



**U.S. Department of Justice**

**Criminal Division**

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*Deputy Assistant Attorney General*

*Washington, D.C. 20530*

June 26, 2015

Office of Governor Nikki R. Haley  
1205 Pendleton Street  
Columbia, SC 29201

Dear Governor Haley:

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 the Inspector General (1997 OIG Report)<sup>1</sup> specifically identified 13 examiners whose work may have failed to meet professional standards.<sup>2</sup>

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.

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<sup>1</sup> "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/>.

<sup>2</sup> 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).<sup>3</sup> The OIG identified a number of deficiencies in the work of the Task Force, and made five recommendations, which are described in Chapter Seven of the Assessment. The Department concurs in all five recommendations, and is working toward complying with the same.

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.<sup>4</sup> The Department also has complied with the OIG’s second recommendation, which suggested that, in death penalty cases in which the defendant has died (either from natural causes or by execution), the Department retest physical evidence, if possible or, if not possible, undertake the review of any available testimony, FBI Laboratory reports, bench notes, and other relevant materials.<sup>5</sup>

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

<sup>4</sup> 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 FBI 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.

<sup>5</sup> 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.

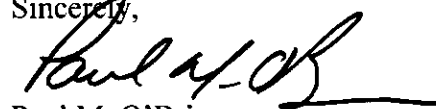
Consistent with the OIG's third recommendation, the Department has endeavored to provide case-specific notice to non-capital defendants whose cases involved the Task Force's submission of any analysis and/or testimony by a criticized examiner to the FBI for an ISR.<sup>6</sup> Given the age of the prosecutions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

The Criminal Division has referred to the FBI for location assistance the names of, and other identifying information for, the defendants it has not been able to locate. In addition, the Criminal Division has provided the same information to the NACDL.

Consistent with the OIG's fourth recommendation, the Department has effectuated broad notice, including to state and federal prosecuting offices and defense and civil liberties offices and organizations, 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, including cases 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.<sup>7</sup>

The Department respectfully requests that the Office of the Governor disseminate this correspondence, as appropriate. Upon request, the Criminal Division will provide to your office a list of cases in your state that were within the scope of the Task Force review. If your office has questions, please contact me at (202) 514-0169.

Sincerely,

A handwritten signature in dark ink, appearing to read "Paul M. O'Brien", with a stylized flourish at the end.

Paul M. O'Brien  
Deputy Assistant Attorney General

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<sup>6</sup> 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 FBI Laboratory evidence was not material to the conviction, and there is no indication that such determination was undermined by a lack of objectivity.

<sup>7</sup> The categories of cases excluded from the Task Force review are identified in Chapters Two and Six of the Assessment.