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**Criminal Law****Post-Conviction Relief**

Marshall Hale was erroneously convicted of a violent rape and his pro se post-conviction efforts were fruitless. Not until the Pennsylvania Innocence Project got involved in his case was Mr. Hale's conviction overturned. Attorneys from Hangley Aronchick Segal Pudlin & Schiller, who volunteered on the case, tell Hale's story and give insights into the causes of wrongful convictions.

**Marshall Hale's Long Road to Freedom:  
Ten Insights Into the Causes of Wrongful Convictions**

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On July 13, 2017, Marshall Hale was released from a Commonwealth of Pennsylvania prison, having served over 33 years for a crime he did not commit. Mr. Hale was one of the Pennsylvania Innocence Project's first clients when it opened in 2009 and we partnered with the Project's lawyers to secure Mr. Hale's release.

Mr. Hale's case is an archetype of exoneration cases that are freeing wrongfully convicted inmates around the country. Below, we provide a snapshot of Mr. Hale's case and offer 10 insights illustrating how it mirrors concerns present in many exoneration cases.

**Background**

Mr. Hale was convicted in September 1984 of a November 1983 violent rape at gunpoint of a 14-year old girl in Philadelphia, Pa. In his brief three-day trial, the

only evidence presented linking Mr. Hale to the crime was the victim's cross-racial identification of him, notwithstanding that she was traumatized by the crime, had provided an inconsistent physical description of the rapist in the weeks and months following the crime, and did not identify Mr. Hale from police photos until two months after the crime.

The forensic evidence presented at trial came from a Philadelphia Police Laboratory serologist. This was in the days before DNA testing was performed. She testified that blood type B and semen were found on some of the victim's clothing, blood type A was found on other clothing, likely because the rape occurred in a drug shooting gallery, and that the rape kit test results were either inconclusive or showed only the victim's blood type O. The Commonwealth argued that this blood evidence did not exclude Mr. Hale as the rapist, because he had Type A blood, which was found at the scene.

The jury convicted Mr. Hale and he was sentenced in April 1985 to 23.5 to 47 years in prison.

***The Commonwealth belatedly produced the evidence demonstrating Mr. Hale's innocence***

In the years following his conviction, Mr. Hale filed many *pro se* petitions to obtain DNA testing and discover evidence he contended had been withheld by the Commonwealth. As to the former, the Commonwealth either lost or destroyed all of the evidence from the trial and so DNA testing was not possible. And as to the latter, the Commonwealth belatedly—13 years late—produced in July 1998, for the first time, 25 pages of difficult to follow Philadelphia Police Department lab notes showing test results that had been performed in 1984 from the physical evidence then in existence.

The significance of those notes—which demonstrated his innocence—was not known until the Pennsylvania Innocence Project opened in 2009. Mr. Hale had tried to get help while in prison but without success. The Project and its lead lawyer Marissa Bluestine, however, located a serology expert who, by July 2010, interpreted the lab notes and concluded that they showed Mr. Hale was innocent. In handwritten notations, the lab notes revealed that Mr. Hale is what is known as a Type A secretor, meaning that all of his bodily fluids—i.e., his semen as well as blood—secrete his blood type, Type A. Coupled with the rape kit test results appearing elsewhere in the lab notes, the long withheld evidence demonstrated not what the jury heard—that the forensic evidence was inconclusive—but that Mr. Hale could not have been the rapist. Specifically, the lab notes demonstrated:

- (1) only Type B, and not Type A, was found in the rape kit where semen was present;
- (2) the rapist was the source of the Type B semen because the victim had Type O blood; and
- (3) Mr. Hale could not have been the source of the semen because he is not Type B but instead a Type A secretor.

Mr. Hale therefore should have been excluded as a suspect, never charged, and never convicted. Tragically, however, the jury never heard this evidence as it was belatedly produced 13 years after his conviction when he was incarcerated, and had no lawyer or access to expert help.

***The Pennsylvania Innocence Project pursued Mr. Hale's release in the trial court and then the Pennsylvania Superior Court***

With this clear forensic evidence demonstrating Mr. Hale's innocence, the Project pursued a petition for post conviction release in the Philadelphia Court of Common Pleas. Mr. Hale had wrongfully served more than 25 years in prison by this point and it was time for him to be released or at least receive an immediate new trial. Regrettably, however, the DA's Office opposed his petition *even though the Director of the Philadelphia Police Department Forensic Science Bureau agreed with the Project's expert that the rape kit evidence excluded Mr. Hale.*

It opposed Mr. Hale's petition on a technical ground unrooted in Mr. Hale's actual innocence, namely that Mr. Hale's petition was filed too late because he had supposedly "known" the facts showing his innocence when he received the stack of lab notes in 1998 and he "waited" to file his petition in 2010. The Commonwealth of Pennsylvania has among the harshest post conviction statutes in the United States providing that, after initial direct and collateral appeals, a later court will only consider a post conviction petition for release if it is filed within 60 days of the date the petitioner "knew" or reasonably should have known some new fact demonstrating his innocence. 42 Pa.C.S.A. § 9545(b)(1)(ii).

Unfortunately, in an Opinion dated January 30, 2015, the court accepted the DA's position and dismissed Mr. Hale's petition. *First*, defying the fact that Mr. Hale actually had no understanding of the meaning of the highly technical lab notes and had tried hard, without success, to obtain help in interpreting them, the court dismissed Mr. Hale's petition by concluding that he had missed the 60-day deadline. *Second*, the court failed to apprehend the new evidence demonstrating Mr. Hale's innocence. The Commonwealth (erroneously) argued that the late-produced lab notes were not new evidence of innocence, but rather only a variation of the evidence presented at trial that blood type B, which could not have come from Mr. Hale, was found on the victims clothing. That was plainly wrong—it ignored the typing of the *semen* found in the rape kit, demonstrating that Mr. Hale, as a Type A secretor, could not have been the source of the Type B rape kit semen.

In collaboration with the Project, in May 2015, we appealed the trial court's decision, arguing that the trial court had misapplied the law and misunderstood the significance of the late produced forensic evidence.

***The Superior Court reversed the trial court and the Philadelphia DA's Conviction Review Unit recommended that Mr. Hale should be released***

After a thorough and full oral argument and briefing, in a unanimous opinion written by Judge Olson and joined by Judge Ott and Justice Stevens, the Pennsylvania Superior Court reversed the trial court in September 2016, rejecting the Commonwealth's positions accepted by the trial court, holding instead that Mr. Hale's petition presented viable factual claims concerning his innocence that could have been unknown to him and not previously ascertained through reasonable diligence. The court remanded back to the trial court for further proceedings consistent with its opinion.

Along with the Project's lawyers, we then met several times with the Philadelphia District Attorney's Office's Conviction Review Unit. The Unit, which was rejuvenated with greater authority and resources in February 2017, studied carefully Mr. Hale's claims, met with Mr.

Hale's expert and the Chief of its own Police Forensic Unit, and agreed to recommend Mr. Hale's release.

And so, on July 13, 2017, the trial court formally released Mr. Hale, nearly 33 years after he was wrongfully convicted, 19 years after he first received the lab notes that the DA's office should have long ago produced, and almost 8 years after the Project argued that the lab notes conclusively demonstrated his innocence.

## Insights

It is said that life is lived forward but can only be understood backwards. Looking forward, Mr. Hale will now re-enter society at age 57 and begin to build the life that was taken from him. It is a tremendous challenge, although Mr. Hale has already demonstrated remarkable strength in surviving 33 years in prison for a terrible crime that he did not commit.

To begin to understand how this injustice occurred, we identify 10 Insights about Mr. Hale's wrongful conviction and incarceration common to other innocence cases, as well as law enforcement and legislative changes targeted to prevent or limit similar injustices.

**1. Government failure to disclose timely evidence to the defense leads to wrongful convictions** The Commonwealth failed to timely produce evidence demonstrating Mr. Hale's innocence. The lab notes demonstrating Mr. Hale's innocence were not contemporaneously produced to him and were withheld for 13 years after his sentencing.

This kind of failure—i.e., the government's failure to comply with its *Brady* obligations to produce exculpatory evidence—is unfortunately common in many exoneration cases. Had law enforcement followed an “open file” discovery policy and made its file available for review on an ongoing basis, Mr. Hale's wrongful conviction could have been avoided or corrected long ago.

An example of an open file discovery policy is Texas's Michael Morton Act, which requires prosecutors to disclose or make available all defendant and witness statements in any form as well as “any books, accounts, letters, photographs, objects, or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the State or any person under contract with the State.”

**2. Eyewitness testimony is deeply flawed** Mr. Hale was convicted on the basis of a shaky, cross-racial identification from an understandably traumatized young victim. As the Pennsylvania Supreme Court has recognized, the scientific evidence overwhelmingly demonstrates that such identifications can be unreliable. See *Commonwealth v. Walker*. Law enforcement must implement procedures to avoid misidentification. Moreover, as the Pennsylvania Supreme Court recognized in *Walker*, trial courts should let juries hear expert evidence on potential flaws in eyewitness testimony so that juries weigh such testimony and assess considerations that can lead to unreliable identifications.

**3. Forensic evidence can be mistaken and misleading** The jury considering Mr. Hale's case was told that the forensic evidence was inconclusive when in fact that evidence showed that Mr. Hale could not have been the rapist.

According to *Misapplication of Forensic Science*, The Innocence Project, the misapplication of forensic science is the second most common contributing factor to wrongful convictions. Among the many changes necessary to improve the use of forensic science are rigorous guidelines for reports and testimony based on forensic science. If the Commonwealth's lab had created and turned over clear documentation of its tests and conclusions at the time of trial, the evidence showing Mr. Hale's innocence would have been clear. The trial court could have dismissed the charges; alternatively, the jury could not have convicted him or any conviction could have been promptly reversed.

**4. The Government should preserve evidence—not destroy it—so that DNA testing can remedy wrongful convictions and identify perpetrators** The Courts and law enforcement allowed all of the evidence in Mr. Hale's case to be destroyed or lost, preventing DNA testing. This prevented Mr. Hale from obtaining DNA testing that would have demonstrated his innocence decades ago. The Commonwealth also lost the opportunity to identify the true rapist through DNA evidence.

After a conviction, Pennsylvania courts and law enforcement routinely destroy evidence, supposedly because storage costs are high and there no longer is any need for the evidence. This practice must be curtailed and best practices for evidence retention should be implemented. See *Preservation of Evidence*, The Innocence Project.

**5. The Commonwealth's statute requiring a prisoner to file a petition for post conviction relief within 60 days of when he knew or reasonably should have known of a fact demonstrating his innocence should be changed** Pennsylvania's post-conviction statute requires inmates, including *pro se*, incarcerated individuals, to file a petition for post-conviction relief within 60 days of having known or should have known evidence of innocence. This is one of the most restrictive laws in the country and it prevents courts from even considering the petitions of those like Mr. Hale who have undisputed evidence of their innocence. The Pennsylvania Senate recently considered a bill extending the deadline to one year. That proposal should be passed by both houses of the legislature. See S.B. 1261, Gen Assemb., Reg. Sess. (Penn. 2016).

**6. Our nation's prisons and jails hold many wrongfully convicted individuals** Mr. Hale's release is one of many exonerations nationwide.

According to the authoritative National Registry of Exonerations, there have been more than 2,061 exonerations nationwide since 1989, 67 in Pennsylvania. While the plurality of the exonerations are for murder convictions (39%) as those involve the longest and most severe punishments, the next most frequent exonerations are for sexual assault convictions (15%).

Perhaps more chilling is the result of a respected statistical study, *Rate of false conviction of criminal defendants who are sentenced to death*, published in the Proceedings of the National Academy of Sciences, estimating that the rate of false conviction of criminal defendants convicted of murder is at least 4%. As of 2016, there were 2.3 million people incarcerated in federal, state and local jails, approximately 169,000 for murder. See *Mass Incarceration: The Whole Pie 2016*. A 4% error rate would imply more than 6,700 men and



women are presently wrongfully convicted of murder. And if that rate were representative of the overall error rate, which is admittedly debatable, it would imply that as many as 92,000 people are wrongfully convicted and incarcerated.

**7. States should provide compensation for those wrongfully convicted** Mr. Hale will not receive any compensation from the Commonwealth of Pennsylvania for the 33 years he lost.

As two of us have written, unlike New York, New Jersey and the majority of states, Pennsylvania has no provisions for compensating exonorees. These individuals, however, face extraordinary financial, psychological and physical burdens caused by their wrongful incarceration. Many have difficulty finding employment once released and are significantly in need of medical and psychological treatment.

Returning exonerated individuals in states like Pennsylvania, moreover, face a cruel paradox: while released offenders are eligible for vocational and job training, released wrongfully convicted men and women are often ineligible for these benefits. The laws on qualified and absolute immunity make it very difficult for exonorees to receive compensation through filing a civil lawsuit, a process that, even if successful, takes many years when exonorees have immediate needs. Well-crafted compensation statutes are necessary.

**8. The law enforcement and judicial failures that lead to wrongful convictions prevent the arrest and conviction of those who committed the crimes** Once Mr. Hale was charged, law enforcement stopped their investigation. It is surely impossible, now decades later and without DNA evidence, to identify the actual rapist in this case.

**9. The grindingly slow criminal legal process extends wrongful incarceration** Much is written about the delays in the civil court system. While that is a problem surely meriting close attention, delays in the criminal justice system's addressing innocence claims cause an even more substantial burden on the wrongfully convicted.

Mr. Hale was wrongfully in prison since 1984 (33 years), far longer than average for wrongful incarcerations. According to the National Registry of Exonerations, on average, exonorees spent 8.7 years in prison and those exonerated for sexual assault crimes, 11.9 years. In addition to his direct appeal of his conviction and sentence in 1985, Mr. Hale filed six post conviction relief appeals in state court and three *habeas corpus* petitions in federal court. That's nine missed opportunities. Mr. Hale's counsel also presented the evidence indisputably demonstrating his innocence in 2010, yet it took almost 7 years for the trial court and then appellate court to rule on his petition.

At the end of the day, it was a better structured and independent Conviction Review Unit that led to Mr. Hale's release.

**10. The Pennsylvania Innocence Project and other similar Projects throughout the country are needed** Mr. Hale would still be in prison today if it were not for the Pennsylvania Innocence Project. Multiple lawyers and legal organizations could not or did not accept Mr. Hale's decades-long plea for help. It was not until the Project opened its doors in 2009 and began its rigorous review process that Mr. Hale's case was reviewed, an expert was retained and, finally, help came to Mr. Hale.