila. Ct. Comm. Pl. Feb. 15, 2022); Mem. Op. ("Superior Court Opinion"), *Comm. v. Thomas*, No. 1034 EDA 2022 (Pa. Sup. Ct. Sept. 11, 2023); Commonwealth's Mot. for Panel Rehearing ("Motion for Rehearing"), *Comm. v. Thomas*, No. 1034 EDA 2022 (Pa. Sup. Ct. Sept. 25, 2023); Mem. Op. ("Superior Court Remand Opinion"), *Comm. v. Thomas*, No. 1034 EDA 2022 (Pa. Sup. Ct. Nov. 13, 2023); Chris Palmer, "Murder Case Dropped Over Fired Philly Detective's 'Outrageous' Misconduct,", Philadelphia Inquirer, July 3, 2018; Chris Palmer, "As a Fired Philly Homicide Detective Awaits Trial on Rape Charges, More of His Cases Are Getting Overturned," Philadelphia Inquirer, June 4, 2021.

The Criminal Investigation

In April 2010, Anwar Ashmore was shot and killed on a Philadelphia street. Four witnesses identified Thomas as the shooter, and Detective Nordo interviewed three of them. Jeffrey Jones identified Thomas after he was arrested on a separate charge. Detectives Nordo and Tracy Byard took his statement. Jones said he was with a group that included Thomas and Ashmore, and that they were arguing over whether to retaliate against a group of people who had shot one of them. Thomas favored retaliation, while Ashmore did not. When Ashmore walked away to conduct a drug transaction, Thomas shot him twice. Detectives Nordo and Byard also took a statement from Troy Devlin, who said substantially the same thing as Jones.

Raphael Spearman gave a statement to Detective Nordo and Officer Billy Golphin after he was arrested while in possession of a .45 caliber handgun that police later determined was the gun used to kill Ashmore. Spearman said he was standing with Thomas, Ashmore, and others when Thomas pulled out a gun and shot the victim. Spearman said that Thomas handed him a bag containing a black .45 caliber gun and told him to hide it. Spearman kept the gun in his basement until he was arrested with it.

Kaheem Brown gave a statement to Detectives Nathaniel Williams and Brian Peters. Brown said he was standing across from a group of people when he saw Thomas pull out a "dirty" black gun and shoot Ashmore. Brown said he ran home after the shooting.

The First Trial

Thomas went to trial in 2013, and the prosecution alleged that he killed Ashmore over a drug dispute. Thomas was convicted, but the Superior Court vacated his conviction after it held that the trial court improperly admitted Thomas' rap lyrics that discussed drug activities, and that once this evidence was properly excluded, the remaining evidence was insufficient to support a guilty verdict.

The Retrial

Thomas was retried in 2018, and **ADA Matthew Krouse** prosecuted the case. By this time, Nordo had been fired from the Philadelphia Police Department due to allegations that, among other things, he sexually coerced and assaulted witnesses and suspects. A Philadelphia Court of Common Pleas judge had also dismissed a prosecution against Darnell Powell after finding that Nordo committed misconduct in that case, which included "improper, possibly sexual, interaction[s] with witnesses."[670] As a result of these Nordo-related developments, **ADA Krouse** filed a motion *in limine* seeking to preclude defense counsel from referencing Nordo's criminal acts on the grounds that it was both hearsay and irrelevant to Thomas' case. In the motion, **ADA Krouse** wrote that Nordo did not "work alone in any aspect of the case,"[671] and that Nordo investigated Thomas' case more than five years before his own unrelated alleged misconduct. In response, defense counsel represented to the court that he would not explore these issues at trial.

ADA Krouse called Jones, Devlin, Brown, and Spearman as witnesses, and they all recanted. Jones said he was on drugs when he was questioned, that he did not give the statement he signed, and that he was promised benefits from the detectives if he signed it. Devlin said he had a seizure disorder and did not recall anything about the murder or what preceded it. Brown said he did not recognize his prior statement or remember anything, and he claimed police abused him during the interrogation.

Spearman refused to testify at all and was eventually found in contempt of court and sentenced to a term of incarceration. The trial court declared him unavailable, and his police statement and his testimony from Thomas' first trial were read to the jury. Notably, at the first trial, Spearman testified that he was the person who shot Ashmore. According to his testimony, he had taken his gun out to show Ashmore and Dennis Williams, and both men began jostling over the gun. One of them bumped Spearman, who burned his hand on a cigarette he had been smoking, leading him to accidentally discharge the gun and shoot Ashmore. Spearman testified that Williams then grabbed the gun and shot Ashmore again. After the shooting, Spearman hid the gun in his house. When asked why he told police that Thomas was the shooter, Spearman testified that he knew Thomas had already been charged, and that police had threatened to charge him and his friends with murder if he did not provide a statement. Spearman also said that no one gave him Miranda warnings, and he made up the statement with some coercion from the police.

To rebut these claims, police detectives testified about the witness' interrogations. Detective Tracy Byard said that Jones did not appear intoxicated and that no one promised Jones anything. With respect to Devlin, Detective Byard said he was not present for the start of this interview and that Detective Nordo began

670. Homicide Unit Brief at 3.

671. CIU Thomas Answer at 5, ¶ 23, Ex. B (citing and attaching ADA Krouse's motion in limine).

Devlin's interview alone, but that when he joined it, he heard Devlin provide all the answers in his statement, which he then signed without coercion. Detective Brian Peters testified that Brown voluntarily gave his statement and did not ask for either his mother or a lawyer. The prosecution also presented evidence of Brown's possible intimidation—posters of his statement were put up in the neighborhood, someone held a gun to his mother's head and pulled the trigger twice, and shots were fired into his home. Detective Golphin testified that Spearman voluntarily gave his statement and that no promises were made. The prosecution also presented evidence that Spearman was intimidated into changing his statement—Spearman was attacked while in jail, and afterward he called his brother and said that Thomas and other inmates were spreading rumors that he was cooperating with police. Spearman also sent a letter confessing to the shooting to Thomas' defense counsel, but he later said he did this because someone in jail threatened him and told him he had to confess.

Thomas was convicted of first-degree murder and sentenced to life imprisonment.

The Law Division Agrees to an Evidentiary Hearing

Thomas appealed his conviction, and the Law Division conceded that Thomas was entitled to an evidentiary hearing[672] to give him the chance to develop facts to support his PCRA petition. The Law Division acknowledged that defense counsel was never informed of the "uniquely disturbing allegations" [673] against Nordo, and that Nordo took statements from Devlin, Jones, and Spearman "under questionable circumstances"[674] and using tactics like those he used in at least one other case that led to an exoneration. As such, the Law Division conceded that defense counsel was denied the opportunity to thoroughly cross-examine Nordo's colleagues about the interrogations of the Commonwealth's key witnesses, and they asked the court to remand the case back to the PCRA court so that Thomas had a chance to develop the record.

The Pennsylvania Superior Court agreed and remanded the case for an evidentiary hearing.

The CIU Investigation

Following remand, the CIU took over the case and determined that an evidentiary hearing was not necessary for the Office to concede that Thomas was entitled to a new trial, because the Office had actual and constructive knowledge of some of Nordo's prior bad acts by the time of Thomas' first and second trials, and trial prosecutors did not disclose this information to defense counsel. For instance, the Office was on notice of Nordo's sexual misconduct as early as 2005, when IA sent a memorandum to the Office regarding a complaint from a suspect that Nordo had coerced him into a non-consensual sexual encounter in a police interrogation room. In the memorandum, IA noted that it had seized Kleenex from the interrogation room that appeared to have semen on it, which corroborated the suspect's account that Nordo forced him to masturbate. However, despite receiving this memorandum, **ADA Deborah Harley** of the Family Violence and Sexual Assault Unit declined to pursue charges against Nordo. **ADA Harley** noted the suspect's credibility issues and the fact that Nordo had no history of misconduct. After **ADA Harley's** declination, IA received test results showing that there was semen on the Kleenex, and that it belonged to the complaining suspect.

The CIU also conceded relief because **ADA Krouse's** motion *in limine* contained factual misstatements: it "inaccurately minimized both in time and substantive scope Nordo's acts of misconduct...."[675] For instance, **ADA Krouse** argued that Nordo had not worked alone on any part of Thomas' case—but Detective Byard testified that Nordo began Devlin's interview alone. The CIU noted the importance of this fact because Nordo had interviewed witnesses alone in other cases in which he made sexual advances toward those witnesses. **ADA Krouse** also described Nordo's misconduct as occurring well after April through August 2010, and he described the misconduct as putting money into prison commissary accounts and speaking to witnesses or defendants from homicide investigations. The CIU found these misstatements inaccurate, because they minimized the duration and substance of Nordo's misconduct, which lasted longer than April through August 2010, and involved sexual coercion and assault of witnesses and suspects.

672. The Law Division conceded that Thomas was entitled to develop the record further because of Nordo's involvement, as well as Detective Nathaniel Williams' involvement in the investigation. Williams was later fired from PPD and criminal charges were filed against him for alleged misconduct. *See* Law Division Brief, 2020 WL 3030650, at *16-17.

673. Law Division Brief, 2020 WL 3030650, at *22.

674. *Id.* at *21.

675. CIU Thomas Answer at 8, ¶ 33.

The Double Jeopardy Hearing

After the PCRA court granted Thomas' petition, defense counsel moved to prohibit retrial on Double Jeopardy grounds. The Homicide Unit, which had assumed responsibility for the litigation, opposed the motion. In a letter brief to the court, **ADA Robert Foster** disputed the notion that **ADA Krouse** downplayed or minimized Nordo's misconduct, arguing that **ADA Krouse** was not aware of the full scope of Nordo's misconduct until after Nordo was indicted. **ADA Foster** did not address (i) **ADA Krouse's** constructive knowledge of the 2006 IA complaint or (ii) **ADA Krouse's** actual knowledge of the Darnell Powell case, which was dismissed in part because of allegations of possible sexual improprieties between Nordo and a key witness.

The trial court held an evidentiary hearing on the double jeopardy motion where **ADA Krouse** testified about his knowledge and understanding of Nordo's misconduct at the time he prosecuted Thomas. **ADA Krouse** testified that he knew that the Darnell Powell case had been dismissed at the time he was preparing Thomas' retrial. Despite the case being dismissed, **ADA Krouse** testified that he did not read the notes of testimony or independently investigate the reason for the dismissal. He also testified that the Homicide Unit did not hold a unit meeting to discuss the Powell case. Instead, **ADA Krouse** relied on internal communications within the Homicide Unit, including communications with then-supervisor **ADA Ed Cameron**, to learn about the Powell case and to decide how to handle Detective Nordo's involvement in Thomas' case. According to **ADA Krouse,** he exchanged emails with **ADA Cameron** in August 2018, wherein **Cameron** told him that so long as Nordo was not subpoenaed as a witness in Thomas' case, then he did not need to disclose *Brady/Giglio* information for Nordo.

On cross-examination, **ADA Krouse** described the allegations in the Powell case as Nordo putting money onto people's commissary accounts and promising to help them with probation issues. **ADA Krouse** did not believe these allegations were relevant to Thomas' case, and he said he did not learn about Nordo's sexual improprieties until "later," after a grand jury investigation into Nordo's misconduct was completed and transcripts were made available. However, because **ADA Krouse** did not read the Powell transcript or personally investigate the reasons for the dismissal, he failed to learn that there were suggestions of sexual impropriety in Darnell Powell's case. For instance, at the hearing dismissing the case, Court of Common Pleas Judge Diana Anhalt described a conversation between Nordo and one witness where the latter said, "I love you;" elsewhere, Judge Anhalt opined that Nordo and a second witness had a "messed up relationship."[676] **ADA Krouse**'s testimony also suggested that he received inaccurate information about the Powell case from **ADA Cameron**, who described the case as involving putting money into commissary accounts and promising to help with probation issues. **ADA Cameron** did not mention any improper personal relationships, even though he appeared before Judge Anhalt at the Powell hearing when she made these statements about Nordo's questionable relationships with the witnesses.

Finally, at the conclusion of the hearing, the trial court denied Thomas' Double Jeopardy motion. It found no *Brady* violation with respect to the Darnell Powell information, because it was publicly available at the time of Thomas' retrial. With respect to the 2005 IA complaint, the trial court found no *Brady* violation because the incident was not material, *i.e.*, it would not have affected the outcome of Thomas' case. The trial court also found there was no *Brady* violation with respect to information developed in the grand jury, because the information was secret and protected from disclosure. Lastly, the court held that, even if the Office violated *Brady*, there was no intentional or reckless conduct that would trigger Double Jeopardy.

Although not addressed by the PCRA court, it appears that **ADA Cameron's** advice to **ADA Krouse** conflicted with instructions from the CIU regarding how to handle Nordo cases. As noted above, **ADA Cameron** shared his "personal opinion" [677] that if Nordo was not called as a witness, the Office did not need to disclose anything about Nordo unless a specific request was made by defense counsel. **ADA Cameron's** advice came five days before the CIU instructed the Homicide Unit to take the opposite approach. In an August 2018 email sent by CIU supervisor Patricia Cummings, she emailed the Homicide Unit (and other units) a Nordo police misconduct disclosure packet and instructed unit supervisors to disclose the packet in cases where Nordo *played any role in the case*, not just where he would be a witness. The CIU found no indication that **ADA Cameron** amended his advice to Krouse.

676. Chris Palmer, "Murder Case Dropped."

677. February 2022 Hearing Transcript at 31 (citing ADA Krouse's testimony).

The Law Division Defends the Double Jeopardy Ruling

Thomas appealed to the Pennsylvania Superior Court, arguing in part that **ADA Krouse's** motion *in limine* misrepresented the scope and substance of Nordo's misconduct, and that had defense counsel known the full extent of Nordo's misconduct, he would have opposed the motion. Law Division **ADA Andrew Greer** filed briefing arguing that Double Jeopardy did not apply and that retrial was appropriate.

The Superior Court upheld the denial of Double Jeopardy, finding that the Commonwealth did not act intentionally or recklessly. Like the PCRA court, it found no *Brady* violation with respect to the Darnell Powell allegations, because they were publicly known and available, and it found that the 2005 IA complaint of sexual impropriety was "completely irrelevant to the facts at issue in Appellant's case."[678] It also held that there the Commonwealth was not sufficiently aware of the "breadth or depth"[679] of Nordo's misconduct at the time of Thomas' retrial, because the "details… were still unfolding at that time."[680] The Superior Court also noted that it was not until 2019, when Nordo was indicted, that the Commonwealth "learned of Detective Nordo's coercive interrogation tactics, which might have affected the witness statements" [681] taken in Thomas' case.

The Law Division Admits Misstatements in its Filings

After the Pennsylvania Superior Court upheld the denial of Double Jeopardy, the Law Division discovered that its pleadings contained misstatements of material fact, and that the Superior Court had relied on some of these misstatements in upholding the denial of Double Jeopardy. After consultation with the CIU and ADA Matthew Stiegler, the Law Division filed a motion before the Superior Court seeking to vacate the earlier decision and to remand the case for rehearing.

In the motion, **ADA Greer** acknowledged that his briefing "unintentionally included two misstatements of material fact regarding who was consulted and what was known about former Detective Philip Nordo at the time of [Thomas'] September 2018 retrial."[682] He also noted that one of the misstatements "formed a substantial part"[683] of the Commonwealth's argument as to why any *Brady* violation was not reckless or intentional and thus did not trigger Double Jeopardy, and also served as the basis for the Superior Court's ruling. The first misstatement related to who **ADA Krouse** consulted when deciding what to disclose about Nordo. In earlier briefing, **ADA Greer** had asserted that **ADA Krouse** "sought advice from the CIU supervisor"[684] and the "newly formed CIU."[685] However, this was incorrect: **ADA Krouse** never discussed the Thomas case with anyone in the CIU, and the CIU never provided him any advice regarding how to proceed in the Thomas case.

The second misstatement related to who in the Office had actual knowledge about the allegations of Nordo's sexual misconduct and coercive interrogation tactics. **ADA Greer** had argued that these allegations were "not actually known by the trial prosecutor, Homicide Unit supervisor, *or CIU supervisors* of the new administration…until three months after [Thomas'] trial."[686] This was also incorrect: CIU supervisor Patricia Cummings had actual knowledge of the substance of Nordo's sexual misconduct allegations and coercive interrogation tactics, but she did not know that **Homicide Unit Chief ADA Cameron** had approved Thomas' retrial. In describing these misstatements, **ADA Greer** explained that these inaccuracies occurred due to miscommunication within the Office: when he drafted the initial briefing before the Superior Court, he was unaware of the facts known to other ADAs.

ADA Greer acknowledged that both misstatements were important because they formed the basis for the Superior Court's prior holding. As previously discussed, the Superior Court found no evidence that the Commonwealth was aware of the "breadth

678. Superior Court Opinion at 32.
679. *Id.*
680. *Id.*
681. *Id.* at 32-33.
682. Motion for Rehearing at 1.
683. *Id.*
684. *Id.* at 3.
685. *Id.*
686. *Id.* at 3-4.

or depth"[687] of Nordo's misconduct, because the details were still "unfolding"[688] at the time of Thomas' retrial. However, this was not accurate.

In November 2023, the Pennsylvania Superior Court vacated its ruling and granted reconsideration of Thomas' Double Jeopardy motion. As of the date of publication, both the hearing on the motion and Thomas' third trial remain pending.

Brady Disclosures Versus Grand Jury Secrecy?

ADA Krouse's approach to the ongoing grand jury investigation involving Nordo illustrates the need for clearer grand jury policies pertaining to favorable information. **ADA Krouse** knew there was an active grand jury investigation which was ostensibly developing facts relating to Nordo's misconduct that were not yet public and to which he was not privy. While he was not permitted to know these facts, he should have adopted a conservative approach regarding any representations he made about Nordo, given that the grand jury investigation was ongoing. In the future, the Office should consider whether the existence of an ongoing grand jury investigation mean that ADAs should refrain from making representations that cannot not be corroborated without violating grand jury secrecy.

687. *Id.* at 4 (citing Superior Court opinion).
688. *Id.*

Cases Involving Wrongful Convictions and/or Court-Ordered Relief

Name	Year Convicted	Year Exonerated or Court Relief Granted	CRU or CIU Case?	State or Federal Court	Violations	Notes
William Hallowell	1974	1978	No	State court	Brady/Napue	Lost Double Jeopardy motion
Anthony Shands	1981	1985	No	State court	Brady/Napue	Case involving "Granny Squad"
Matthew Connor	1980	1990	No	State court	Brady	Connor was tried twice (first trial ended in hung jury)
Edward Ryder	1974	1996	No	State court	Brady	Ryder's sentence was commuted in 1993 and he was released before the court granted him relief
Ah Thank "Allen" Lee	1988	2004	No	State court	Brady	
Orlando Maisonet I	1992	2005	No	State court (acquittal on retrial)		Maisonet was tried twice (first trial ended in guilty verdict) Acquittal on Figueroa murder charges
Zachary Wilson	1988	2009	No	Federal court	Brady	Lost Double Jeopardy motion
James Lambert	1984	2013	No	Federal court	Brady	Third Circuit heard the case twice and ruled against the Office each time
Anthony Washington	1994	2015	No	Federal court	Brady	
Rod Matthews	2012	2015	No	State court	Brady	
James "Jimmy" Dennis	1992	2016	No	Federal court	Brady	Third Circuit heard case en banc and vacated its earlier ruling Dennis took a ""no-contest"" plea
Anthony Wright	1993	2016	No	State court (acquittal on retrial)	Brady/Napue	Case resulted in state criminal charges against detectives Martin Devlin, Frank Jastrzembski, and Manue; Santiago
Shaurn Thomas	1994	2017	CRU	State court	Brady	Case investigated by Detective Martin Devlin
Marshall Hale	1984	2017	CRU	State court	Brady	
Terrance "Terry" Williams I	1986	2017	No	State court	Brady	Resentenced to life imprisonment on Norwood murder conviction
Dontia Patterson	2012	2018	Yes	State court	Brady	
Esheem Haskins	2006	2018	No	Federal court	Brady	Lost Double Jeopardy motion Retrial remains pending
Jamaal Simmons	2012	2018	Yes	State court	Brady	Case investigated by Detective Philip Nordo
Dwayne Thorpe	2009	2019	Yes	State court	Brady	Case investigated by Detective James Pitts
James Frazier	2013	2019	Yes	State court	Brady	Case investigated by Detective Philip Nordo
Hassan Bennett	2008	2019	No	State court (acquittal)	Brady	Case investigated by Detective James Pitts. Bennett was tried four times
Orlando Maisonet II	1992	2019	No	State court	IAC	Alford plea on Figueroa murder

Name	Year Convicted	Year Exonerated or Court Relief Granted	CRU or CIU Case?	State or Federal Court	Violations	Notes
Sherman McCoy	2016	2019	Yes	State court	Brady	Case investigated by Detective Philip Nordo
Clayton "Mustafa" Thomas	1994	2019	No	State court	Brady	Case investigated by Detective Martin Devlin
John Miller	1998	2019	Yes	Federal and state court	Brady	Miller won federal habeas relief before CIU moved to dismiss charges
Chester Hollman III	1993	2019	Yes	State court	Brady	
Willie Veasy	1993	2019	Yes	State court	Brady	Case investigated by Detectives Martin Devlin, Frank Jastrzembski, and Paul Worrell
Christopher Williams I	1993	2019	Yes	State court	Brady/Napue	CIU dismissed charges for the Anderson/Reynolds murders
Theophalis Wilson	1992	2020	Yes	State court	Brady/Napue	
Kareem Johnson	2007	2020	No	State court	Brady/Double Jeopardy	Pennsylvania Supreme Court expanded Double Jeopardy law
Walter Ogrod	1996	2020	Yes	State court	Brady/Napue	Case investigated by Detectives Martin Devlin and Paul Worrell
Andrew Swainson	1989	2020	Yes	State court	Brady/Napue	Case investigated by Detective Manuel Santiago
Antonio Martinez	1990	2020	Yes	State court	Brady	Martinez had a pending federal habeas petition when he was granted relief in state court
Termaine Hicks	2002	2020	Yes	State court	Brady/Napue	
Donald Outlaw	2004	2020	Yes	State court	Brady/Napue	
Christopher Williams II	1992	2021	Yes	State court	Brady/Napue	CIU vacated conviction and dismissed chargtes for Haynesworth murder
Jahmir Harris	2015	2021	Yes	State court	Brady	Judge Rose Marie DeFino-Nastasi initially tried to order the Office to undertake additional investigation before she would agree to dismiss charges
Obina Onyiah	2013	2021	Yes	State court	Brady/Napue	Case resulted in state criminal charges against Detective James Pitts
Eric Riddick	1992	2021	Yes	State court	Brady	CIU offered a negotiated plea to third-degree murder
Arkel Garcia	2015	2021	Yes	State court	Brady/Napue	Case investigated by Detective Philip Nordo
Curtis Crosland	1988	2021	Yes	Federal court	Brady/Napue	Crosland was tried twice (first conviction was vacated due to violation of confrontation clause)
Jerome Loach	2011	2021	Yes	State court	Brady	"CIU did not concede Loach's innocence and offered him a negotiated plea Office later dismissed case due to insufficient evidence"
Lamar Ogelsby	2013	2021	No	Federal court (case pending)	Brady/Napue	s
Albert Washington	2015	2021	Yes	State court	Brady	Case investigated by Detective Philip Nordo. CIU offered negotiated plea to voluntary manslaughter

Name	Year Convicted	Year Exonerated or Court Relief Granted	CRU or CIU Case?	State or Federal Court	Violations	Notes
Jehmar Gladden	1999	2021	Yes	State court	Brady	CIU offered a negotiated plea to third-degree murder
Arthur "Cetewayo" Johnson	1971	2021	Yes	State court	Brady	CIU offered a negotiated plea to 10-20 years' imprisonment on a lesser charge
Troy Coulston	1992	2021	Yes	State court	Brady/Napue	
Ricardo Natividad	1997	2022	Yes	Federal and state court	Brady	Natividad won federal habeas relief. CIU offered negotiated plea to 25-to-50 years' imprisonment
Derrill Cunningham	2014	2022	Yes	State court (case pending)	Brady	CIU did not concede Cunningham's innocence. Office made "open plea" offer to Cunningham. Retrial remains pending"
Marvin Hill	2013	2023	Yes	State court	Ineffective Assistance of Counsel	Case investigated by Detective Philip Nordo
Lavar Brown	2004	2023	Yes (joint investiga-tion with Law Division)	State court (case pending)	Brady/Napue	Victims have filed Kings Bench petition challenging PCRA court grant of a new trial, which remains pending Brown's retrial remains pending
Neftali Velasquez	2016	2023	Yes	State court	Brady	Case investigated by Detective Philip Nordo. Velasquez's PCRA petition was initially denied by Judge Genece Brinkley. Relief granted after Judge Brinkley's criminal cases were reassigned due to allegations of judicial misconduct
Ronald Thomas	2018	2023	Yes	State court (case pending)	Brady	Case investigated by Detective Philip Nordo. Thomas was tried twice (first conviction was vacated due to admission of unduly prejudicial evidence)

About the Center

The Center's mission is to promote good government practices in criminal matters at all levels of government.

In recent years, the Center has focused on (i) the exercise of prosecutorial power and discretion, and (ii) researching and advocating for expanding resentencing mechanisms at the federal, state, and local levels, including federal and state clemency and discretionary resentencing processes. The Center pursues this mission through a mix of academic and public policy research. The academic and public policy components include producing reports and white papers on reforming the criminal legal system as well as hosting symposia and conferences to address significant topics in criminal law and procedure and enhance the public dialogue on criminal legal matters.

Clemency and Second Chances

The Zimroth Center has established itself as a leading voice for clemency reform at the federal and state levels. In recent years, the center has shifted its focus to clemency reform at the state level. From 2016 to 2018, the center established a pro bono pop-up legal services office for the sole purpose of preparing and submitting federal clemency petitions to the Office of the Pardon Attorney. These services were provided through the center's Mercy Project and the Clemency Resource Center.

As a result of the Center's work, President Obama granted freedom to 96 of our clients, many of whom were serving life sentences for non-violent drug offenses.

In recognition of our efforts to pursue freedom on behalf of people serving lengthy federal sentences for non-violent drug offenses, our student fellows were awarded the inaugural Make a Difference Award in 2017 by New York University President Andrew Hamilton. This university-wide award recognizes members of the NYU community who "have made a lasting impact for the better on the city, region, nation, or globe."

In 2018, the Center launched the Historical State Clemency Project, exploring states' historical clemency grants and examining the types of crimes for which people received sentence commutations, and the involvement, if any, of prosecutors in the deliberative process. The goal of the project is to contribute to the larger debate about "violent" versus "non-violent" crimes and the allowance of second chances in the criminal justice system, as well as the proper role of prosecutors who are consulted during these processes.

Professor Barkow has been a tireless advocate for structural clemency reform efforts through her legal scholarship, including her article, "Clemency and the Unitary Executive," published in the *New York University Law Review*; "Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal," co-authored with University of St. Thomas Law Professor Mark Osler and published in the *University of Chicago Law Review*; and "Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform," co-authored with Professor Osler and published in the *William & Mary Law Review*.

Academic Scholarship

The center's faculty director, Rachel Barkow, has written a book, *Prisoner of Politics: Breaking the Cycle of Mass Incarceration*, which describes the political dynamics that produce irrational and inhumane criminal justice policies that not only feed mass incarceration but fail to make us safer. Barkow provides detailed examples of those counterproductive policies and the political forces that lead to them. The book then offers concrete proposals for changing the institutional dynamics. Those proposals fall into three main buckets: (1) reforms for prosecutors (including better metrics for judging their performance), (2) the creation of agencies charged with paying attention to the costs and benefits of different policy proposals and subject to judicial review, and (3) a more robust role for courts and greater attention to the composition of the bench (state and federal) so we do not have a bench as tilted toward former prosecutors as we do today.

Judicial Accountability

The Zimroth Center has partnered with Scrutinize, an organization dedicated to promoting judicial accountability using empirical data analysis. Together, the Center and Scrutinize released "Cost of Discretion: Judicial Decision-Making, Pretrial Detention, and Public Safety in New York City," which analyzed publicly available pretrial data for New York City judges to identify those judges who were more likely to order pretrial detention than their peers. We anticipate releasing future reports with Scrutinize as part of this ongoing partnership.

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Prosecutorial Misconduct in the Philadelphia District Attorney's Office

Peter L. Zimroth Center on the Administration of Criminal Law at NYU School of Law