

Houston! We Have a Problem!

The Houston Police Department Crime Laboratory is the paradigmatic example of a failed forensic agency. According to a state senator, “the validity of almost any case that has relied upon evidence produced by the lab is questionable.” (Rodney Ellis, Editorial, *Want Tough on Crime? Start by Fixing HPD Lab.*, HOUSTON CHRON., Sept. 5, 2004.)

The story began with an investigation by a TV station, which led in turn to a state audit of the lab in December 2002. The audit revealed a dysfunctional organization with serious contamination issues and an untrained staff using shoddy science. As described by a later investigation, “the DNA Section was in shambles—plagued by a leaky roof, operating for years without a line supervisor, overseen by a technical leader who had no personal experience performing DNA analysis and who was lacking the qualifications required under the FBI standards, staffed by underpaid and undertrained analysts, and generating mistake-ridden and poorly documented casework.” (THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (June 30, 2005) [hereinafter THIRD REPORT].) As a result of these findings, the DNA unit was shut down.

The exonerations

As a result, several defendants have been exonerated. For example, Josiah Sutton was convicted of rape in 1999 based on flawed DNA evidence: “[P]rosecutors in Mr. Sutton’s case had used [DNA] to convict him, submitting false scientific evidence asserting that there was a solid match between Mr. Sutton’s DNA and that found at the crime scene. In fact, 1 of every 8 black people, including Mr. Sutton, shared the relevant DNA profile. More refined retesting cleared him.” (Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Crime Testing in Houston Cases*, N.Y. TIMES, Aug. 5, 2004.)

Paul C. Giannelli is the Albert Weatherhead III and Richard W. Weatherhead Professor of Law at Case Western Reserve University School of Law in Cleveland, Ohio, and the coauthor of *Scientific Evidence* (Lexis 3d ed., 1999). He is also a contributing editor to the ABA’s *Criminal Justice* magazine and a member of its editorial board.

In an earlier case, George Rodriguez was convicted of rape on “scientifically unfounded and inaccurate” testimony. (Sylvia Moreno, *Police Lab’s Troubles Grow: Problems in Houston Lead to Moratorium on Executions*, WASH. POST, Oct. 2, 2004 (“[T]his week, the district attorney’s office announced that a new, independent analysis of chemical testing used to convict Rodriguez found the testing was inaccurate.”).) After reviewing the case, a panel of experts concluded that the lab examiner “either lacked basic knowledge of blood typing or gave false testimony.” (Liptak & Blumenthal, *supra*.)

Other revelations concerned the toxicology, serology, and ballistics units of the lab. Moreover, these problems were compounded by the district attorney’s failure to recuse himself from the case, as 22 judges had requested. (Roma Khanna & Steve McVicker, *DA Office Kept in Dark on Lab, Rosenthal Says*, HOUSTON CHRON., July 10, 2003 (“Rosenthal also adamantly refused to recuse himself from investigations of the lab’s problems, allowing for the appointment of a special prosecutor, despite the urging of 22 state district judges and others.”).) Two grand juries looking into the role of prosecutors in the lab cases rejected the assistance usually provided by the D.A.’s office and called its own witnesses, becoming that rare phenomenon—a “runaway” grand jury. (Adam Liptak, *Prosecutions Are a Focus in Houston Lab Scandal: Grand Jury Seen as Widening an Inquiry*, N.Y. TIMES, June 9, 2003, at A18.)

Texas now requires its labs to be accredited. (TEX. CRIM. PROC. CODE art. 38.35 (2004) (requiring accreditation by the Department of Public Safety).)

The independent report

In addition, Houston commissioned an independent investigation of the laboratory. In its first three months, that investigation found myriad deficiencies. (THIRD REPORT, *supra*.) First, four instances of “dry labbing” (reporting results without doing tests) in the drug section were disclosed. These incidents were apparently well known within the lab. One of the two examiners involved was still employed by the lab, having been reinstated by the police chief after being removed from his position by the lab. This examiner filed a harassment complaint against one of his superiors who had discovered the malfeasance. They both received the same disciplinary sanction.

Second, the technical leader in the DNA unit had been removed and never replaced, leaving a six-year vacancy in an important supervisory position. To compound matters, he was reassigned to head the quality control program, a critical task that even he admitted he did in a lackluster fashion. In short, having failed in one job, he was “booted upstairs.”

Third, serious backlog problems with the processing of rape kits remained unaddressed: “In March 2002, Mr. Bolding estimated that there were 19,500 sexual assault kits received by HPD that had never been processed, some dating as far back as 1980.” The lab was analyzing only “known suspect” cases—i.e., persons already arrested. This meant that “cold cases” were not being entered into the national DNA database (CODIS), where they might have produced a cold hit and taken a rapist off the streets. Even with arrestees, the lab was incredibly slow. For example, when Lynn Jones was arrested and charged with the sexual assault of a child, he remained in jail for nine months while the DNA test that would eventually exonerate him was run.

Fourth, 34 homicide and sexual assault cases were badly water damaged by tropical storm Allison in 2001 due to a leaking roof. “In 2003, several Crime Lab Employees told internal affairs investigators that this biological evidence had become so saturated with water that they observed bloody water dripping out the boxes containing the evidence and pooling on the floor.” (*Id.* at 45.)

Fifth, the laboratory “stopped performing lab-wide quality control audits in 1997,” and when audits were performed in the DNA unit (as required by federal standards), they were superficial at best. “Mr. Bolding’s reviews of the DNA/Serology Section, using the [FBI] Quality Assurance Standards for Forensic DNA Testing Laboratories performed at the end of 2000 and 2001 described a very different picture of the state of that Section than did the outside audit in December 2002, which used the same standards.” (*Id.* at 5.) Indeed, the section was shut down after

the 2002 audit, demonstrating the value of external audits when compared to internal ones.

Sixth, key personnel failed to meet educational requirements: “Mr. Bolding, who had served as the technical leader of the DNA/Serology Section following Dr. Sharma’s removal from the Section in 1966, lacked sufficient training and education in statistics. Our preliminary review suggests that in several cases involving mixtures, the DNA analysts performed statistical calculations incorrectly. We also already have encountered deficiencies in the documentation contained in analysts’ case files.” (*Id.* at 65.)

Seventh, proficiency testing results were sub par: “We found numerous errors in the typing results in the serology proficiency tests.” (*Id.* at 61.)

Finally (and probably not much of a surprise), the laboratory director was oblivious to all these problems. “On December 13, 2002, the audit team briefed Mr. Krueger on its findings. Mr. Krueger recalls that the audit team told him the DNA section was in shambles. He told us he was completely surprised by this report. . . .” (*Id.* at 50-51.)

The chair of the legislative committee investigating the lab has stated: “It’s a comedy of errors, except it’s not funny.” (Adam Liptak, *Review of DNA from Houston Police Crime Lab Clears Man Convicted of Rape*, N.Y. TIMES, March 11, 2003 (quoting state Representative Kevin Bailey).) No. It certainly is not funny. The innocent were convicted, and the guilty went free.

At the behest of the Criminal Justice Section, the ABA House of Delegates adopted a resolution recommending that “Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.” (See AMERICAN BAR ASSOCIATION, ACHIEVING JUSTICE: REPORT OF THE ABA CRIMINAL JUSTICE SECTION’S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (2006).)