

QUATTRONE CENTER

for the Fair Administration of Justice

REPORT OF THE PHILADELPHIA EVENT REVIEW TEAM

ON

COMMONWEALTH V. GEORGE CORTEZ

April 2019

This project was supported by Award No. ,2015-R2-CX-K040 awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. The opinions. findings, and conclusions or recommendations expressed In this publication are those of the author(s) and do not necessarily reflect those of the Department of Justice.

TABLE OF CONTENTS

Introduction 1

Summary of Contributing Factors and Recommendations 3

Factors Contributing to Error 9

- Investigation Phase 9
- Pre-Trial Phase 20
- Trial Phase 22
- Post-Conviction Phase 28

Preparation for a New Trial 29

Exoneration 29

Appendices 30

- Figure 1 30
- Figure 2 31
- Figure 3 32
- Timeline 33

Stakeholder Participants 36

INTRODUCTION

The Philadelphia Event Review Team (PERT) is a voluntary collaboration among the Philadelphia District Attorney's Office, the Philadelphia Police Department, the First Judicial District Courts of Pennsylvania, and the Defender Association of Philadelphia, coordinated by the Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School. The PERT is a first-of-its-kind initiative in the United States, dedicated to a culture of learning from error that is shared across all of the participating agencies. The project is supported by funding from the National Institute of Justice (NIJ), the research and development arm of the United States Department of Justice (DOJ).

The stakeholders listed above decided to review the conviction and subsequent exoneration of George Cortez as its initial case for review. The PERT dedicated itself to the thorough review of the case using principles of root cause analysis (RCA) to conduct a "just culture event review." For purposes of this process, we define a "just culture" as "a culture that recognizes that competent professionals make mistakes and acknowledges that even competent professionals will develop unhealthy norms (e.g., shortcuts, 'routine rule violations'), but has zero tolerance for reckless behavior."[1] Thus, **we designed our review to understand the events that occurred in the George Cortez case, from arrest through appeal and ultimately exoneration, and to generate precise recommendations with the goal of preventing the mistakes that occurred in that case from happening in the future. Our goal was not to punish or find blame with any individual or agency**, but solely to understand how our system could ultimately convict George Cortez and then conclude that the conviction was in error based on the specifics of this case and its subsequent appeal.

While obviously the reversal of a conviction is evidence of imperfections in our criminal justice system that are worthy of close review and improvement, it is important to acknowledge that the decision to review this case and learn from errors is a victory for Philadelphia's criminal justice system. A case timeline and narrative follow, as well as a set of contributing factors that combined to enable the inaccurate conviction, and a list of proposed improvements to the Philadelphia criminal justice system that are designed to reduce opportunities for error in this jurisdiction.

Our analysis of the George Cortez case revealed a substantial number of contributing factors that combined to cause inaccurate conviction of George Cortez. The issues occurred at two main phases of the case (Figs. 1 - 2, below):

- The Investigational Phase, where factors including inaccurate witness identifications, inadequate recordkeeping, and issues with investigating alternative suspects contributed to the inaccurate arrest of George Cortez (Fig. 1 below); and

- The Trial Phase, where factors including the District Attorney's Office's use of a cell phone belonging to a defense witness at the request of the Court, and resulting

[1] Agency for Healthcare Research & Quality Glossary, available at http://psnet.ahrq.gov/popup_glossary.aspx?name=justculture.

inaccurate testimony admitted at trial by the DA's digital media expert contributed to Mr. Cortez's inaccurate conviction for murder (Fig. 2 below).

What follows is a summary of the contributing factors and recommendations, a history of the case including an identification and discussion of the contributing factors leading to the errors in this case, and a set of recommendations for each participating agency to implement. If these recommendations had been in place (or had been followed) at the time of Mr. Cortez's case, the City of Philadelphia would not have arrested or convicted an innocent man of murder.

The identification and description of these factors, as well as the recommendations that accompany them, are the product of a consensus review by all the stakeholders involved with the PERT, who sought to develop mutually agreeable best practices that further the common goal of all the stakeholders in the system – accuracy and integrity of the criminal justice process.

Witnesses and other individuals who have not previously been identified in public records are identified by alias initials to protect their identities.

A timeline of key events in this case is attached as an appendix.

SUMMARY OF CONTRIBUTING FACTORS AND RECOMMENDATIONS

Contributing Factor 1:

The surviving Victim inaccurately identified George Cortez as the individual who shot her and killed Decedent.

- **Recommendation 1.** (*Responsible agency: PPD*) Investigators should follow current PPD protocols for the use of photo arrays to maximize the likelihood of an accurate eyewitness identification, including:

    - The collection of a confidence statement from the witness at the time the identification is first made;

    - The use of sequential photo presentation rather than presenting the witness with a single mug shot (a "singleton") or a 6 or 8 photo array, even in instances where the eyewitness claims to know the suspect personally;

    - Whenever possible, minimizing subsequent repeat displays to the eyewitness of the same photo used in the initial identification, to minimize the possibility of confirmation bias contributing to an inaccurate identification;

  In situations where multiple eyewitnesses have offered conflicting identifications, further investigation must be conducted. If appropriate, each witness should be presented with sequential photos that include the different potential suspects with only one prime per series.

- **Recommendation 2.** (*Responsible agencies: CCP, PPD, DAO, Defender Association*). To facilitate the accurate identification of actual perpetrators, PPD, DAO, Defender Association, and CCP personnel who work on cases involving eyewitnesses should receive education about common "system variables" (e.g., police procedures) and "estimator variables" (e.g., environmental or witness conditions) that may knowingly or unknowingly impact the ability of an eyewitness to provide an accurate identification.

- **Recommendation 3.** (*Responsible agencies: PPD, DAO, Defender Association*)**.** Whenever feasible, appropriate individuals for each agency should physically observe the location where the crime was committed, at a time that replicates the weather/lighting conditions of the crime as much as possible.

- **Recommendation 4.** (*Responsible agencies: PPD, DAO*). Investigators should receive training on implicit and/or cognitive biases that can impact the

behavior of all individuals, including but not limited to those that may influence an investigation. Managers and supervisors at the PPD and case screeners and ADAs in the DAO should also receive this education

- **Recommendation 5.** (*Responsible agencies: PPD, DAO*). Managers and supervisors should adopt practices that guard against potential implicit biases in the investigation or pretrial phases of the case, including ensuring that each case is reviewed by a supervisor acting as a "devil's advocate" whose role is to consider the suspect's point of view and ask critically "how would I argue in support of the argument that this individual is innocent?"

- **Recommendation 6.** (*Responsible agency: PPD, DAO*). In single-witness eyewitness identifications that lack material corroborating evidence, additional care should be taken at charging. The DAO and PPD representatives involved should evaluate systems and estimator variables prior to charging and seek additional corroborating evidence where appropriate as quickly as possible after the identification. If specific information is available that calls the identification into question, the DAO should not charge without additional investigation.

- **Recommendation 7.** (*Responsible agency: CCP, DAO, Defender*). The judge should craft appropriately measured jury instructions that describe the factors jurors should consider when evaluating a single eyewitness identification uncorroborated by other evidence. The prosecutor and defense attorney should suggest relevant instructions for the judge to consider.

<u>Contributing Factor 2:</u>

The PPD/DAO investigation of the George Cortez case did not effectively address the evidence indicating that the identification of George Cortez was inaccurate and thus did not permit downstream decision-makers to make fully informed decisions about charging and prosecution.

<u>Contributing Factor 3:</u>

The recordkeeping in the George Cortez case was inadequate to permit any supervisor or screener to confidently conclude that George Cortez was the perpetrator.

- **Recommendation 8:** (Responsible agency: PPD) Investigators should be required to complete standardized Activity Sheets upon the initiation of an investigation and for each instance of supplemental investigative activity between the commission of the crime and the completion of the active investigation phase of the case.

- **Recommendation 9:** (*Responsible agency: PPD*). Supervisors must monitor the use of activity sheets to ensure proper completion. In the absence of activity sheets as required by protocol, Supervisors should review personnel time sheets, identify all dates for which activity was logged for the case at issue, and require detectives to prepare activity sheets for those dates.

- **Recommendation 10:** (*Responsible agencies: PPD, DAO*). All interviews with potential witnesses conducted by the PPD or DAO should be captured faithfully in writing and signed by the individual providing the statement if possible. To enhance consistency in information gathering, these interviews should also be recorded by audio or video when practicable and legally permissible.

- **Recommendation 11:** (*Responsible agencies: PPD, DAO, Defender Association*). The PPD, DAO and Defender Association should move beyond paper files. The agencies should have a process for sharing digital records for all cases. At a minimum, this records management system should provide secure, role-based access to files to all individuals within the PPD and DAO who are related to a specific case, and should automatically keep an audit trail log of file access, upload/download/copying, etc.

    - ***Recommendation 11(a)*****:** This system would also identify documents sent to defense counsel by the DAO, acknowledge their receipt by Defender Association, and would send discovery updates to the relevant Judge to ensure judicial oversight of discovery rules, orders and timelines.

    - ***Recommendation 11(b)*****.** All documents collected by the PPD, whether or not in digital form, should be made available to the DAO by the PPD unless specifically withheld. PPD should retain a complete copy of information provided to the DAO and the date provided for archival purposes. If a document is withheld from the DAO, the existence of the document, a description of its contents, and a reason for its withholding would be noted by an authorized decision-maker.

- **Recommendation 12.** (*Responsible agency: PPD*). PPD should standardize investigative forms and tools throughout the department, including specifically requiring Homicide investigators to use Police Integrated Information Network (PIIN) system.

- **Recommendation 13.** (*Responsible agency: PPD*). PPD Homicide investigators should provide contemporaneous information identifying and detailing all potential suspects and specifically providing the reasons any potential suspect has been excluded from further consideration as a perpetrator of a crime.

Contributing Factor 4:

Discovery passed from DAO to defense counsel was incomplete. The DAO did not provide all information in its possession related to the case to defense counsel, including:

a) **Crime scene information was incomplete; and**
b) **911 transcript not included.**

- **Recommendation 14.** (*Responsible agency: DAO*). The DAO should adopt an open-file discovery protocol with appropriate safeguards to protect potential witnesses and to preserve the integrity of investigations and adjudications.

- **Recommendation 15.** (*Responsible agency: CCP*). The Court should adopt a standing Discovery order protocol for all criminal cases. The order would place affirmative obligation on all attorneys appearing before the Court to certify compliance with discovery obligations, including expressly the obligation to provide to the defense all potentially exculpatory material in the government's possession, and the obligation to make reasonable good-faith efforts to obtain all such material that is in the possession of the PPD.

Contributing Factor 5:

The need for judicial efficiency, urgency, and finality influences decision-making by criminal justice actors.

***Factor 5(a)*: Judicial docket management influences decisions in in-trial developments.**

***Factor 5(b)*: At the urging of the Court, defense counsel provided key physical evidence – the mobile phone - to the prosecuting Assistant District Attorney during trial and outside formal discovery protocols.**

- **Recommendation 16.** (*Responsible agency: CCP*). Philadelphia courtrooms should be equipped with the ability to display digital information on an open platform that will enable both parties to effectively display relevant information stored on personal electronic devices to the finder of fact. The Court should consider standardizing the accepted formats to those most readily playable (i.e., MP4 for video, MP3 for audio, etc.)

- **Recommendation 17.** (*Responsible agency: CCP*). The CCP should ensure that its IT staff are competent in frequently encountered technical evidence issues (e.g., those encountered in the Cortez case) and that IT staffers are

readily accessible to assist the court and attorneys appearing before the court in real-time with digital evidence issues.

Contributing Factor 6:

The discussion between defense counsel, the ADA and the Court regarding the transfer of the phone to the DAO was held off the record.

- **Recommendation 18.** (*Responsible agency: CCP*). All discussions between case-related counsel and the Court should on the record. While it may be preferred from some discussions to be held in camera and out of the public courtroom, any discussion that relates to evidence in the case, legal issues or proposed conduct of the attorneys should be recorded. The Court should not dismiss the court reporter or DRT recorder until all case discussions are complete.

Contributing Factor 7:

The DAO executed a broader search of a witness's mobile phone than was necessary to fulfill the agreed purpose of the transfer of the phone.

Contributing Factor 8:

The DAO Technical Services Unit (TSU) issued a report that inaccurately opined that the data in the phone had been manually altered.

Contributing Factor 9:

The DAO TSU report was provided the evening before the final day of trial and no continuation was requested or granted *sua sponte* to facilitate appropriate review of the new forensic data and opinion.

Contributing Factor 10:

TSU Director is accepted as expert and no defense expert is consulted or presented.

Contributing Factor 11:

The trial attorneys and the Court lacked sufficient technical knowledge to evaluate the expert's opinion statements.

- **Recommendation 19.** (*Responsible agency: CCP*). In any case where new technical evidence has emerged that was not anticipated, discussed or otherwise disclosed in the pre-trial stage, the Court should ensure that the trial includes adequate safeguards for the defense or the prosecution,

including continuing or bifurcating the trial or appointing a neutral expert under Pa.R.E. 706. Such an independent expert could assist the court in understanding the relevant issues so that evidentiary decisions are more informed. The evaluation and report of such an expert would assist all the actors in their understanding of the evidence and would obviate the potential bias issues.

Contributing Factor 12:

The original cell phone and the original file extracted by the DAO TSU were not retained as evidence by the DAO.

- **Recommendation 20.** (*Responsible agency: CCP*). Whenever the contents or data from an original device is at issue, the CCP should require that the relevant data has been preserved or imaged consistent with Rule 1900 and it should be archived by the court.

FACTORS CONTRIBUTING TO ERROR: INVESTIGATION PHASE

Contributing Factor 1: The surviving victim inaccurately identified George Cortez as the individual who shot her and killed Decedent.

The circumstances leading up to the inaccurate conviction of George Cortez began on the evening of April 13, 2011. Around 8:30 p.m., the surviving victim of the assault ("Victim") stepped outside her home on the 2400 block of N. Garnett Street, near the intersection with York St. in Northwest Philadelphia, to speak to her nephew (Decedent Victim or "Decedent"). Decedent parked his car and got out, and he and Victim began talking near the corner. While they were talking, a man dressed in a grey hooded sweatshirt approached them and started shooting. Decedent fell towards and grabbed Victim, but she ran across the street. As she ran, she felt the impact of several bullets in her back and heard continuing gunfire. Decedent had also been shot and died quickly from his wounds.

Several calls reporting the shooting were placed to 911, and Philadelphia police officers arrived on the scene within minutes. They found Victim bleeding from her gunshot wounds and immediately transported her to a nearby hospital, where she received emergency surgery. Immediately after her surgery, she was taken by police to the homicide division headquarters at the "Roundhouse." Once there, she was interviewed by police detectives about the shooting. She told detectives that while she was talking with the Decedent she had seen a flash and heard shots. She identified the shooter as "Mal," a former friend of Decedent[2] who had recently had "bad blood" with Decedent. She described a series of arguments between Decedent and George's friends, whom she identified by name (Referenced herein as "AF" and "CJ." Eventually "Mal" was involved in the arguments. Detectives showed the victim a single photo of George Cortez and she identified him as "Mal." She also told them that her neighbor ("Eyewitness") had witnessed the shooting.

The first inaccuracy in the case was the misidentification of George Cortez as the shooter by victim. This inaccurate identification was accepted as accurate by the PPD and the DAO, and ultimately by a jury. It is important to note that Victim's identification appeared quite reliable. She claimed to have seen the shooter at close range. During her first interview with the police, she identified the shooter as "Mal," a street alias for George Cortez, and she explained that she had known Mr. Cortez personally for several years, including seeing him 2-3 times a week over the prior year. While an independent eyewitness later identified "Owen" as the shooter, it should be noted that the existence of multiple shooters would not have made this identification exclusive of the Victim's. Taken together, the question becomes how to assist investigators and prosecutors in identifying inaccurate eyewitness identifications that appear reliable on their face.

[2] Victim used several names to refer to the person she identified as the shooter. One was the name "George", one was the name Omar, and one was "Mal." In her live testimony, she stated that at the time of the shooting she only knew him by the third name, but the April 13, 2011 written statement prepared by Detectives and signed by the victim only uses the name "George."

While Victim's identification had many hallmarks of reliability, Figure 3 (below) sets forth several factors that, in retrospect, could have acted as warning signs that the identification was inaccurate.

The dangers of confirmation bias – the tendency to embrace facts that support an existing case hypothesis and ignore facts that contradict the hypothesis – are well known in an investigational setting. Confirmation bias can be especially dangerous in an environment like homicide investigations, where resources needed for investigation exceed demand, and where there is intense pressure to "close" cases quickly and efficiently. Under such circumstances, the urge to accept a seemingly reliable identification without evaluating every alternative hypothesis can be quite strong. In such a situation it is especially important to pursue all actions that may undercut the hypothesis of guilt that has formed in an investigator's mind.

The Philadelphia criminal justice system should implement policies that will enhance accurate eyewitness identifications, including:

- **Recommendation 1:** (*Responsible agency: PPD*) Investigators should follow current PPD protocols for the use of photo arrays to maximize the likelihood of an accurate eyewitness identification, including:[3]

    - The collection of a confidence statement[4] from the witness at the time the identification is first made;

    - The use of sequential photo presentation rather than presenting the witness with a single mug shot (a "singleton") or a 6 or 8 photo array, even in instances where the eyewitness claims to know the suspect personally;

    - Whenever possible, minimizing subsequent repeat displays to the eyewitness of the same photo used in the initial identification, to minimize the possibility of confirmation bias contributing to an inaccurate identification;

    In situations where multiple eyewitnesses have offered conflicting identifications, further investigation must be conducted. If appropriate, each

[3] On May 15, 2015, the PPD adopted new eyewitness identification protocols for the use of a photo array to confirm an eyewitness identification. These protocols instruct investigators to use a computer to generate an array of photos, including the suspect, in a double-blind, sequential fashion and to secure a confidence statement from the witness at the time of the identification.

[4] A confidence statement is a statement of the witness indicating her level of confidence in the accuracy of her identification; such statements have been shown to correlate with the accuracy of the identification when the identification occurs under pristine conditions (the administrator of the lineup is blind to the identity of the suspect and offers no confirmatory feedback, and the suspect does not stand out in the lineup) and the confidence statement is taken contemporaneously with the first identification. The confidence statement can be in the witness' own words, and can be qualitative (e.g., "I am pretty sure" or "I am quite sure"), or quantitative ("My confidence is 8 on a scale of 1 to 10.")

witness should be presented with sequential photos that include the different potential suspects with only one prime per series.

- **Recommendation 2:** (*Responsible agencies: CCP, PPD, DAO, Defender Association*). To facilitate the accurate identification of actual perpetrators, PPD, DAO, Defender Association, and CCP personnel who work on cases involving eyewitnesses should receive education about common "system variables" (e.g., police procedures) and "estimator variables" (e.g., environmental or witness conditions) that may knowingly or unknowingly impact the ability of an eyewitness to provide an accurate identification.

- **Recommendation 3:** (*Responsible agencies: PPD, DAO, Defender Association*)**.** Whenever feasible, appropriate individuals for each agency should physically observe the location where the crime was committed, at a time that replicates the weather/lighting conditions of the crime as much as possible. This will help all parties consider more fully and intimately the estimator variables that may have existed at the time of the crime.

- **Recommendation 4:** (*Responsible agencies: PPD, DAO*). Investigators should receive training on implicit and/or cognitive biases that can impact the behavior of all individuals, including but not limited to those that may influence an investigation. Managers and supervisors at the PPD and case screeners and ADAs in the DAO should also receive this education

- **Recommendation 5:** (*Responsible agencies: PPD, DAO*). Managers and supervisors should adopt practices that guard against potential implicit biases in the investigation or pretrial phases of the case, including ensuring that each case is reviewed by a supervisor acting as a "devil's advocate" whose role is to consider the suspect's point of view and ask critically "how would I argue in support of the argument that this individual is innocent?"

- **Recommendation 6:** (*Responsible agency: PPD, DAO*). In single-witness eyewitness identifications that lack material corroborating evidence, even when the person identified was previously known to the eyewitness, additional care should be taken at charging. The DAO and PPD representatives involved should evaluate systems and estimator variables prior to charging and seek additional corroborating evidence as quickly as possible after the identification. If specific information is available that calls the identification into question, the DAO should not charge without additional investigation.

- **Recommendation 7:** (*Responsible agency: CCP, DAO, Defender*). The judge should craft appropriately measured jury instructions that describe the

factors jurors should consider when evaluating a single eyewitness identification uncorroborated by other evidence. The prosecutor and defense attorney should suggest relevant instructions for the judge to consider.[5]

<u>Contributing Factor 2</u>: The PPD/DAO investigation of the George Cortez case did not effectively address the evidence indicating that the identification of George Cortez was inaccurate and thus did not permit downstream decision-makers to make fully informed decisions about charging and prosecution.

a) The PPD files suggests that Victim was not provided an opportunity to consider/rule out Owen Cortez as her assailant.

b) The PPD file suggests that the independent eyewitness was only approached and interviewed once about the shooting after his initial call, even after his subsequent call to 911 in which he stated that "two males from [the shooting] 2-3 weeks ago are in Chinese store now.[6]

c) There is no documentation in the file regarding any conversations between investigators and the friends of Mr. Cortez identified by both Victim and the mother of Decedent as individuals with motive and a connection to George Cortez.

d) Any efforts to interview or subpoena "reluctant" eyewitnesses (i.e. the independent eyewitness) and others who may have had information useful to the investigators were not recorded; there is no documentation of any such attempts and no record of any subpoenas.

Victim was not the only witness with relevant information. At the time of the shooting, [7] a Philadelphia Police Officer ("SB") who was also Decedent's cousin, received a call from the independent eyewitness that the officer's "family" was being shot. Officer SB went to his assigned police district headquarters and confirmed that the shooting had occurred. He then went to the hospital and learned of the death of his cousin.[8] Officer SB spoke with detectives later that evening and told them about the call from the independent eyewitness. He also told the detectives that two days before the shooting, Decedent had talked to Officer SB about a prior incident he had with a person known as "Mal" who had been selling drugs near Decedent's

[5] Models of such instructions have been promulgated in response to *State v. Henderson*, 27 A.3d 872 (N.J. 2011).
[6] The information about this call was obtained from a document known as a "Computer Aided Dispatch (CAD) Event Detail Report." This report is the coded record of a 911 call. This record was present in the DAO file but there is no record of this document being provided to the defense prior to the first trial.
[7] Officer SB testified at trial that he heard gunshots in the background when he spoke to the independent eyewitness and it was his understanding that the call took place during the shooting.
[8] Officer SB testified at trial that he visited the scene of the shooting at some point before travelling to the hospital, but it in his recorded interview with detectives he only described going to HQ and the hospital.

mother's house. Officer SB said he had also encountered "Mal," but it was ten years prior. Detectives showed Officer SB a single of photo of George Cortez and he identified him as the person he knew as "Mal."[9]

Members of the Philadelphia Police Department ("PPD") Crime Scene Investigators' Unit ("CSI") were dispatched and processed the scene of the shooting. Three different calibers[10] of fired shell casings were discovered on the scene and sketches of the scene were created. Additionally, video capturing portions of the incident was recovered from two nearby locations. The cameras were fixed vantage, and the video is of low visual quality. They showed two males in hooded sweatshirts firing guns from the northeast and southwest corners, respectively, of the intersection of N. Garnett and York. Both shooters quickly left the scene in opposite directions. In the immediate aftermath of the shooting, PPD officers stopped and questioned several individuals, but none were found to be involved.

On April 14, the day after the shooting, detectives questioned the eyewitness, a neighbor of Victim on the 2400 block of N. Garnett Street, about the shooting.[11] He told detectives that he had seen Decedent speaking with a female on the night of the shooting. He went inside his home, and then heard gunshots. Going back outside, he saw Decedent being shot by a black male and falling to the ground. He identified the shooter as a man he knew named "Owen." He also told detectives that he did not want to get involved and refused to provide them with a formal statement.

On April 15, detectives interviewed an unlicensed cab driver who had dropped off a passenger near the Garnett and York at the time of the shooting (Witness 1 or "W1"). W1 told detectives that he had seen the shooting and described the shooter as around 5'9", 175 – 190 pounds and wearing jeans and "some kind of jacket" with no hood up. He told police that he only saw one person shooting and he believed he would be able to recognize the shooter.[12]

PPD detectives interviewed Victim again on April 18. She said that she had not seen anyone at the scene other than the people she previously described. Detectives presented her with two single photos (AF and CJ) which she identified as associates of George Cortez.[13]

While the investigation remained open and active, case files maintained by the PPD and given to the District Attorney's Office ("DAO") show no evidence of any investigative activity on the

---

[9] The relative timing of the homicide interviews of Victim and Officer SB on April 13th is unclear. The report of Victim's interview does not specify the time. Officer SB interview was conducted at 11:10 p.m. Victim was transported to homicide at approximately 10:50 p.m., and her interview included the identification of a photo that appears to have been printed at 11:40 p.m. No hospital discharge paperwork for her was in the available file.

[10] .45, .40 and 9mm.

[11] It is inferred in Officer SB's trial testimony that the person who called him was the independent eyewitness, who was identified by Officer SB as appearing on the video of the incident as was described by Victim as a neighbor and an eyewitness.

[12] There is no further record of conversations or interviews with W1, but Officer SB later testified that W1 and the eyewitness did not want to be further involved in the case.

[13] In her first interview, Victim identified two specific friends/associates of Decedent, but there is no indication in the documentation explaining how police further identified these individuals and produced the photos for identification. One of the friends was killed on July 13, 2011.

case between April 18 and May 1. Despite this lack of documentation, it is clear that during this time period, PPD detectives were aware that George Cortez had a brother, Owen Cortez, as an 8-person photo array including a photo of Owen Cortez was generated on April 22, 2011.

On April 20, PPD detectives sought an arrest warrant for George Cortez for the murder of on Decedent. DAO denied the request, primarily due to the fact that the Medical Examiner Report was not complete. The DAO also requested that PPD make efforts to interview the independent eyewitness and to investigate his two known associates.[14]

On May 1st, detectives interviewed Decedent's mother ("Mother"), who described a series of arguments between her son and CJ and AF about 3 months before the shooting. She identified the known associates to police from single photos. Detectives also asked her about George and Owen Cortez and showed her single photos for each. Mother identified both men and told the detectives that George "appeared to be the leader" of the group that included the known associates. She also identified Owen as George's brother.

At around 1:30 a.m. on May 3, 2011, the independent eyewitness placed a call to 911. He told the operator that two males who had recently been involved in a murder were in the Chinese store near his home, and he identified one of the men as Owen Cortez. The police arrived at the location quickly and stopped three men, one of whom was Owen Cortez. Owen was wearing a gray hooded sweatshirt at the time. All three were brought in for investigation but were released, and any interviews conducted with them were not included in the case file.[15]

Based on the above information, PPD detectives succeeded in obtaining an arrest warrant for George Cortez for the murder of the decedent, and Mr. Cortez was arrested at 6:11 a.m. on May 3, 2011. There is no suggestion in the record that Owen Cortez was questioned, and no warrant was issued for his arrest.

While the victim's identification of George Cortez was immediate and compelling, the identification of Owen Cortez by the independent eyewitness was similarly compelling. He twice identified the shooter as "Owen Cortez" to police: first on April 11, while the shooting was occurring; and second in the early morning hours of May 3, 2011, when he called 911 and again stated that the killer and one of his accomplices were present in the Chinese store. The second call caused police to detain Owen Cortez and two other individuals.[16]

---

[14] Although the activity sheet describing the interview of the eyewitness is dated April 14, the information about the interview which included his identification of "Owen" as the shooter was not made available to the DAO prior to the April 20 warrant submission. The PPD records do not contain any further detail of what if any investigations of AF and CJ were conducted.

[15] As discussed below, Owen Cortez was later arrested for an unrelated shooting case on October 9, 2011 and charged with Attempted Murder, Burglary, Possession of a Firearm and other offenses. He was convicted after a trial and was sentenced on February 22, 2016.

[16] In interviews, responding police officers identified one of the other men who was wearing a black Nike sweat suit. Owen Cortez was identified as wearing a gray hoodie. Only a 75-48 was present in the file, there are no records of 48A or 229 reports. It is perhaps telling that the eyewitness identified two of the shooters as present in the Chinese store; while this would not exclude George Cortez from participation in the shooting, it increases the likelihood that Victim's identification was one of mistaken identity, rather than one of incomplete identification of multiple shooters.

The ADA for the case also made a strategic decision not to show the video of the shooting to the victim prior to the trial. This was done to capture her visceral reaction to watching the video for the first time, and so that the jury could watch the victim essentially "re-living" the event. Such decisions are within the prosecutor's discretion, but they come at a price. By not showing the video to the witness promptly after the crime, the PPD and DAO lost the ability to use the video as a tool to increase the likelihood of accuracy in the victim's identification of the shooter(s) prior to trial. In a similar vein, methods of confronting eyewitnesses before trial with other known suspects (i.e., Owen Cortez) should have been considered.

Contributing Factor 3: The recordkeeping in the George Cortez case was inadequate to permit any supervisor or screener to confidently conclude that George Cortez was the perpetrator.

The PPD Homicide folder of the George Cortez case file took several months to be located. When it was provided, its contents were not in keeping with PPD policies or customary practices regarding documentation in homicide investigations, containing very little detail about the investigation. It is unclear whether the file we received was the complete file maintained by PPD Homicide in 2011, since according to the PPD, standard procedure is for the Homicide division to provide the DAO with the entire original homicide folder, and not to retain an archival copy.

The practice of sending a complete file from PPD to the DAO is sound. DAO is obliged to make disclosures to the defense on behalf of the government (broadly defined and including PPD) of exculpatory information learned in the investigation. DAO cannot satisfy this obligation without a complete and fully documented case file from the PPD, including statements of each interview conducted by the police and all actions undertaken in the investigation.

The PPD practice of sending the original file without retaining a copy, however, puts the PPD and the investigating officers at risk unnecessarily. PPD should retain a complete copy of any and all materials sent to the DAO pertaining to PPD investigations. The DAO has different needs, uses, and obligations with the Homicide file, and will modify the file to conform with these needs, including adding many documents to the file. There is also the very real potential for a later review (like this one) that will ask questions about what information was provided or was not provided by the PPD to the DAO. In such circumstances, the maintenance of an archival copy of the file will protect the PPD from allegations of manipulation or wrongdoing.

PPD investigative protocols require that homicide investigators record their activities in daily "Activity Sheets" provided by the PPD. These sheets are intended to describe all investigatory activity on each day. In this case, the PPD file includes Activity Sheets for the following dates only: 4/13/11, 4/14/11, 5/3/11 and 4/22/16. The file includes no Activity Sheets for the 19-day period between the initial investigative steps and the final approval of the warrant for George Cortez or for the nearly five-year period between the approval of the warrant and the date of Owen Cortez's ultimate confession.

The lack of activity sheets described above inhibited the ability of any police supervisor, or any Assistant DA assigned to the case, to evaluate the investigation's thoroughness, or to support the

inclusion of Mr. Cortez or the exclusion of Owen Cortez, the known associates, or others in the crime.

Further, the activity sheets that are present in the file do not include any information about several significant investigative events:

- The initial investigative steps and the final approval of the warrant for George Cortez on May 2, 2011, or for the nearly five-year period between the approval of the warrant and the date of Owen Cortez's ultimate confession on April 22, 2016;

- The stop and investigation of a known associate of the decedent, Owen Cortez and George Cortez. PPD records indicate only that AF was stopped and investigated around 10:30 p.m. the night of the shooting but was cleared by the lead detective on the case;

- Witness interviews at PPD headquarters with Owen Cortez, and the other two men from the Chinese store on the night of George Cortez's arrest. PPD records indicate that all three were taken to Homicide for further investigation, but no records of what transpired there exist in the file;

- Documentation of any subsequent attempts to interview the independent eyewitness, particularly after his second 911 call in May 2011. He was identified by the DAO supervisor and acknowledged by the trial ADA as the most important witness in the investigation; further investigation of him would have been invaluable to downstream actors in understanding the events of the shooting.

- Any investigation related to the two known associates, AF and CJ, who were identified by several key witnesses as linked to the "beef" between Decedent and George Cortez that was the alleged motive in the shooting;

- Any communication between the PPD and DAO before and after the May 3 arrest of George Cortez regarding the additional investigation performed by both the DAO and PPD as the case was prepared for trial in 2012 and again in 2016.

The members of the PERT acknowledge that administrative work of the sort recommended here is not what drives officers to join the Philadelphia Police Department. At the same time, it is imperative that the PPD investigators "show their work," to enable objective review of their conclusions and to display and defend their professionalism. A digital case management system shared by the PPD and DAO, as recommended below, would greatly assist these important efforts.

On the morning of May 3, 2011, Police responding to the second call of the independent eyewitness detained Owen Cortez and two other individuals and brought them in to Police Headquarters for questioning. While the PPD file includes reports from the officers who detained Owen Cortez and the others, it does not include any indication of who (if anyone) spoke

to the men once they arrived at Police Headquarters, of what was said, or of any resolution to the interaction.

An eight-photo array which included a photo of Owen Cortez was generated on April 22, 2011, suggesting that the PPD had not excluded Owen Cortez as a suspect as of that date. The timing of the photo array corresponds to statements from multiple people interviewed in our review, who described an ongoing investigation into the identity of the three shooters, but no evidence of such an investigation exists in the PPD file. The absence of any such documentation substantially impairs the ability of the PPD to conduct the investigation in an efficient manner, since reassigning any detective would effectively require the PPD, and the new lead detective assigned to the case, to restart the investigation from square one. It also substantially impairs the ability of the DAO to act in its capacity as a check and balance for the PPD, limiting the information available for providing an arrest warrant or otherwise screening the case for prosecution.

This lack of record-keeping, especially regarding the activity sheets, was a deviation from PPD's established documentation practice and should have been recognized by the supervisor(s) of the investigation at the PPD, as well as by the DAO in its review of the file, both prior to the issuance of an arrest warrant and during preparation for trial. Despite the lack of documentation and the glaring absence of information about PPD discussions with other potential suspects, the case compiled by the lead Homicide detective against George Cortez was allowed to proceed, and an arrest warrant was generated for George Cortez.[17]

Multiple individuals interviewed indicated that file maintenance and recordkeeping procedures presented a number of risks to all involved in the case:

- PPD: The file, while at Homicide, was described as "being touched by lots of hands," as various PPD detectives and officers provided reports related to the case. Without a master index and comprehensive activity reports, it would have been difficult for PPD supervisors to effectively monitor the progress of the investigation and provide appropriate review and oversight.

- DAO: As discussed, the lack of documentation with respect to other potential shooters – and specifically to Owen Cortez – prevented the DAO from fully assessing these issues prior to making charging and warrant decisions. Without an internal audit trail process or index it was impossible to otherwise ascertain the integrity or completeness of the records. Discovery packets were created only from the file as it was received from the PPD; the DAO was thus without any mechanism by which to determine that the disclosure was complete and satisfied the government's Brady obligations.

[17] While it is possible that some of this information was transmitted verbally among the participants, the failure to document the investigation subjects the PPD and DAO to needless risk of criticism, since only the lead detective would be able to testify accurately about the investigation over time, and such testimony would occur without the benefit of timely corroborating records.

- **Recommendation 8:** Investigators should be required to complete standardized Activity Sheets upon the initiation of an investigation and for each instance of supplemental investigative activity between the commission of the crime and the completion of the active investigation phase of the case.

- **Recommendation 9:** Supervisors must monitor the use of activity sheets to ensure proper completion. In the absence of activity sheets as required by protocol, Supervisors should review personnel time sheets, identify all dates for which activity was logged for the case at issue, and require detectives to prepare activity sheets for those dates.

- **Recommendation 10:** All interviews with potential witnesses conducted by the PPD or DAO should be captured faithfully in writing and signed by the individual providing the statement if possible. To enhance consistency in information gathering, these interviews should also be recorded by audio or video when practicable and legally permissible.

- **Recommendation 11:** The PPD, DAO and Defender Association should move beyond paper files. The agencies should have a process for sharing digital records for all cases. At a minimum, this records management system should provide secure, role-based access to files to all individuals within the PPD and DAO who are related to a specific case, and should automatically keep an audit trail log of file access, upload/download/copying, etc.

    - ***Recommendation 11(a)*:** This system would also identify documents sent to defense counsel by the DAO, acknowledge their receipt by Defender Association, and would send discovery updates to the relevant Judge to ensure judicial oversight of discovery rules, orders and timelines.

    - ***Recommendation 11(b)*:** All documents collected by the PPD, whether or not in digital form, should be made available to the DAO by the PPD unless specifically withheld. PPD should retain a complete copy of information provided to the DAO and the date of provision, for archival purposes. If a document is withheld and not sent to the DAO, the existence of the document, a description of its contents, and a reason for its withholding would be noted by an authorized decision-maker.

- **Recommendation 12:** PPD should standardize investigative forms and tools throughout the department, including specifically requiring Homicide investigators to use the Police Integrated Information Network (PIIN) system.

- **Recommendation 13: PPD** Homicide investigators should provide contemporaneous information identifying and detailing all potential suspects and specifically providing the reasons any potential suspect has been excluded from further consideration as a perpetrator of a crime.

FACTORS CONTRIBUTING TO ERROR: PRE-TRIAL PHASE

The preliminary hearing in the Cortez case was held on August 3, 2011. Victim described George Cortez as "just a face" to her, saying that she only knew him from the neighborhood. She stated that she knew him as "Omar"[18] and that Decedent had introduced her to George; she had agreed to furnish Mr. Cortez with counterfeit pay stubs to help him purchase a car. She described the shooting and her identification of Mr. Cortez as the shooter in a manner relatively consistent with her prior written statements.

The case was held for court and scheduled for pre-trial listings on October 27, 2011, November 17, 2011 and December 1, 2011. At the December 1st listing, the case was scheduled for trial to begin on September 10, 2012. On January 12, 2012, the trial date was moved up to January 23, 2012. On that date the matter was not reached and was "rolled" to the next day when trial began with jury selection.

Contributing Factor 4. Discovery passed from DAO to defense counsel was incomplete. The DAO did not provide all information in its possession related to the case to defense counsel, including:

a) Crime scene information was incomplete; and
b) 911 transcript not included.

The discovery packet provided to appointed defense counsel was incomplete when passed, missing several critical documents.[19] Defense counsel requested a continuation of the case due to "missing discovery" and thus any of his specific concerns may have been addressed prior to trial. Even so, our review indicated that some relevant documents were never provided by the DAO to defense counsel for George Cortez:

- The crime scene report provided to defense counsel was missing some pages that later appeared in the PPD file for Owen Cortez; and

- The DAO file contained a CAD record of the May 3, 2011 call to 911 from the independent eyewitness in which he (a) notified the police that two of the shooters were in a local Chinese store, and (b) by describing the clothing of the two shooters again identified Owen Cortez as the shooter and identified one of the other men as a participant.

The failure to provide this information would seem to be in violation of the prosecutorial obligation under Brady v. Maryland to provide potentially exculpatory information to the defense. Such information was material to the case and could have assisted the defense in questioning the ultimately inaccurate identification of George Cortez. Our review did not find

[18] Curiously, Owen Cortez's codefendant in the October 2011 shooting case was named Omar.
[19] The DAO file provided to the PERT contains copies of itemized discovery documents that purport to be the documents provided to defense. There were discovery issues noted in the docket, so it is possible that additional documents were provided on an ad-hoc basis between the trial attorneys prior to trial. The findings and recommendations of this report related to discovery are based only on the provided files and the documents they contain.

evidence to suggest that the failure to disclose this information was intentional on the part of the DAO. Additionally, the standard protocol for sharing homicide files between the PPD and the DAO consisted of a physical transfer of the original file by PPD to DAO. PPD did not retain an archival copy. Because of this, there is no official record of what precisely was transferred from the PPD to the DAO. This creates multiple risks. First, should the file be lost or damaged, there would be no records of the investigation, conceivably leading to the inability to convict a perpetrator of a crime due to administrative errors.

Failures to provide complete discovery place the DAO and the PPD at unnecessary risk of criticism, discipline and/or liability. A discovery protocol in which the DAO may not know what police documents exist outside the DAO "file" and in which individual prosecuting attorneys make discretionary choices about what documents and/or information to provide to defense is an environment ripe for error.

- **Recommendation 14:** The DAO should adopt an open file discovery protocol with appropriate safeguards to protect potential witnesses and preserve the integrity of investigations and adjudications.

- **Recommendation 15:** The Court should adopt a standing Discovery order protocol for all criminal cases. The order would place affirmative obligation on all attorneys appearing before the Court to certify to their compliance with all discovery obligations, including expressly the obligation to provide all potentially exculpatory material in the possession of the government to the defense, and the obligation to make reasonable good-faith efforts to obtain all such material that is in the possession of the PPD.[20]

[20] In November 2017, the New York State Unified Court system issued a similar policy based on the findings and recommendations of the New York State Justice Task Force in the report titled "Report on Attorney Responsibility in Criminal Cases." A copy of the report and the model order can be found at http://www.nycourts.gov/PRESS/PDFs/PR17_17.pdf.

FACTORS CONTRIBUTING TO ERROR: TRIAL PHASE

The trial lasted four days. During the Commonwealth's case in chief, the ADA elicited testimony from a number of involved police officers and detectives, a medical examiner, Victim, and a crime scene investigator and a firearms expert.

The primary witness for the defense case was George Cortez's wife.[21] She worked for a janitorial service, and on the night of shooting was working at URL Pharma. URL Pharma had a video camera that observed the employee entrance and exit, and a video was shown in court of the camera's perspective on the April 13, 2011, the evening of the murder. She identified herself on video from that work location, and testified that on the night in question, at almost 8 pm, she had been waiting to be picked up by Mr. Cortez, who regularly picked her up from work using her car.

She testified that Mr. Cortez was present with her throughout the evening of April 11, and thus did not commit the murder or the shooting. She testified to the following components of Mr. Cortez's alibi:

- Records of her cell phone showed calls with Mr. Cortez that were made while she was waiting to be picked up at URL;

- The security camera from URL moved from its position monitoring the employee entrance to an adjoining parking lot where her car was parked. She testified that Mr. Cortez was driving the car at the time;

- She produced a receipt from a party supply store dated April 11 at 6:56 p.m and testified that this was a receipt for food for her son's birthday party, which was held that evening; she explained that Mr. Cortez had purchased the birthday supplies before returning to the house and attending the birthday party;

- Her cell phone contained a video file that she testified was filmed by Mr. Cortez at the birthday party at 7:28 p.m. While Mr. Cortez did not appear in the video, she testified that a voice heard in the recording was that of Mr. Cortez and that her mother and son were also in the video; and

- She testified that Mr. Cortez was with her at home continuously that night, from the time he brought her back home from work until the next morning.

On cross examination she was confronted with her cell phone records which showed, contrary to her testimony on direct, that she had called Mr. Cortez at 3:44 a.m. on the morning of April 14; thus, he was not continuously with her as she had testified. She confirmed that was true, and that in fact, she had sent Mr. Cortez on an errand to buy Tylenol and had called him while he was

[21] The first defense witness was an employee of URL Pharma who served to authenticate security video from the URL Pharma parking lot.. This video was also obtained by the ADA prior to trial.

out. Given the timing of the murder/shooting at 8:30 p.m., her admission was not directly relevant to Mr. Cortez's alibi, but observers in the courtroom felt that it damaged MO's credibility.

Following this testimony, counsel for Mr. Cortez sought to publish the cell phone video to the jury. The request was made at the end of the day, and the court adjourned for the day, directing that the video would be shown the following day.

Contributing Factor 5: The need for judicial efficiency, urgency, and finality influences decision-making by criminal justice actors.

Each individual we interviewed who participated in the trial phase of the Cortez case referenced time management as a factor in their decisions on how to handle the case. They shared the common perception that the Philadelphia criminal courts are overwhelmed with cases. The imposing caseload creates a constant struggle for justice system professionals to attend to individual cases in a timely and efficient manner, and to give each individual case the time it deserves. The motives of these professionals were pure, driven by a desire to minimize the impact of delays and multiple trials on the defendant and the jury. At the same time, their concern for efficiency can impact the search for accuracy and justice, and it is our obligation to deliver not just procedural justice, but substantive justice, to each participant in the system.

George Cortez's wife's cell phone was a flip phone model with a very small screen, and defense counsel had no ability to display the birthday party video to the jury other than to hand them the phone and permit them to watch it on the phone's 2" x 2" screen, handing the phone down the line in the jury box until all jurors had seen it. To address this issue, the judge secured the agreement of defense counsel to provide the cell phone to the Assistant District Attorney in charge of the prosecution ("ADA"). ADA had previously been displaying exhibits on a large screen in the courtroom, and he agreed to assist the court and defense counsel in playing the video of the birthday party on a larger screen for ease of juror viewing. This agreement was not transcribed as part of the record, as the transcriptionist had apparently already packed up his/her equipment for the day.

Factor 5(a): Judicial docket management influences decisions in in-trial developments.

The forensic evidence issues involving the cell phone video surfaced unexpectedly and presented complex questions about the basis for Cortez's defense, evidentiary decisions for the ADA and the legality of providing the defense with time to respond to expert testimony. The Court elected not to continue the case, but to grapple with these issues immediately and in real time, and neither attorney moved to request such a continuance. This was for a number of reasons, including:

- The posture of this trial;
- The knowledge that another trial was scheduled to begin a few days later in the same courtroom;

- Concerns that pausing the trial would have a negative impact on the jury panel, causing expense and potentially leading to a mistrial to empanel another jury, and implicating the defendant's right to a constitutionally speedy trial.

Accordingly, the judge and the attorneys in this case worked hard to avoid a mistrial. Ironically, their emphasis on efficiency, speed and finality unintentionally led to discretionary choices that made accurate judgments of guilt or innocence more difficult and resulted in countless additional hours of court time during the appellate phase of the case.

***Factor 5(b)*: At the urging of the Court, defense counsel provided key physical evidence – the mobile phone - to the prosecuting Assistant District Attorney during trial and outside formal discovery protocols.**

- **Recommendation 16.** Philadelphia courtrooms should be equipped with the ability to display digital information on an open platform that will enable both parties to effectively display relevant information stored on personal electronic devices to the finder of fact. The Court should consider standardizing the accepted formats to those most readily playable (i.e., MP4 for video, MP3 for audio, etc.)[22]

- **Recommendation 17.** The CCP should ensure that its IT staff are competent in frequently encountered technical evidence issues (e.g., those encountered in the Cortez case) and that IT staffers are readily accessible to assist the court and attorneys appearing before the court in real-time with digital evidence issues.

Contributing Factor 6: The discussion between defense counsel, the ADA and the Court regarding the transfer of the phone to the DAO was held off the record.

Contributing Factor 7: The DAO executed a broader search of MO's mobile phone than was necessary to fulfill the agreed purpose of the transfer of the phone.

ADA returned to his office with the phone and presented it to the director of the District Attorney's Technical Services Unit ("Expert Witness"). Accounts differ as to what precisely

[22] The state of the art in digital technology changes constantly, and system actors must remain flexible, open to and knowledgeable about newer standards and file types. Some devices use readily accessible and transferable file types while others do not. All actors should receive regular training on basic digital evidence issues. Philadelphia Rule of Judicial Administration No. *1900, Trial Division, became effective on January 6, 2018. This rule establishes "Protocols to Mark, Inventory, Store and Retain Exhibits, Physical Evidence and Electronic Evidence Offered During Trials and Evidentiary Hearings in the Philadelphia Court of Common Pleas" and in relevant part provides that "Electronic evidence, including audio or video exhibits, must be produced by the proponent on a USB drive, or other medium specified by the Office of Judicial Records from time to time, together with any associated player."

what ADA directed Expert Witness to do, but Expert Witness did not limit his review of the phone to the specific file that had been requested by the Court. Rather, he extracted all of the photos and videos in the phone.

- **Recommendation 18.** All discussions between case-related counsel and the Court should be on the record. While it may be preferred from some discussions to be held in camera and out of the public courtroom, any discussion that relates to evidence in the case, legal issues or proposed conduct of the attorneys should be recorded. The Court should not dismiss the court reporter or DRT recorder until all case discussions are complete.

<u>Contributing Factor 8</u>: The DAO Technical Services Unit (TSU) issued a report that inaccurately opined that the data in the phone had been manually altered.

<u>Contributing Factor 9</u>: The DAO TSU report was provided the evening before the final day of trial and no continuation was requested or granted *sua sponte* to facilitate appropriate review of the new forensic data and opinion.

Upon reviewing the video and photo log, Expert Witness noticed that the video in question was in an unexpected position in the video list, in that it was not numbered in order relative to the files next to it and had a nonstandard title. He had recently participated in a case where the defendants had manipulated their phone's date/time stamp feature as part of a fabricated alibi and in part due to this prior recent experience, he reached the conclusion (which later proved to be inaccurate) that Mr. Cortez or his wife must have altered the date/time stamp for the birthday party video so that it would conform with Mr. Cortez's alibi. He alerted ADA to this conclusion and, at ADA's direction, created an expert report explaining what he believed he had learned and his conclusions. ADA faxed that report to defense counsel that evening prior to trial the next day.

The extraction program generated a list of files and dates and times that various files were created by the phone. Upon reviewing the video and photo log, Expert Witness noticed that the video in question was in an unexpected position in the video list and had a nonstandard title. He reached the conclusion that the date/time stamp for the alibi video had been altered and created an expert report explaining what he had learned and his conclusions, which was faxed to defense counsel that evening. That report was ultimately proved to be inaccurate, but the errors were not discovered until after the trial and conviction.

The truncated timeframe in which evaluation of the technical evidence took place raised several concerns. Although all actors agreed the development was significant, none sought even a brief delay to evaluate the new information. Again, the primacy of perceived efficiency and achieving finality had greater weight in the decision-making than an interest in accuracy.

The day after the adjournment, the trial Judge and the ADA described on the record what had transpired at the end of the previous day, stating that the original discussions on the topic had not been recorded. ADA advised the court that as a result of the Court's request, the DAO now had

"rebuttal evidence" that had not previously been available, and that the DAO had prepared a report outlining this evidence.

The Judge stated for the record that he did not perceive the acts of the DA's Office related to the phone to be an illegal search or seizure of the contents of the phone because the downloading of all the video files was a "by-product" of the agreed plan to determine how to show the videos on a large screen. Defense counsel objected to the admissibility of the report on the basis of relevance and was overruled by the court. [23] The video was shown to the jury and the defense rested. At no time did defense counsel request an extension of time to review the expert report, or to engage an expert on behalf of the defense.

Contributing Factor 10: TSU Director is accepted as expert and no defense expert is consulted or presented.

The ADA then called the technical services Expert Witness to the stand. Expert Witness set forth his qualifications as an expert in the field of "certified digital forensic examiner" and explained his conclusions about the manipulation of the cell phone. Defense counsel had the opportunity to cross examine Expert Witness but did not object to his qualification as an expert, and thus he was admitted as an expert witness by the court.

There was unanimous agreement among the participants interviewed that that the sudden and unanticipated introduction of the DAO's expert testimony on the date/time stamp of the video was a material development in the case. There was also unanimous agreement in hindsight that none of the participants, including prosecutors, defense attorney, court, and even Expert Witness himself, created sufficient time for a comprehensive evaluation of this new information.

Additionally, the expert in this case was a DAO employee who worked exclusively for the DAO. Any evidence that is presented by a non-neutral party raises concerns about potential bias, and protocols should be developed that take these issues into account.

Contributing Factor 11: The trial attorneys and the Court lacked sufficient technical knowledge to evaluate the expert's opinion statements.

Expert Witness testified that his extraction software automatically arranged the video files in the order of their numeric file names. He testified that with the example of the two videos at issue (those that had been presented by defense counsel of the birthday party), the "first" one was named 0001.3GP and was dated 4/13/11 with a time of 6:28 p.m. (contrary to defense testimony). The "second" video was named 0005.3GP and dated 8/22/10. Because the "first" video had the lower numbered file name, it should have been recorded before the other, yet the "second" file had the earlier date. He testified that because of the irregularity in the name-date order it was his "professional opinion" that the dates had been altered in some way.

Significantly, in response to defense cross-examination, Expert Witness testified that "without conducting further examinations on the phone, a like model phone, I can't determine exactly

[23] The transcript does not indicate that defense raised a specific constitutional objection, but the court discussed the issue and stated that there was no 4th amendment violation.

when that video was recorded" and further that he could not "determine if you're able to manipulate the name of the video." He also acknowledged that if someone had altered the files in the way the witness described, by changing the phone's date, they could have inserted any date they wished in the files.[24]

- **Recommendation 19.** In any case where new technical evidence has emerged that was not anticipated, discussed or otherwise disclosed in the pre-trial stage, the Court should ensure that the trial includes adequate safeguards for the defense and the prosecution, including continuing or bifurcating the trial or appointing a neutral expert under Pa.R.E. 706. Such an independent expert could assist the court in understanding the relevant issues so that evidentiary decisions are more informed. The evaluation and report of such an expert would assist all the actors in their understanding of the evidence and would obviate the potential bias issues.

After all testimony was concluded, both sides rested, and the jury was charged. Later that day, the jury returned a verdict of guilty on all charges. George Cortez was sentenced to life without parole for the murder of Decedent. He received no penalty on the other charges.

[24] This line of questioning allowed the later common-sense argument that if one had chosen to make such an alteration to deceive a fact-finder in a homicide case, it would be more sensible to create a date and time that would serve as an actual alibi.

FACTORS CONTRIBUTING TO ERROR: POST-CONVICTION PHASE

Contributing Factor 12. The original cell phone and the original file extracted by the DAO TSU were not retained as evidence by the DAO.

Mr. Cortez filed a timely appeal to the Superior Court, which was denied.[25] A PCRA petition advancing several claims was filed, including defense counsel ineffectiveness in failing to sufficiently challenge the cell phone "expert" testimony. The original phone at issue in the first trial was never returned to trial defense counsel and was never located by the DAO or PPD. However, even without the physical phone, the post-conviction defense team was able to establish that the claims made by the expert witness were easily disprovable. Based upon simple Google searches about the make and model of the phone, the defense team was able to make multiple credible attacks on the expert's opinion testimony at trial. First, the naming convention testimony was disproved by a simple experiment with an independently purchased exemplar of the phone model at issue. PCRA counsel stated that his office conducted an experiment where the phone date was in fact manipulated, but the numeric naming convention was not affected in the way the witness had described. Second, the "1 hour earlier" time testimony was easily explained by a technical glitch in the phone model; the screen clock would automatically adjust for daylight savings time, but the imbedded time codes did not. Thus, all automatically named files made during Daylight Savings Time were timecoded one hour earlier than the actual time at which they were created. This glitch was a known issue within the code of the model of the phone at issue; its existence was discovered by PCRA counsel, an attorney with no specific technical expertise in cell phones, through Google searches.[26]

The trial court granted a PCRA hearing and ultimately, on April 15, 2015, granted the PCRA with no objection from the District Attorney's Office. The court reversed the conviction and vacated the sentence. The matter was then to be listed for a new trial.

- **Recommendation 20.** Whenever the contents or data from an original device is at issue, the CCP should require that the relevant data has been preserved or imaged consistent with Rule 1900 and it should be archived by the court.

[25] Trial defense counsel withdrew from the case after filing the notice of appeal and another attorney was appointed for the direct appeal.

[26] The relative ease with which the critical information was discovered leads to a strong inference that these issues could have been discovered during the trial had the even a short continuance been granted on request of the defense or *sua sponte* by the Court.

V. PREPARATION FOR A NEW TRIAL

The case was relisted for appointment of new counsel and was ultimately given a trial date of May 31, 2016. As the second trial approached, the DAO assigned a new ADA to take a fresh look at the case. During this time, representatives from the DAO and PPD met with the victim to discuss the case, and the new ADA ordered and received a number of recordings of prison phone calls placed by George Cortez which spanned the time both before and after the initial trial. Mr. Cortez is heard on those calls repeatedly denying involvement with the murder and suggesting that his brother Owen is culpable.

The DAO and new defense counsel specifically discussed the possibility that Owen Cortez, not George, was actually the shooter. After again reviewing the video of the shooting and noting the body-type differences among the shooters in the video, the DAO became confident that George and Owen could not both have been participants in the shooting. In light of the prison phone calls and the contemporaneous identification of Owen Cortez made by the independent eyewitness, the DAO concluded that Owen, not George, was the perpetrator of the shooting. Owen Cortez was interviewed, and he confessed to the murder and the shooting of the surviving Victim on April 22, 2016.

VI. THE EXONERATION

Once Owen Cortez had confessed to the murder and the shooting of the surviving Victim, and in consideration of all the other information that was then known by the DA's office, the DAO concluded that George Cortez had been inaccurately identified by the Victim and that Owen Cortez was the shooter. At that point, taking into account the new interviews with Victim, a review of the prison recordings, interviews with George Cortez, a review of the videos from the scene, a review of the cell-phone related technical evidence, and finally, the confession of Owen Cortez, the DAO took immediate action to exonerate George Cortez. The ADA made a motion to the trial court to *nolle prosse* all charges against George Cortez. The motion was granted and he was discharged.

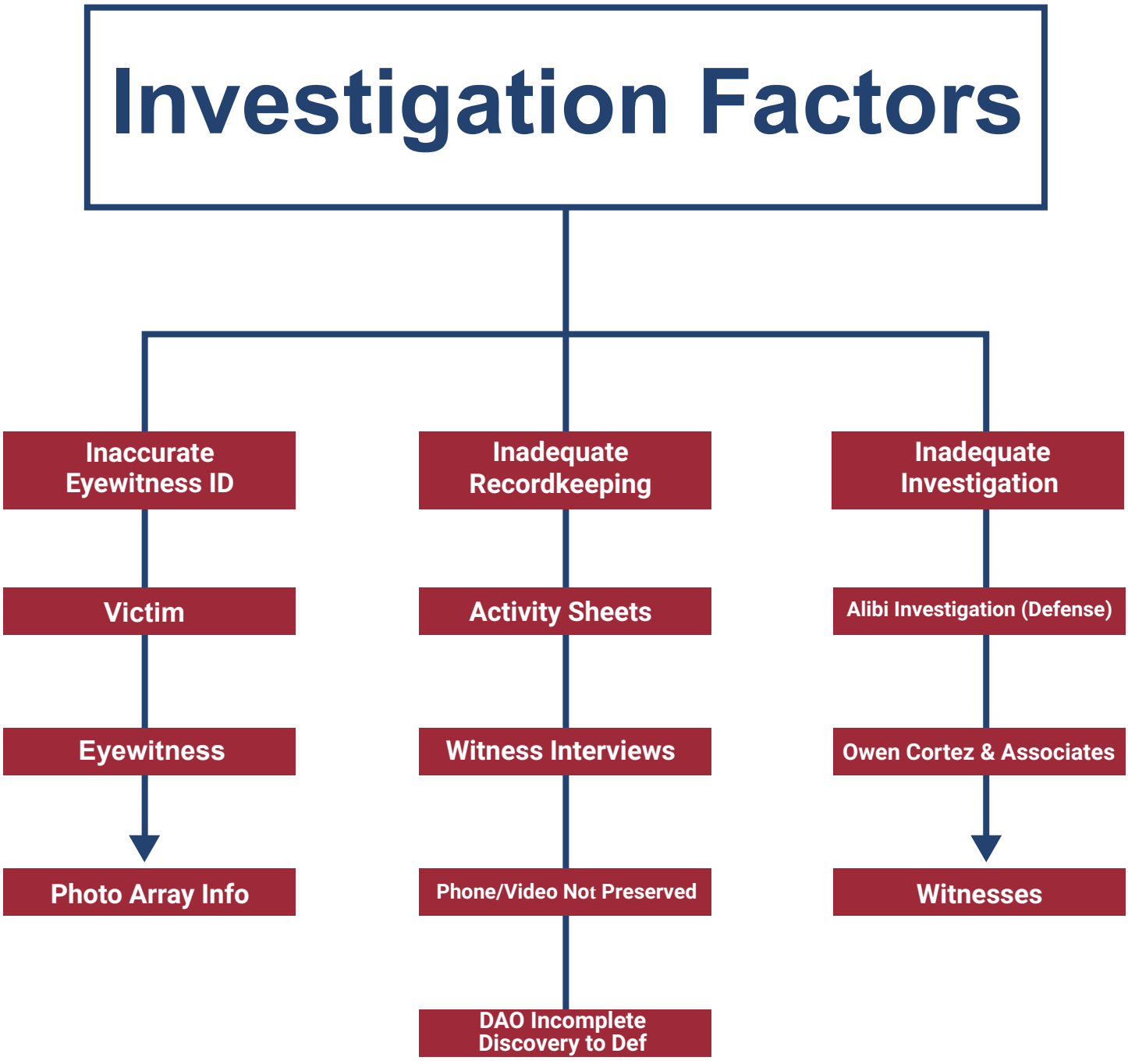

Investigation Factors
Inaccurate Eyewitness ID
Victim
Eyewitness
Photo Array Info
Inadequate Recordkeeping
Activity Sheets
Witness Interviews
Phone/Video Not Preserved
DAO Incomplete Discovery to Def
Inadequate Investigation
Alibi Investigation (Defense)
Owen Cortez & Associates
Witnesses

Figure 1.

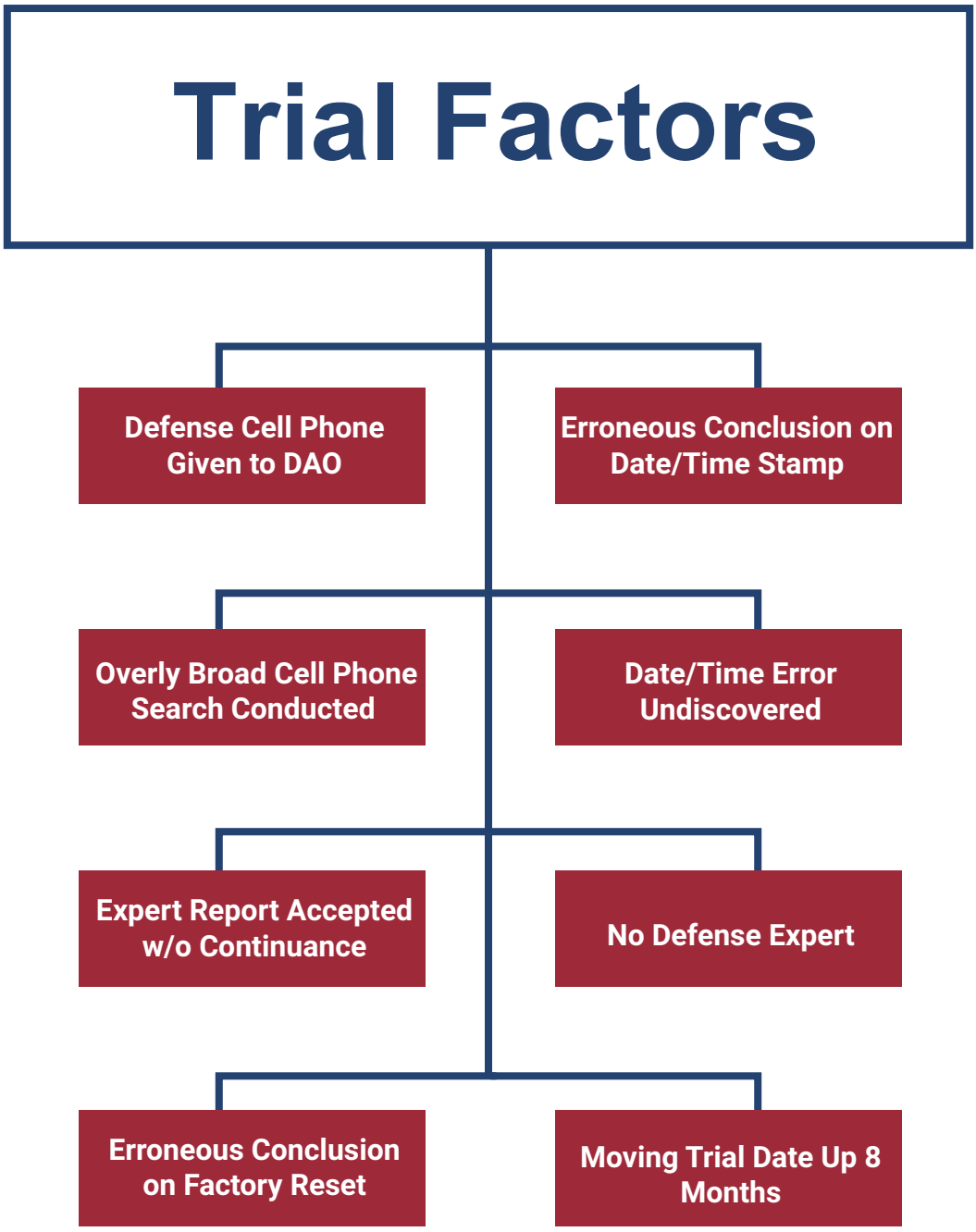

Trial Factors
Defense Cell Phone Given to DAO
Erroneous Conclusion on Date/Time Stamp
Overly Broad Cell Phone Search Conducted
Date/Time Error Undiscovered
Expert Report Accepted w/o Continuance
No Defense Expert
Erroneous Conclusion on Factory Reset
Moving Trial Date Up 8 Months

Figure 2.

Eyewitness ID Assessment Factors

- Victim got a good look at the shooter.
- Victim knew George for at least a year.
- Victim confirmed her ID from the hospital two days after the initial ID.

- The police did not collect a contemporane-ous statement of the shooting from Victim, either at the scene or en-route to the hospital
- Victim's statement identifying George was given while still on anesthesia and while bleeding substantially from a previously undisclosed would from the shooting.
- An independent eyewitness stated that Owen Cortez (George's brother) was the shooter.
- No confidence statement was taken of Victim at the time of the identification.
- Owen Cortez and George Cortez appear to have great physical and facial similarity.
- Owen Cortez was not interviewed by the PPD prior to the arrest of George Cortez.
- It appears that the PPD provided a single photo of George Cortez to Victim in response to her verbal identification of George as the shooter, rather than providing a photo array of potential matching suspects.
- The eyewitness who identified Owen Cortez refused to participate further in the investigation.
- There is no documentation reflecting any investigational follow-up of Owen Cortez.
- Several estimator variables (stress, lighting, presence of a weapon, etc.) existed that may have affected the Victim's identification of George Cortez.
- Victim's knowledge of Owen and her ability to delineate between them at the time of the incident is unknown.

TIMELINE

Date	Time	Event
4/13/2011	8:32 pm	911 Calls re: shooting of Decedent.
4/13/2011	8:36 pm	Police first arrive on scene.
4/13/2011	8:51 pm	Decedent pronounced dead.
4/13/2011	9:25 pm	PPD CSI personnel arrive at scene.
4/13/2011	10:19 pm	PPD stop AF for shooting - Cleared by Det.
4/13/2011	11:10 pm	Det. W interviews Off. SB at homicide.
4/13/2011	11:10 pm	Interview of Victim by Det. W and M. Victim identifies George Cortez in photo array.
4/13/2011 **OC File**[27]	11:40 pm	Singleton of George Cortez printed
4/13/2011		Activity Sheet from Det. B/W
4/14/2011		Activity Sheet by Det. B, Supervisors Lt. B/Sgt. C
4/15/2011	2:25 am	Interview of W1 by Det. M & S
4/18/2011	1:50 pm	Second Victim interview at Jefferson Hospital – ID of AF and CJ from photo arrays.
4/20/2011		Det. B asks DAO for arrest warrant – DENIED
4/26/2011 **OC File**	12:42 pm	8-pack of photos printed out for CJ; 8-pack printed for George Cortez

[27] **"OC File"** refers to the Owen Cortez File produced by PPD; the information referred to in these rows was not found in any other file related to George Cortez.

5/1/11	10:00 am	Det. B interviews Decedent's mother
5/2/2011		Arrest warrant Approved by DAO.
5/3/2011	6:15 am	George Cortez arrested by PPD
5/3/2011	1:26 am	Independent Eyewitness calls 911 - 2 males from day care shooting 2-3 weeks ago are in the Chinese store now.
5/3/2011 **OC File**	1:33 am	Owen Cortez and two others stopped at/near Chinese Store
5/3/2011	3:00 am	Owen Cortez and two others brought in for questioning
5/3/2011	3:20 am	Detectives interview the officers who responded to Chinese store call.
5/5/2011	1:30 pm	George Cortez (GC) jail phone call: "Other little fat boy Owen . . . No, I did not do it. It wasn't me."
5/9/2011		Subpoena URL Pharmacy Security footage re: alibi
5/12/2011	7:54 pm	GC Jail phone call: Says waiting to blow up Chinese store video to show it isn't him.
5/13/2011	8:20 pm	GC Jail phone call: Little brother was picked up at 1 am and then George arrested 5 am. Can't believe my little brother be doing me dirty like that.
5/25/2011		URL Pharmacy Security footage received.
6/14/2011	8:05 – 8:38 pm	GC Jail phone call: Says "little fat mother f***er running around . . . he's the reason I'm in this." Then calls Owen.
7/13/2011	11:23 pm	CJ pronounced dead, homicide by gunshot wounds
8/24/2011		Formal arraignment of George Cortez
9/13/2011		Discovery packet mailed to Defense attorney from ADA
10/27/2011		Defense requests court continuance to get further information/discovery

12/1/2011		Case continued for 9/10/2011
1/12/2012		Case assigned to trial Judge: Rescheduled for trial 1/23/2012
1/24 – 27/2012		Trial of George Cortez
5/24/2012		Post-Sentence Motions Hearing completed
6/22/2012		Notice of Appeal Filed - Superior Court
8/23/2012		Trial defense counsel withdraws
10/1/2013		Superior Court Appeal – Dismissed on motion of Appellant
3/10/2014		PCRA Filed by Retained PCRA Counsel
4/15/2015		PCRA Granted – New Trial to be scheduled
7/10/2015		New Defense Counsel appointed for second trial
7/22/2015		Trial Scheduled for 3/14/2016 (later moved to 5/31/2016)
2/22/2016 **OC File**		Owen Cortez convicted of robbery (unrelated to this case), sentenced to 18-40 yrs
4/22/2016 **OC File**		Letter from new ADA to Owen Cortez's counsel seeking statement from Owen Cortez
4/22/2016 **OC File**		Owen Cortez confesses to and is arrested for murder of Decedent and shooting of Victim and confesses.
4/22/2016		DAO moves for *Nolle Pros* of George Cortez

STAKEHOLDER PARTICIPANTS

Court of Common Pleas - First Judicial District

- Hon. Leon Tucker, Supervising Judge of Criminal Trials
- Hon. Sheila Woods-Skipper
- Hon. Benjamin Lerner

Philadelphia District Attorney's Office

- Carolyn Engel Temin, First Assistant District Attorney
- Dana Bazelon, Senior Policy Counsel

Defender Association of Philadelphia

- Mark Houldin, Policy Director
- Byron Cotter, Director of Alternative Sentencing

Philadelphia Police Department

- Staff Inspector Francis Healy, Special Advisor to the Police Commissioner
- Lieutenant Norman Davenport, Homicide Unit
- Sergeant Matthew White, Special Advisor's Office

Administrative Office of Pennsylvania Courts

- Stephen Feiler, Ph.D, Director of Legal Education

Temple University, Beasley School of Law

- Jules Epstein, Director of Advocacy Programs