



U.S. Department of Justice

Criminal Division

Deputy Assistant Attorney General

Washington, D.C. 20530

September 22, 2014

Greg Abbott
Texas Attorney General
Capitol Station
PO Box 12548
Austin, TX 78711-2548

Dear Mr. Abbott:

As you may be aware, in 1996, following allegations of improper practices by certain FBI Laboratory examiners, the United States Department of Justice (Department) established a Task Force to ensure that no defendant's right to a fair trial was jeopardized by the performance of a criticized FBI Laboratory examiner. A subsequent report by the Department's Office of Inspector General (1997 OIG Report)¹ specifically identified 13 examiners whose work may have failed to meet professional standards.²

Thereafter, the Task Force identified the cases in which the criticized examiners offered analysis or testimony, determined whether the cases resulted in convictions, and provided notice of the OIG Report to the responsible prosecutors so that they could make any necessary disclosures. In certain cases, the Task Force secured Independent Scientific Reviews (ISRs) of the work of criticized examiners and, where such ISRs were performed, forwarded the resulting reports to the responsible prosecutors. After forwarding the ISRs, the Task Force generally did not track or maintain records of any subsequent actions taken by prosecutors.

¹ "The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases" (April 1997). The report can be found online at <http://www.justice.gov/oig/special/9704a/>.

² The criticized examiners were Richard HAHN, Robert HECKMAN, Wallace HIGGINS, Alan JORDAN, Lynn LASSWELL, Michael MALONE, Roger MARTZ, J. Christopher RONAY, Terry RUDOLPH, James Thomas THURMAN, Robert WEBB, Frederic W. WHITEHURST, and David WILLIAMS.

Beginning in 2012, the OIG undertook a review of the work of the Task Force. In July 2014, the OIG issued its findings in a report entitled, “An Assessment of the 1996 Department Task Force Review of the FBI Laboratory” (Assessment).³ The OIG identifies a number of deficiencies in the work of the Task Force, and makes five recommendations, which are described in Chapter Seven of the Assessment. The Department concurs in all five recommendations.

The Department already has complied with the OIG’s first recommendation, which is to provide “case-specific notice” to persons currently on death row or awaiting resentencing or retrial for capital offenses.⁴ Regarding the OIG’s second recommendation, the Department is in the process of determining whether, in death penalty cases in which the defendant has died (either from natural causes or by execution), retesting of physical evidence is possible and, if not, undertaking the review of any available testimony, Laboratory reports, bench notes, and other relevant materials.⁵

³ The Assessment can be found online at <http://www.justice.gov/oig/reports/2014/e1404.pdf>.

⁴ All persons in this category were convicted of state offenses. Case-specific notice includes (a) a copy of the 1997 OIG Report, (b) a brief description of the 1996 Task Force review, (c) whether the prosecutor involved in that case advised the Task Force of his or her assessment of whether the Laboratory evidence was material to the conviction, (d) whether the Task Force referred the case to the FBI for review by independent scientists, (e) whether an independent scientist prepared a report, and (f) a copy of any such report.

⁵ In a separate effort, the Department is conducting a comprehensive review of microscopic hair comparison analysis or testimony provided in more than 20,000 cases prior to December 31, 1999, when mitochondrial DNA testing became routine at the FBI Laboratory. The purpose of this review, which is ongoing, is to ensure that analysis or testimony by FBI Laboratory personnel regarding hair comparison properly reflected the bounds of science, and that no person is or has been deprived of a fair trial based on flawed analysis or testimony. The review of hair comparison analysis or testimony is not limited to the work of particular examiners; rather, it focuses more broadly on analysis or testimony by all FBI hair comparison examiners who found positive associations between evidentiary hair and a known hair sample. The Department has been working in cooperation with both the Innocence Project and the National Association of Criminal Defense Lawyers, and is committed to employing practices and procedures that are intended to ensure an efficient and meaningful assessment of the historical work of all hair examiners, and effective and documented notice to affected defendants.

Consistent with the OIG's third recommendation, the Department has endeavored to provide case-specific notice to non-capital defendants whose cases involved the Task Force's submission of any analysis and/or testimony by a criticized examiner to the FBI for an ISR.⁶ Given the age of the prosecutions implicated by the Task Force review, the Department has encountered some difficulty locating the defendants in this category and/or last known defense counsel. If the Department is able to locate a defendant, but is unable to identify or locate last known defense counsel, the Department intends to provide notice to the defendant and, where possible, provide copies of such notice both to a public defender organization or office in the state in which the prosecution took place and to the prosecuting authority.⁷ The correspondence from the Department to the defendant will indicate that the public defender organization or office and the prosecuting authority also received copies of the notice.

In addition, consistent with the OIG's fourth recommendation, the Department is committed to effectuating broad notice that the Task Force did not review all criminal cases that both resulted in convictions and involved one or more of the criticized FBI Laboratory examiners.⁸ Among the categories of excluded cases were those in which the defendant was convicted before 1985, as the FBI did not (during the pendency of the Task Force review) and does not now maintain a database that is capable of identifying such cases. If your office is aware of any such cases that previously were not identified for Task Force review, we respectfully request that your office bring them to our attention.

The Department also is engaging in similar outreach to defense and civil liberties organizations and offices throughout the country. In the context of those communications, we are both asking defense organizations to identify cases implicated by the 1997 OIG Report in which defendants were convicted before 1985, and inviting the organizations to inquire about other cases that may have been implicated by the 1997 OIG Report but were excluded from the Task Force review.

Finally, consistent with the OIG's fifth recommendation, the Department is tracking, and will continue to maintain records of, notice to specific defendants or defense counsel, and steps taken to provide constructive notice to categories of defendants whose identities are unknown.

Please disseminate this letter to local prosecuting authorities in your state.

⁶ According to the OIG recommendation, notice is not necessary if (a) the materiality and integrity of the evidence previously was litigated; (b) there is definitive evidence of prior notice; or (c) the prosecutor previously determined that the Laboratory evidence was not material to the conviction, and there is no indication that such determination was undermined by a lack of objectivity.

⁷ The Department is engaging in similar outreach to federal prosecutors and defenders.

⁸ The categories of cases excluded from the Task Force review are identified in Chapters Two and Six of the Assessment.

Thank you in advance for your cooperation. Please send any responses, questions, or comments by e-mail to LabReview@usdoj.gov or by U.S. Mail to: Office of Enforcement Operations, Attn: FBI Lab Review, 1301 New York Avenue NW, Washington, D.C. 20005.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul M. O'Brien". The signature is fluid and cursive, with a long horizontal stroke at the end.

Paul M. O'Brien
Deputy Assistant Attorney General