An Assessment of the 1996 Department of Justice Task Force Review of the FBI Laboratory

U.S. Department of Justice
Office of the Inspector General
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EXECUTIVE SUMMARY[1]

This is the third review by the Office of the Inspector General (OIG) since 1997 related to alleged irregularities by the Federal Bureau of Investigation (FBI) Laboratory (Lab).[2] The first two OIG reports focused on alleged FBI Lab deficiencies, the conduct of individuals brought to our attention by a whistleblower, and remedial actions the FBI took in response to our recommendations. This report addresses how the Criminal Division Task Force (Task Force), created by the Department in 1996 and whose mission was redefined in 1997, managed the identification, review, and follow-up of cases involving the use of scientifically unsupportable analysis and overstated testimony by FBI Lab examiners in criminal prosecutions. We analyzed the Task Force's review of cases involving 13 FBI examiners the Task Force determined had been criticized in the 1997 OIG report. We included in our review a close examination of cases handled by 1 of the 13 examiners, Michael Malone, the Lab's Hairs and Fibers Unit examiner whose conduct was particularly problematic.

Although the Task Force made a diligent effort to manage a complex review of thousands of cases, we found the following serious deficiencies in the Department's and the FBI's design, implementation, and overall management of the case review process.

First, despite some effort by the Task Force to segregate for priority treatment cases involving defendants on death row, the Department and the FBI did not take sufficient steps to ensure that the capital cases were the Task Force's top priority. We found that it took the FBI almost 5 years to identify the 64 defendants on death row whose cases involved analyses or testimony by 1 or more of the 13 examiners. The Department did not notify state authorities that convictions of capital defendants could be affected by involvement of any of the 13 criticized examiners. Therefore, state authorities had no basis to consider delaying scheduled executions.

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[1] Department of Justice Inspector General Michael E. Horowitz recused himself from this review because he occupied senior management positions within the Criminal Division from 1999 through 2002. We did not interview Mr. Horowitz or review his conduct because of the inherent conflict for this office to evaluate the role of the Inspector General. Although auditing standards are not applicable to this review, which is not an audit, they provided useful guidance on this issue. *See* Generally Accepted Government Auditing Standards (December 2011).

[2] U.S. Department of Justice Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (April 1997) and *The FBI Laboratory One Year Later: A Follow-Up to the Inspector General's April 1997 Report on FBI Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (June 1998).

As a result, one defendant (Benjamin H. Boyle) was executed 4 days after the 1997 OIG report was published but before his case was identified and reviewed by the Task Force. The prosecutor deemed the Lab analysis and testimony in that case material to the defendant's conviction. An independent scientist who later reviewed the case found the FBI Lab analysis to be scientifically unsupportable and the testimony overstated and incorrect. Two other capital defendants were executed (Michael Lockhart in 1997 and Gerald E. Stano in 1998) 2 months and 7 months, respectively, before their cases were identified for Task Force review as cases involving 1 or more of the 13 examiners. Although we found no indication in the Task Force files that the Lab analyses or examiners' testimony were deemed material to the defendants' convictions in these cases and, according to the FBI, the OIG-criticized examiner found no positive associations linking Lockhart or Stano to the crimes for which they were convicted and executed, the Task Force did not learn this critical information before the executions so that appropriate steps could have been taken had the analyses or testimony been material to the convictions and unreliable.

Another capital defendant (Joseph Young) died in prison of natural causes in 1996 before the 1997 OIG report was published. However, the Task Force did not refer his case to the FBI for review by an independent scientist even though the prosecutor had deemed the FBI Lab analysis and testimony to be material to the conviction. It is not known whether the outcome of this defendant's trial or his sentence would have been different without the examiner's testimony, which in other cases was deemed scientifically inaccurate, exaggerated, and unreliable. In all, the Task Force referred only 8 of the 64 death penalty cases involving the criticized examiners for review by an independent scientist. We found evidence that the independent scientists' reports were forwarded to capital defendants in only two cases. The Department should have handled all death penalty cases with greater priority and urgency.

Second, we concluded that the Department should have directed the Task Force to review all cases involving Michael Malone, the FBI Lab examiner whose misconduct was identified in the OIG's 1997 report and who was known by the Task Force as early as 1999 to be consistently problematic. Malone's faulty analysis and scientifically unsupportable testimony contributed to the conviction of an innocent defendant (Gates), who was exonerated 27 years later, and the reversal of at least five other defendants' convictions because of Malone's unreliable analysis and testimony. Malone retired from the FBI in 1999, but we learned, and the FBI confirmed, in May 2014 that Malone had been performing background investigations as an active contract employee of the FBI since 2002. After we brought Malone's contract employment to the attention of the FBI and the Department, the FBI reported that, effective June 17, 2014, Malone's association with the FBI was terminated.

Third, while we recognize that resource management is an appropriate consideration in the Department's decision-making, we found that categories of cases were inappropriately eliminated from the Task Force's scope, including most cases that pre-dated 1985, to reduce its work to a more manageable level. The decision not to review these categories of cases devalued the liberty of and collateral consequences potentially suffered by the defendants in these cases whose convictions may have been supported by unreliable FBI Lab analysis or testimony. In our view, the Department fell short of the Task Force's articulated mission to ensure that defendants' rights were not jeopardized by the conduct of any of the 13 examiners when it excluded categories of cases from the Task Force's review.

Fourth, we concluded that the Department failed to ensure that prosecutors made appropriate and timely disclosures to affected defendants, particularly in cases where the prosecutor determined that Lab analysis or testimony was material to the conviction and the report of the independent scientists established that such evidence was unreliable. Some federal and state prosecutors failed to disclose the independent scientists' reports or did so months or years after they received them from the Task Force. As a result, some defendants learned very late – or perhaps never – that their convictions may have been tainted. The Department should have required federal prosecutors, and strongly encouraged state prosecutors, to disclose the independent scientists' reports to defendants when the reports concluded that material Lab evidence was unreliable.

Fifth, we found that the Department failed to staff the Task Force with sufficient personnel to implement a case review of the magnitude it undertook. We also concluded that the FBI did not consistently maintain the project as a sufficiently high priority, as reflected by the irregular staffing it committed and its manner of hiring and managing independent scientists to review the work of the Lab examiners. In our view, 8 years was much too long for the Task Force and the FBI to complete the case reviews. The delays had significant consequences for individual defendants' cases.

Lastly, we found that the Department failed to require prosecutors to notify the Task Force of their disclosure determinations to enable the Task Force to track disclosures of independent reports to affected defendants. We found evidence that the prosecutors disclosed the reports in only 13 of the 402 case files we reviewed. As a result of the Department's failure to incorporate a tracking component in the case review process, the Task Force was unable to determine whether effective notification to defendants or their counsel had been achieved. In addition, the Task Force's communications to prosecutors did not emphasize the importance of acting swiftly to disclose the reports, particularly in death penalty cases.

In this report, we make five recommendations to the Department and the FBI regarding additional review of and notification to defendants whose convictions may have been tainted by unreliable scientific analyses and testimony. We also note that almost all of the problems we identified with the Department's and the FBI's design and management of the FBI Lab case review occurred long ago and most of the employees responsible for the review have left the Department or the FBI. During the course of this review, we provided the Department and the FBI with information about certain defendants – including all capital cases and all cases reviewed by independent scientists – so that the Department could take immediate action to ensure these defendants received appropriate notice of the possibility that their convictions were supported by unreliable evidence. The Department and the FBI have worked cooperatively with us to expedite potentially remedial action.

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CHAPTER ONE: INTRODUCTION

I. Background

This is the third report the Office of the Inspector General (OIG) has published since 1997 related to alleged irregularities by the Federal Bureau of Investigation (FBI) Laboratory (Lab).[3] This report addresses the effort by the Department of Justice (Department) from 1996 to 2004 to remedy improprieties in the Lab analysis of evidence, or in the testimony by FBI Lab personnel, that was used to support convictions in federal and state criminal cases. In particular, this report focuses on how the Criminal Division Task Force (Task Force), created by the Department in 1996 in response to alleged improprieties in the Lab, managed the identification, review, and follow-up of cases involving the use of unreliable analysis and overstated testimony by FBI Lab examiners in criminal cases.[4]

We conducted this review to assess the process and implementation of the Department's Task Force case review and to determine whether additional cases warrant review to meet the Task Force's objectives. We found critical deficiencies in the case review process and implementation. Given that there are at least seven defendants whose convictions were tainted by unsupportable FBI Lab analysis or testimony after they each served lengthy prison terms (see Appendix A), this report includes recommendations to the Department and the FBI regarding additional review of and notification to certain defendants whose convictions may have been tainted by unreliable scientific analyses and false, inaccurate, or misleading testimony.

In view of the potential effect of our report on individual defendants' cases, we have taken steps during this review to enable the Department to

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[3] U.S. Department of Justice Office of the Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (April 1997) and *The FBI Laboratory One Year Later: A Follow-Up to the Inspector General's April 1997 Report on FBI Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (June 1998).

[4] Department of Justice Inspector General Michael E. Horowitz recused himself from this review because he occupied senior management positions within the Criminal Division from 1999 through 2002. We did not interview Mr. Horowitz or review his conduct because of the inherent conflict for this office to evaluate the role of the Inspector General. Although auditing standards are not applicable to this review, which is not an audit, they provided useful guidance on this issue. *See* Generally Accepted Government Auditing Standards (December 2011).

move forward with ensuring that defendants receive notice, even if long overdue, of unreliable Lab analysis or examiner testimony that may have affected their convictions. To that end, we provided information regarding all capital cases, regardless of whether they were reviewed by independent scientists, and all cases reviewed by independent scientists (described in Chapter Two) to the Department and the FBI at several points during this review. We did this to enable the Department and the FBI to begin remedial action we anticipated recommending without awaiting completion of this report.

This report is divided into seven chapters. In the remainder of this Introduction, we describe the events that led to the OIG's current review and report. In Chapter Two, we describe the Task Force case review process and the independent scientists' review process, which the FBI managed. Chapter Three addresses our analysis of the timeliness of the independent reviews and transmissions of the independent scientists' reports. Chapter Four presents our findings about Michael Malone, the FBI examiner in the Hairs and Fibers Unit of the Lab who repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials. Chapter Five outlines the Task Force's and the FBI's death penalty case review process and the capital cases affected by the faulty FBI Lab analysis and examiner testimony. Chapter Six contains our analysis and conclusions. In Chapter Seven, we set forth our recommendations to the Department and the FBI.

A. OIG Investigation of Whitehurst Allegations, 1994–1997

The OIG first investigated the FBI Lab in 1994 when Frederic Whitehurst, an FBI Supervisory Special Agent and Ph.D. scientist who worked in the Lab between 1986 and 1998, complained to the OIG and the Department's Criminal Division about irregularities at the FBI Lab. Whitehurst, who performed chemical analyses of explosives and explosives residue, made allegations related primarily to bombings and explosives cases concerning the reliability of the procedures employed by the Lab to analyze evidence, the integrity of the Lab analysts, and the trustworthiness of testimony provided by Lab examiners. In particular, Whitehurst alleged that some Lab examiners improperly testified outside their expertise, presented unsupportable scientific conclusions, committed perjury, fabricated evidence, and failed to follow appropriate procedures. These allegations, along with subsequent allegations that Whitehurst made after his initial complaint to the OIG in 1994, encompassed events dating from the early 1980s through 1997. The allegations involved some of the most highly publicized and significant cases investigated by the FBI during that period.

The OIG's investigation focused on Whitehurst's allegations, as well as on additional problems either identified by the OIG or brought to the OIG's attention by Lab employees during the course of the investigation. Whitehurst's allegations primarily concerned three Lab components: the Explosives Unit, the Chemistry-Toxicology Unit, and the Materials Analysis Unit. Another purpose of the OIG's investigation was to determine whether the performance of Lab personnel and Lab practices satisfied general standards of conduct for forensic scientists and complied with Lab policies in effect at the time the work was performed. While the OIG's investigation of the Whitehurst allegations did not include an examination of all examiners or the operations of the Hairs and Fibers Unit of the Lab, it did review the conduct of one examiner from that unit.[5]

On April 15, 1997, the OIG issued a report of its investigation (1997 OIG Report), and in June 1998, the OIG issued a follow-up report. The 1997 OIG Report addressed 28 FBI employees – including Lab examiners and Whitehurst himself – whose conduct was the subject of Whitehurst's allegations, merited comment, or was otherwise identified to the OIG in the course of its investigation. While the 1997 OIG Report exonerated 11 of the individuals Whitehurst identified as having committed misconduct and did not substantiate his allegations against 3 others, it found significant instances of testimonial errors, substandard analytical work, and deficient practices by many Lab examiners. The 1997 OIG Report described scientifically flawed and inaccurate testimony, testimony beyond the examiner's expertise, improper preparation of Lab reports, insufficient documentation of test results, and scientifically flawed reports in some cases. In addition, the Report found that the Lab had an inadequate record management and retention system, a flawed staffing structure in the Explosives Unit, and various other management failures.

The 1997 OIG Report recommended reassignments and other actions for 9 of the 28 FBI employees investigated, including Whitehurst, and made 40 recommendations to enhance the quality of the FBI Lab's forensic work. The 40 recommendations were in the areas of: (1) accreditation, (2) structure of the Explosives Unit, (3) the roles of Lab examiners and resolutions of disputes, (4) report preparation, (5) peer review, (6) case documentation, (7) record retention, (8) examiner training and qualification, (9) examiner testimony, (10) protocols, (11) evidence handling, and (12) the role of management.

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[5] In particular, the OIG evaluated the work of Michael Malone, but only because a witness whom the OIG interviewed in connection with Whitehurst's allegations raised questions about the scientific integrity of specific testimony Malone had provided years earlier. The OIG concluded in its 1997 Report that Malone had testified falsely before a congressional committee about having conducted a tensile test on a leather strap – a test that measures the force required to break material.

B. Criminal Division Task Force

In January 1996, 2 years after the OIG had commenced its first investigation but prior to the release of the 1997 OIG Report, the Criminal Division, at the direction of Deputy Assistant Attorney General (DAAG) John C. Keeney, created a task force to conduct a preliminary review of the Whitehurst allegations and the materials Whitehurst provided in support of his allegations.[6] According to a January 4, 1996, memorandum from DAAG Keeney to all United States Attorneys and another memorandum of the same date to Louis Freeh, FBI Director, the purpose of the review at that time was to: (1) assess the validity of Whitehurst's allegations of "improprieties in the analysis and/or presentation of evidence by FBI [Lab] personnel"; (2) determine whether those allegations gave rise to any constitutionally required disclosures in specific prosecuted cases of exculpatory or impeaching material; and (3) inform federal and state prosecutors of such information so they could make disclosures if appropriate.[7]

In June 1997, 6 weeks after the OIG released its report, the Task Force determined that the work of 13 FBI Lab examiners (identified in Appendix B) addressed in the OIG Report warranted closer scrutiny.[8] Accordingly, the Task Force narrowed its scope from a broad review of all Whitehurst allegations to those cases involving only the 13 FBI examiners it determined had been criticized by the OIG (13 criticized examiners). A June 6, 1997 memorandum to all United States Attorneys from DAAG Keeney provided new guidance on the Task Force's mission in light of the OIG Report. Specifically, the Task Force's mission became: (1) identifying cases involving the 13 Lab examiners where the evidence at issue was material to a defendant's conviction, relying on the prosecutors to make that

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[6] Keeney's positions changed during the period 1995 through 2005. In addition to serving as a Criminal Division DAAG, he served as Acting Assistant Attorney General and Principal Deputy Assistant Attorney General.

[7] The seminal authority on prosecutors' disclosure obligations is the United States Supreme Court decision in *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), in which the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In a subsequent ruling, *United States* v. *Bagley,* 473 U.S. 667, 682 (1985), the Supreme Court held that evidence is "material" for *Brady* purposes "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

[8] Malone was not one of the examiners initially criticized by Whitehurst, and even after the OIG expanded its review to include Malone, the OIG did not criticize Malone for his work in the field of hair and fiber analysis. Rather, the crux of the OIG's criticism was Malone's false testimony.

materiality determination; (2) advising prosecutors in all cases resulting in a conviction about the criticisms of the 13 Lab examiners and providing a copy of or link to the 1997 OIG Report so prosecutors could determine and comply with their disclosure obligations;[9] (3) in cases where the evidence was deemed material, collecting and submitting available Lab reports, bench notes, and examiner testimony, if any, for review by independent scientists; and (4) transmitting the independent scientists' reports to the prosecutors so that the prosecutors could determine the need for any disclosures of such reports to defendants or defense counsel and make such disclosures as they deemed appropriate. Ultimately, as described by Louis Freeh, FBI Director, in a June 1997 letter to Congressman Robert Wexler, "This review . . . will ensure that defendants' rights to a fair trial were not jeopardized by the conduct of any of the 13 affected examiners."

It was the efforts of this Task Force, beginning largely in 1997, that were the focus of this OIG review, and which are discussed in the following chapters. The Task Force completed its work in July 2004 and officially dissolved in August 2005. According to former Task Force members, the Task Force did not issue a final report summarizing its work, its findings, or the number or nature of disclosures made to defendants.

C. Defendants Whose Convictions Were Tainted by Unreliable Lab Analysis or Testimony

In April 2012, media reporting concerning tainted convictions of several criminal defendants whose convictions relied upon forensic evidence analyzed by the FBI Lab drew public and congressional interest.[10] The OIG confirmed, as reported, that three defendants, Donald E. Gates, Santae A. Tribble, and Kirk L. Odom, had served sentences in excess of 21 years based in part on FBI hair analyses and testimony that DNA analysis subsequently proved erroneous. All three defendants were exonerated. In addition, another defendant, Benjamin H. Boyle, had been convicted of a capital offense and executed, in part, on the basis of FBI hair and fiber forensic analysis that an independent scientist later determined to be flawed.[11]

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[9] The June 1997 Keeney memorandum provided federal prosecutors with a link to the OIG Report on the OIG website and offered additional copies of the Report upon request. However, as stated in Chapter Two of this report, we found that the Task Force did not always provide this same information to state prosecutors.

[10] Spencer S. Hsu, "Convicted defendants left uninformed of forensic flaws found by Justice Dept.," *The Washington Post,* April 16, 2012; Spencer S. Hsu, "DOJ review of flawed FBI forensics processes lacked transparency," *The Washington Post,* April 17, 2012.

[11] We do not know whether Boyle's capital conviction would have been upheld or overturned based on remaining evidence because Boyle was executed before having the

(Cont'd.)

As explained in Chapter Two, the Task Force's review scope, implemented in 1997, did not include the *Tribble* and *Odom* cases because the examiners involved in those cases were not among those whom the OIG criticized in the 1997 OIG Report and because the Task Force limited its database search to cases dating back only to 1985. As we discuss in Chapter Five, however, we believe the Task Force had sufficient information to expand the scope of its review in September 1999 to include the review of all FBI Lab work involving hair comparison analysis and should not have limited its review to cases beginning 1985 or later. Had the Task Force not limited the scope of its review in these ways, the deficiencies involving the *Tribble* and *Odom* cases would have been identified much earlier.

The Task Force review scope did include the *Gates* and *Boyle* cases and those two cases were analyzed by both the Task Force and the FBI's independent scientists. The Task Force review process identified deficiencies in the Lab analysis or testimony in both cases. However, in *Gates*, the prosecutor failed to convey the identification of deficiencies to the defendant or defense counsel. In *Boyle*, the identification of deficiencies came too late to be of value to the defendant, who was executed 4 days after issuance of the 1997 OIG Report.

II. This Review

Shortly after media reporting about the exonerated defendants, Congressman Frank Wolf, Chairman of the Commerce, Justice, Science, and Related Agencies Subcommittee of the U.S. House of Representatives Committee on Appropriations, requested that the OIG evaluate the work of the Task Force. We decided to conduct this review as a follow-up to our 1997 Report concerning allegations of improper FBI Lab practices and misconduct by Lab examiners.[12]

For this report, we studied the Task Force case review process developed and implemented between 1996 and 2004 – the period when the Task Force conducted its work – and analyzed the results of that process. We considered the Department's initial response to earlier allegations made in 1994 by FBI Lab examiner Frederic Whitehurst that called into question the reliability, integrity, and trustworthiness of work performed by Lab

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opportunity to learn of the flawed forensic analysis or to appeal his conviction on that basis.

[12] Our review was separate from a currently ongoing effort by the Department and the FBI, begun in the summer of 2012, to identify and review thousands of cases where testimony about the results of microscopic hair examinations conducted by the FBI Lab was included as evidence in cases that resulted in conviction.

examiners, primarily in the FBI Lab Explosives Unit, Chemistry-Toxicology Unit, and Materials Analysis Unit. The Department's initial response to the Whitehurst allegations was relevant to this review because it influenced many of the later decisions made in connection with the Task Force's review process and constitutionally required disclosures – decisions which determined the Task Force's approach for the next 8 years. In addition, we explored the FBI's role in identifying cases resulting in convictions, hiring independent scientists to review FBI Lab examiners' analyses and testimony, and managing the independent scientists' work.

Our review identified the key participants and decision-makers involved in the Task Force, determined which decisions had the most significant impact on the case review process, and evaluated the consequences of those decisions. We also assessed the timeliness of the overall case review process, including how that process affected the death penalty cases the Task Force reviewed. We evaluated the timeliness of case identifications, initial Task Force notifications of the case review process to prosecutors, materiality determinations by prosecutors, the scientific review process, the transmissions of the scientists' reports by the FBI and the Task Force, and – when we were able to find and document them – the disclosures made by prosecutors to defendants or defense counsel.

We also examined the decisions the Task Force made related to former FBI Lab Hairs and Fibers Unit examiner Michael Malone, who handled a disproportionately large number of cases and provided seriously flawed analyses and testimony in many cases the Task Force reviewed. We found that, of the 13 FBI Lab examiners whose cases the Task Force reviewed, Malone's conduct was the most egregious. He repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials.

The OIG review team consisted of OIG attorneys and program analysts. We conducted our fieldwork from May 2012 through August 2013. Our fieldwork included data collection and analyses of Task Force case files and electronic databases; reviews of correspondence by and between the Task Force, the FBI, federal and local law enforcement officials who requested FBI assistance, prosecutors, defense counsel, and defendants; reports of independent scientists and other related documents; trial testimony, congressional hearings, and press articles; and factual and legal research on the status of defendants whose cases the Task Force reviewed and who were sentenced to death or lengthy prison terms. We reviewed thousands of pages of documents.

We interviewed former Task Force staff members and former and current senior Department and Criminal Division officials, including a former Department Associate Deputy Attorney General and a former

Criminal Division DAAG. At the FBI, we interviewed former and current Assistant General Counsels in the Office of General Counsel and a former Section Chief of the FBI Lab, as well as two independent scientists whom the FBI had hired as part of the Task Force and FBI case review process described in Chapter Two.

We faced several challenges in reviewing the work of the Task Force. For example, we were unable to interview certain people who played important roles in the 1996 Task Force review of the Lab, the most significant of whom was the late John C. Keeney, formerly a DAAG in the Criminal Division. Others who had left the Department or the FBI prior to our review were unavailable or unwilling to be interviewed.

Another challenge we experienced was understanding the organization and degree of completeness of the files maintained by the Criminal Division. A former Task Force member explained the filing system created for this case review and told us that the Task Force had intended to maintain a system that would capture all correspondence by and between it, the FBI, prosecutors, defense counsel, unrepresented defendants, and other third parties. Yet, despite what appears to have been considerable effort on the part of the Task Force to document its actions, the files we reviewed were not complete and certain files, folders, and boxes were missing in their entirety.

We understand that multiple individuals, including Whitehurst, made extensive requests pursuant to the *Freedom of Information Act* and that as a result of producing documents to comply with those requests, some documents may have been misplaced or misfiled. We also recognize that the passage of time since the conclusion of the Task Force's work may have affected the Department's ability to locate and produce some files. Although we reviewed every file available to us, the Task Force's failure to document certain critical events, such as disclosures made by prosecutors to defendants or defense counsel, and case-specific decisions, such as the elimination of cases falling into as many as 18 categories (discussed in Chapter Two), made it impossible for us to identify all cases and defendants eliminated from review.

In Chapter Two we provide more details about the Task Force case review process, including the key participants, the case identification procedures, the review scope, and the elimination of certain case categories. We also discuss the prosecutors' materiality determinations and the review of cases by independent scientists at the FBI.

CHAPTER TWO:
TASK FORCE CASE REVIEW PROCESS

I. Overview

According to many witnesses we interviewed, the magnitude and complexity of the Task Force case review process and implementation were unprecedented. We were told that never before had the Department undertaken such a massive case review with such potentially serious consequences. Former Task Force members told us they had many challenges to overcome, including negotiating roles and responsibilities with the FBI; managing communications and documentation concerning thousands of cases; compensating for imperfect case identification methods, unavailable or unresponsive prosecutors, missing, destroyed, or incomplete case files; managing an overwhelming number of cases; and developing a comprehensive system to document the Task Force case review process. Participants said that these challenges were compounded by insufficient resources, a lack of decision-making authority delegated to the Task Force, and a lack of continuity in both Task Force staffing and Department leadership.

Through our witness interviews and file review, we determined that there was an absence of planning and forethought with regard to disclosures to defendants that might be required as a result of the Task Force's findings. In particular, other than deciding to inform prosecutors of relevant information and deferring to the prosecutors about their disclosure obligations, we found no evidence that senior management considered the threshold for when disclosures of information to defendants would be legally required in cases involving 1 or more of the 13 examiners. Nor did we find any evidence that senior management considered the kind of information that should be disclosed or the importance of tracking such disclosures.

As we discuss later in this report, the initial Task Force review included over 7,600 federal and state cases involving the 13 criticized examiners. With the assistance of the FBI and federal and state prosecutors, the Task Force determined that approximately 2,900 of those cases: (1) resulted in a conviction (either by trial or guilty plea), (2) were cases awaiting trial or pending appeal, or (3) were sealed. For cases in active litigation, the Task Force worked directly with the prosecutors to ensure appropriate and timely disclosure to defendants or defense counsel. The majority of the 2,900 cases, however, were closed. According to FBI and Task Force documents we reviewed, these 2,900 cases also included a limited number of sealed cases without indication of the litigation status.

We include the sealed cases in our discussion of closed cases resulting in convictions.

For those cases resulting in a conviction, the Task Force requested that federal and state prosecutors determine the materiality of the forensic evidence to each defendant's conviction and, where the FBI Lab evidence was material to the conviction, provide relevant case materials to the Task Force. Where the Lab evidence was material to the defendants' convictions, the Task Force transmitted to the FBI, for review by at least 1 of 14 scientists selected by the FBI, the Lab reports, any underlying documentation from the Lab (such as bench notes and dictation notes), and the examiner's testimony, if any.[13] We found that the Task Force referred a total of 338 cases to the FBI. We determined that the independent scientists reviewed and completed reports for 312 of the 338 cases, relating to 402 defendants.[14]

After the independent scientists completed their reviews, the FBI forwarded the scientists' reports to the Task Force. The Task Force then transmitted copies of those reports to the federal or state prosecutors who handled the cases, and requested that the prosecutors determine if disclosure of the report, or other information, to defendants or defense counsel was required. The prosecutor determined what should be disclosed to the defense without input from the Task Force. Because the Task Force neither required notification of nor tracked the prosecutors' disclosures, we were unable to determine, with limited exceptions, which independent scientists' reports or other information were disclosed to defendants.

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[13] In April 2014, after reviewing a draft of this report, the FBI provided to the OIG for the first time a list of all independent scientists who reviewed cases for the Task Force. The list contained 14 scientists – 10 from independent agencies and 4 from the FBI Lab. Because 4 of the 14 scientists were employed by the FBI Lab, they were not, in our view, "independent." Nevertheless, for purposes of this report, our use of the term, "independent scientists" includes all 14 individuals who reviewed cases for the Task Force.

[14] The independent scientists did not review all of the 338 cases the Task Force referred to the FBI for a variety of reasons, including: (1) the bench notes and Lab report could not be located; (2) the FBI examiner's analysis was deemed inconclusive or not material after the case had been referred for independent review; (3) the FBI examiner only confirmed the work of another examiner and, therefore, the Task Force deemed independent review unnecessary; or (4) the case was eliminated from the Task Force's review scope after the referral but prior to the completion of the independent scientists' review. We discuss eliminated case categories later in this report.

In April 2014, after reviewing a draft of this report, the FBI provided to the OIG for the first time undated documents stating that the Task Force referred 333 cases to the FBI for review by independent scientists, resulting in 368 completed reports. This discrepancy may be attributable to the fact that some reviews by independent scientists involved the work of multiple FBI examiners under scrutiny, multiple evidence types, and multiple defendants.

Below, we describe the key participants in the Task Force case review process and the process as designed and implemented.

II. Key Participants in the Case Review Process

There were four sets of participants in the case review process: (1) Department management personnel within the Criminal Division, the Office of the Deputy Attorney General (ODAG), and the Office of the Attorney General (OAG); (2) the Task Force staff; (3) the FBI; and (4) the federal and state prosecutors.

Department Management: Senior management officials in the Department's Criminal Division, ODAG, and OAG took the lead in designing the case review process and supervising the Task Force. Through our file review and interviews, we found that at least 12 management level attorneys in the Criminal Division and Department, including the Attorney General, an Assistant Attorney General, an Associate Deputy Attorney General, and a DAAG, oversaw the Task Force at various times during its 8-year operation. Those senior officials were responsible for important policy decisions and legal interpretations related to the Task Force case review process and implementation but did not work on the day-to-day case review. The time periods during which senior Department officials oversaw the Task Force varied; some officials were involved for only 1 or 2 years. In addition, these officials had other concurrent responsibilities within the Department.

Former Task Force members told us about frequent changes in senior management leadership. One former member who remained on the Task Force throughout its duration stated that the lack of continuity in Department leadership resulted in different interpretations of how to implement the case review process and difficulty obtaining necessary guidance and decisions from senior management. In the following chapters we discuss how delays in the Department's decision-making affected the general pace of the review and how decisions such as whether and when to eliminate certain case categories from the review scope resulted in delays due in part to changing senior management leadership. We also discuss how the lack of continuity in Department leadership contributed to the Task Force's inability to provide authoritative guidance to the FBI and prosecutors and to address the serious problems with cases Malone handled.

Task Force Staff: The Task Force staff members were responsible for implementing the case review process as designed, including coordinating with the FBI and prosecutors, and managing the records and communications concerning the thousands of cases that were the subject of the review. Through our interviews and file review, we determined that for

the most part, none of the Task Force members participated in or made significant decisions about how the Task Force would operate. Rather, the Task Force received guidance and direction about its operation from Department management and implemented that guidance.

At the outset, the Task Force staff was comprised of one senior trial attorney supervised primarily by John Keeney, then serving as Acting Assistant Attorney General (AAG). DAAG Kevin DiGregory also provided oversight of the Task Force. In January 1996, a second trial attorney was hired to work full time on the Task Force. The second attorney became the head of the Task Force in October 1996 when the original senior trial attorney was promoted to another position in the Department. Between 1996 and 2004, the Task Force was also supported by two to three paralegals and, on some occasions, by a few student interns and administrative personnel. In June 2000, staff leadership of the Task Force changed again with the departure of the second trial attorney and elevation of another attorney to the position of lead attorney on the Task Force. During its 8 years of operation, we found that the Task Force staff included no more than two attorneys, three paralegals, and a few student interns and administrative personnel. For many of those 8 years, the staffing level was even lower. Moreover, only one person served continuously on the Task Force, first as a student intern, then as a contractor, and finally as a Department paralegal.

FBI: The FBI was responsible for identifying criminal cases handled by 1 or more of the 13 criticized examiners and for identifying, hiring, and managing the independent scientists it retained to review the cases referred by the Task Force. According to FBI and Task Force witnesses we interviewed, the FBI was not involved in discussions or decisions relating to notifications to defendants or defense counsel and had no responsibility for communicating with defendants or their counsel at any stage of the process. The FBI witnesses we interviewed told us that the FBI acted in a "support capacity" to the Task Force, not as co-leaders or co-managers of the case review process. In particular, these witnesses told us that the FBI's role was limited to communicating information about case identification to the Task Force staff, managing the hiring and work of independent scientists, and transmitting the completed independent reports to the Task Force. During our review, however, we found that the FBI was actively involved in decisions related to narrowing the scope of cases subject to review by the Task Force. We discuss these decisions and the FBI's role in making them in more detail below.

The FBI assigned one team – a supervisory paralegal and five paralegals – from its Civil Discovery Review Unit (CDRU) of the OGC to work full-time on the Lab case review beginning April 1997. In September 1999, the FBI temporarily reassigned the CDRU team to work on other matters. In

April 2000, the same team, minus one paralegal, resumed work on the Lab case review. In addition, the FBI added OGC attorneys, Chief Division Counsels in field offices, Lab personnel, and staff in other divisions to assist the CDRU team. We found no indication that the FBI assigned other staff to replace the CDRU team to ensure continued progress on the Lab review during the team's 7-month unavailability.

Prosecutors: Federal and state prosecutors assisted in the identification of cases within their jurisdictions that resulted in convictions and that would be subject to the Task Force's review. Their primary responsibilities, however, were to assess the materiality of specific evidence to the convictions in the cases they prosecuted and to make disclosures to defendants or defense counsel when constitutionally required. The responsibility for assessing materiality entailed retrieving case materials from their office or off-site storage files and reviewing the case materials to determine the role, if any, the evidence played in the defendant's conviction. If prosecutors deemed the FBI Lab analysis or testimony material to the conviction, then they were responsible for providing the case materials to the Task Force, which would then transmit those materials to the FBI for review by independent scientists. In addition, under the law, the prosecutors were required to disclose appropriate information, such as the independent scientist's report, to the defendant or defense counsel if there were a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Moreover, if prosecutors decided to disclose the independent scientists' reports to the defendants or defense counsel, then they were responsible for doing so in a timely way.[15] The prosecutors' materiality determinations and ultimate disclosure decisions were fundamental to the objectives that gave rise to the creation of the Task Force: preservation of the rights of the defendants whose cases involved analysis or testimony handled by 1 or more of the 13 Lab examiners.

The Department elected not to include as part of the case identification process any outreach to defense counsel or defense

[15] On April 15, 1997, immediately following publication of the OIG Report, then-Acting AAG Keeney sent a memorandum attaching a copy of the Report to all federal prosecutors and senior Criminal Division management attorneys, requesting that all state and local prosecutors be notified of the Report and be given access to it. In our review of Task Force files, we found that some federal and state prosecutors disclosed to defense counsel in individual cases the OIG Report and its potential relevance to the conviction of the defense counsel's client. Our research revealed, however, that the OIG Report was not uniformly provided to defense counsel in closed cases where the defendant's conviction might have been affected by the OIG Report. *See, e.g., Moss* v. *State of Florida,* 860 So.2d 1007, 1009 (2003) (defendant learned of OIG Report from newspaper article 4 years after publication of the OIG Report).

organizations. Our review of the Department's policy with respect to the work of the Task Force showed this decision was based on settled legal authorities and was approved by Attorney General Janet Reno on the recommendation of her senior advisors.[16]

III. Case Review Process in Detail

A. Review Scope and Case Identification Process

At the direction of Acting AAG Keeney, the case review process called for the Task Force to identify, with the assistance of the FBI and federal and state prosecutors, all cases that resulted in a conviction (by trial or guilty plea) in which forensic evidence had been analyzed or the subject of testimony by any of the 13 criticized Lab examiners.[17] The FBI identified most of the cases using its databases of federal, state, and local cases and a case identification checklist for use by its field offices. With regard to federal cases, Acting AAG Keeney asked all U.S. Attorneys' Offices to search their files for cases involving the 13 examiners. In addition, Acting AAG Keeney directed that each U.S. Attorney's Office review FBI-generated lists of federal cases to determine whether prosecution in the identified cases had resulted in convictions.

With regard to state and local cases, which together outnumbered the federal cases, there is evidence that Acting AAG Keeney or the Task Force considered seeking assistance directly from state attorneys general and district attorneys. We reviewed a draft memorandum and two draft letters addressed to those respective offices but we found no evidence in the Task Force files, that the draft letters were approved and sent. An internal Task Force e-mail, written by a then-senior Task Force attorney prior to the April 1997 OIG Report, stated that the FBI was concerned that sending a blanket notice to all state attorneys general and district attorneys regarding Whitehurst's allegations would "tarnish" the reputation of the Lab when the OIG had yet to make any adverse findings. Our file review showed that the Task Force ultimately did not seek assistance directly from state attorneys general and district attorneys. Instead, we found that after issuance of the 1997 OIG Report, the FBI tasked its field offices with conducting examiner-specific inquiries, directing those offices to contact the state and local prosecutors and local law enforcement officials who had requested the

[16] Attorney General Reno was criticized at the time for this decision by Gerald Lefcourt, President of the National Association of Criminal Defense Lawyers.

[17] Task Force members told us that the Department lacked authority to direct state prosecutors to assist in the case identification process or to demand their immediate assistance with the case review process.

original FBI Lab examination of evidence handled by the 13 examiners. The purpose of those contacts was to assist the Task Force in determining which cases had resulted in convictions.

Based on our file review and interviews, we found that the case identification process was long and arduous due to the sheer volume of cases, the decentralized search efforts, and frequent changes in Task Force staffing and management decisions. In total, the process of identifying cases at the federal, state, and local levels took approximately 8 years, beginning in 1997 and ending in 2004. We also determined that the scope of review for the universe of cases DAAG Keeney sought to capture was subsequently narrowed in significant ways, as described below.

1. Most Cases Pre-dating 1985 Eliminated from Task Force Review

The first scope limitation was one imposed by the FBI, which informed the Task Force during the case identification effort that it would not identify cases prior to 1985 because it did not have a computerized database of cases dating before that time.[18] No Task Force or FBI document we reviewed and no witness we interviewed stated that the Task Force staff, Criminal Division management, or other Department officials inquired of the FBI as to what resources would be required for the FBI to manually identify those cases arising before 1985.[19] The Criminal Division seems to have accepted the FBI's decision not to identify cases prior to 1985 and addressed identification of such cases only by encouraging prosecutors to make "appropriate efforts" to identify any cases pre-dating 1985. Thereafter, the Task Force focused its case search on the period between 1985 and 1996.

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[18] It remains unclear to us, despite interviews of multiple former FBI and Task Force personnel, what stage of investigative, prosecutorial, or court action determined whether a case was captured in the FBI database as of January 1, 1985. We determined, however, that defendants convicted and sentenced prior to 1985 were not captured in the database.

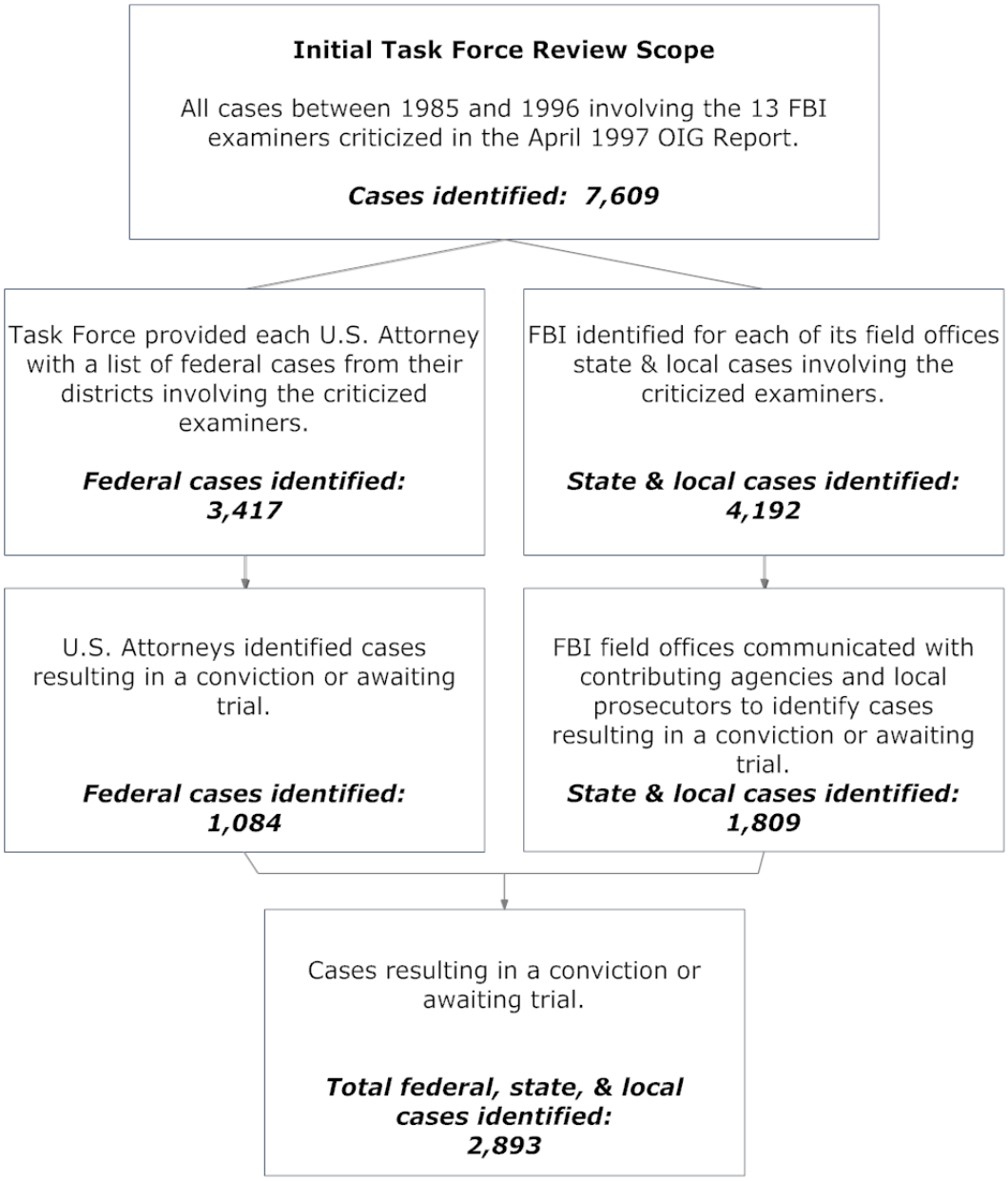
[19] In the course of our document review, we discovered an FBI Lab document purporting to memorialize a May 1, 1998, telephone call with an FBI Assistant General Counsel concerning the use of 1985 as the cut-off date for case retrieval. The typed notes referenced a "manual log" of hair and fiber cases that captured Lab reports between 1982 and 1987 and the existence of a separate computer database, "Express System," that captured reports in the Explosives Unit going back to 1972. The notes stated further that the Lab "demonstrated that we can pull up the old reports." Although the notes referenced the "[n]eed to determine if any other units maintain databases or tickler copies of Laboratory reports prior to 1985," we did not find any other document that discussed or referred any other sources of case information pre-dating 1985 and potentially helpful to the Task Force review.

As a result of this narrowed scope, an unknown number of cases prior to 1985 that included forensic evidence handled by 1 or more of the 13 examiners and potentially material to a defendant's conviction were, with limited exceptions, not reviewed by the Task Force. Moreover, given that at least 6 of the 13 examiners joined the FBI Lab before 1985, the possibility exists that additional problematic cases warranting independent review and disclosure to defendants eluded Task Force review as a result of the decision not to search FBI records for cases pre-dating 1985. Appendix B lists the 13 examiners and the years (where known) they joined the FBI. Our examination of cases the Task Force referred to the FBI for review showed there were at least 68 cases with convictions pre-dating 1985 and involving 1 or more of the 13 examiners. The Task Force did include those 68 cases in its review. The combination of the FBI's limiting the scope of the Task Force's review to cases beginning in 1985, and the Task Force's failure to expand its initial scope to all examiners in the Hairs and Fibers Unit, as discussed in Chapter Four, also resulted in an additional unknown number of cases with potentially tainted convictions. Notably, among the cases not reviewed because of the Task Force's artificially limited scope were those of Tribble and Odom, referenced in Chapter One. Both cases involved defendants who were exonerated by DNA testing and whose convictions were later determined to have been tainted by discredited hair evidence after they served lengthy prison terms (see Appendix A).[20]

Excluding the pre-1985 cases, the FBI reported in a 2007 summary document that the identification process yielded 7,609 cases involving the 13 examiners. Of those 7,609 cases, at least 2,893 cases resulted in convictions and, barring elimination for other reasons, would proceed to the next stage in the case review process: the prosecutor's determination of the materiality of the Lab evidence to the conviction. Figure 1 (next page) illustrates the case identification process and shows the number of cases identified.

[20] The testimony about hair evidence used to convict Tribble in 1980 and Odom in 1981 (and ultimately questioned) was analyzed by FBI Lab examiners James Hilverda and Myron Scholberg, respectively, according to court documents. Tribble spent 27 years in prison and Odom spent 21.5 years in prison before they were exonerated by DNA testing.

FIGURE 1: TASK FORCE CASE IDENTIFICATION PROCESS



Note: Regarding the Task Force review scope, a June 6, 1997, memorandum from John C. Keeney, Acting Assistant Attorney General, Criminal Division, to all United States Attorneys, First Assistant United States Attorneys, Criminal Chiefs, Criminal Division Section Chiefs, and Office Directors stated: ". . . there is no database which identifies pre-1985 cases. Therefore, each United States Attorney's Office should make appropriate efforts to identify any pre-1985 cases involving examiners identified in the OIG report."

Sources: The process for identifying cases was reported in a July 23, 1997 letter from William Esposito, Deputy Director, FBI, to Paul Fishman, Associate Deputy Attorney General. The numbers of cases were reported in a 2007 FBI summary document, "Lab Task Force Summary."

2. Other Cases Eliminated from Task Force Review

According to former Task Force members we interviewed, at the outset of the case identification process in 1996, the Task Force made as its top priority determining constitutionally required disclosures in pending litigation. For those active cases, the Task Force provided Lab reports and other related documents to prosecutors for disclosure to defendants or defense counsel. Once it made the necessary disclosures to the prosecutors, the Task Force did not subject the active cases to further review. We found no documentation indicating that the Task Force referred any active cases to the FBI for review by an independent scientist.

Thereafter, between September 1998 and April 2003, Task Force staff, senior Department management officials, and FBI personnel held meetings and exchanged correspondence in an effort to streamline the review process. The concerns each participant expressed focused on the large volume of cases the FBI had identified, the insufficiency of the resources available to review all the cases that resulted in convictions, and what the participants believed to have been an overbroad initial reading by the Task Force of the 1997 OIG Report. The Task Force's initial interpretation of the 1997 OIG Report had led it and the FBI to include in the review a Lab examiner whom the OIG did not find to have engaged in misconduct and other examiners whose primary work the OIG did not criticize at all.

We ascertained that as a result of the communications between 1998 and 2003, senior Department management officials and the FBI agreed to, and did, eliminate from the case review process 18 additional categories of cases. Appendix C provides a complete list of the case categories eliminated by the Task Force and the reasons cited for the elimination of each category. In one such category – the "small" cases – the Task Force notified prosecutors of the 1997 OIG Report.[21] However, elimination from review generally meant that the Task Force did not seek a determination by the prosecutor as to whether the Lab evidence was material to the conviction. Therefore, in those cases, no review of the Lab evidence was conducted by an independent scientist.

We found that the Department and the FBI provided a rationale in the correspondence for eliminating some of the 18 categories of cases, including that no defendant's constitutional rights were or could have been adversely affected by the lack of review. For example, cases involving defendants who were not convicted of an offense for which the evidence was handled by a

[21] Small cases were defined by the Task Force as cases in which the defendants "were fined, not incarcerated, or should have finished their sentence more than 6 years ago."

criticized FBI examiner were not included in the review process because the evidence was not relevant to the defendant's conviction. Similarly, cases where the conviction was vacated or reversed without subsequent retrial were not included in the review process because any Lab work related to the prosecution was no longer relevant or had no bearing on the defendant's constitutional rights.

According to an FBI summary dated April 18, 2003, 448 cases were eliminated either because allegations against the examiners had not been substantiated in the OIG Report, the examiners had not been criticized for their primary forensic analyses, or the cases were deemed "small" and not worthy of review. However, the 448 cases eliminated from review were associated with only 4 of the 18 categories of cases the Department and the FBI eliminated. Three of those categories (278 cases) related to unsubstantiated allegations against each of 3 examiners. The fourth category (170 cases) entailed "small" cases – defined in the FBI summary as those in which defendants were fined, not incarcerated, or should have finished their sentence more than 6 years earlier. Although the Task Force maintained a database that identified some of the categories of cases that were later eliminated, we were unable to identify which cases and individual defendants the Task Force eliminated from review as a result of the Department and FBI decisions described above.

The Department and the FBI eliminated other categories of cases, however, without an explanation articulated in the correspondence we reviewed. We highlight below five categories of cases excluded from the review process even though there was a potential that the defendants in these categories would suffer serious, adverse consequences if their convictions were tainted by unreliable Lab analysis or testimony.[22] These categories include cases where:

- The defendant had died (whether by natural causes or execution).
- The defendant "should have finished [his] sentence more than 6 years ago." (Date unspecified.) This category is among the "small" cases described above.

[22] Potential collateral consequences to criminal convictions include: loss of job, housing, and educational opportunities; loss of the right to vote; harm to family and other personal relationships; loss of physical and mental health; and the possibility of an enhanced prison sentence in the event of a subsequent conviction after release. In the event of a tainted criminal conviction, the integrity of the criminal justice system also suffers because such incidents undermine the public's respect for and trust in our system of justice.

- The FBI Lab's assistance was requested to support a foreign prosecution.
- The defendant had been deported.
- Malone confirmed the Lab results of another examiner but did not perform the hair examination.

B. Materiality Determinations by Prosecutors

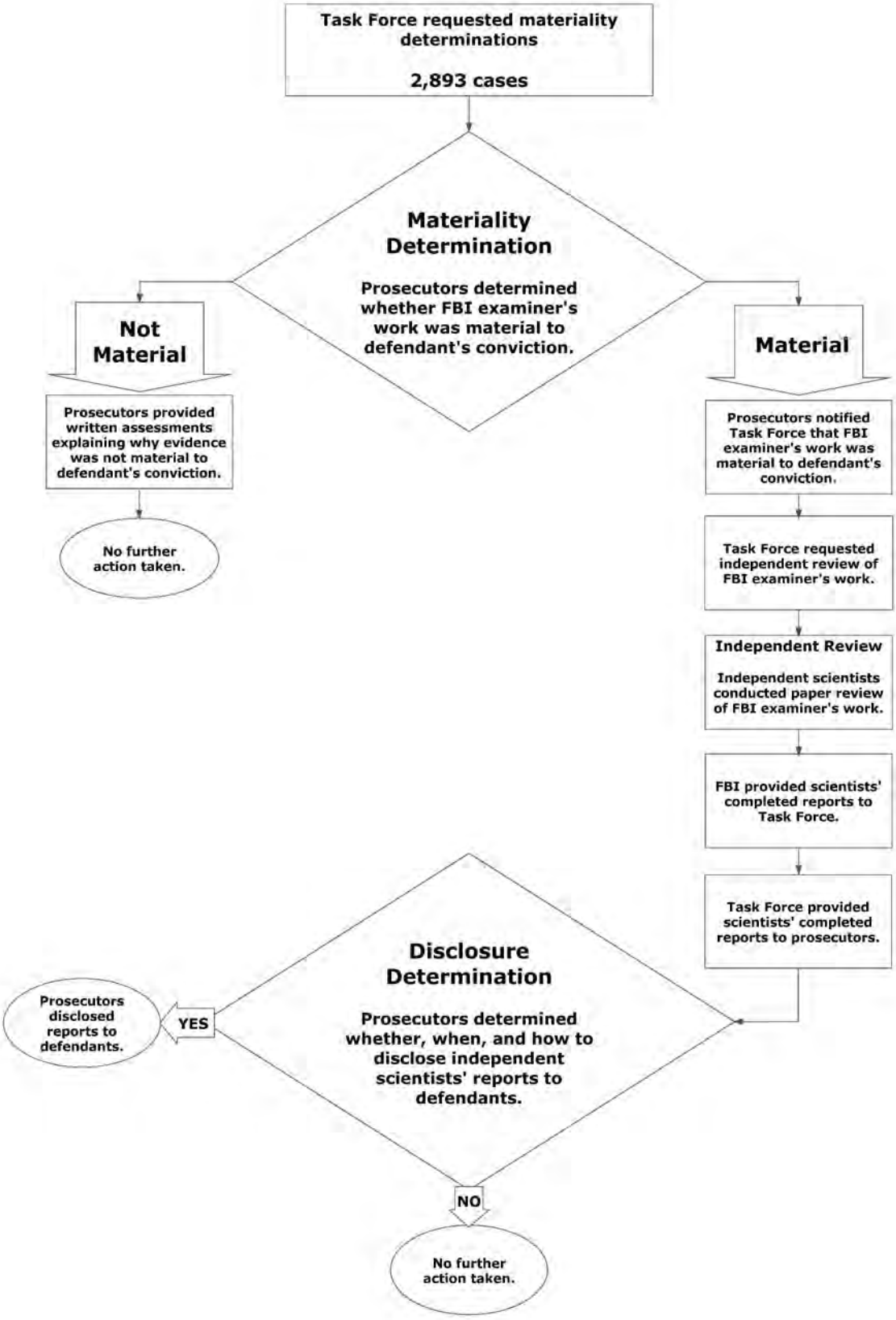
In a June 6, 1997 memorandum to Department attorneys, Acting AAG Keeney directed that after cases involving the 13 examiners and resulting in a conviction were identified, the federal prosecutors were to assess the importance of the Lab evidence and examiner testimony to determine their materiality to the defendant's conviction. The Task Force designed a case review form for federal prosecutors to complete – one form for each defendant and FBI Lab examiner involved in each identified case that resulted in a conviction. Appendix D contains a blank federal case review form the Task Force designed and sent to federal prosecutors. If the federal prosecutor determined that the Lab evidence was not material to the conviction, the case review form directed the prosecuting office to explain in writing the basis for its conclusion.

In cases where the federal prosecutor indicated that the forensic evidence or testimony was material to a defendant's conviction, the Task Force followed up with the prosecutor to request information concerning the role of the FBI Lab examiner in the prosecution and relevant case materials, including transcripts of the examiner's testimony (if any). The Task Force would then transmit these materials, along with any additional information it obtained, to the FBI for review by independent scientists. For general disclosure guidance, the Task Force included with its letter to federal prosecutors a legal memorandum prepared by the Appellate Section of the Criminal Division, referred to as the "Brady Memorandum." This memorandum described the relevant Supreme Court rulings on constitutionally required disclosures, which legal requirements should have been well known to all of the prosecutors. In keeping with the approach described in earlier memoranda to the U.S. Attorneys, the Task Force reiterated that the responsibility to assess these disclosure obligations and to make such disclosures rested with the prosecutors.

We found through our review of hundreds of case files that in the course of requesting the conviction status of each identified defendant, the Task Force sent a copy of the OIG Report to the federal prosecutor associated with each prosecuted case. The Task Force usually indicated the OIG Report page numbers referencing the particular Lab examiner involved in the defendant's case. Generally, although not in every instance, the Task Force requested that if the federal prosecutor were to disclose the OIG

Report to the defendant or defense counsel, then the prosecutor should send to the Task Force a copy of the transmittal letter he or she sent to the defendant or defense counsel. Figure 2 (next page) illustrates the case review process.

FIGURE 2: CASE REVIEW PROCESS



Source: OIG analysis of Task Force and FBI documents.

With respect to materiality determinations for state and local cases, the process was similar. Task Force members worked with state and local prosecutors to collect the same kind of information regarding their cases as sought from the federal prosecutors, described above. The Task Force designed a case review form for state cases similar to the one it designed for federal cases. Appendix E contains a state and local case review form with case information redacted.

Unlike the protocol used for federal cases, however, the Task Force did not consistently provide the state prosecutors a copy of the Brady Memorandum or any other legal guidance of the kind provided to federal prosecutors, or a copy of or link to the OIG Report. Although there may have been some state cases in which this information was provided, it was not consistently done , according to Task Force correspondence we reviewed and former Task Force members we interviewed. These decisions were likely driven by considerations of the relationship between the Department, a federal government agency, and the state prosecuting entities, which were independent of the Department. In addition, one noteworthy modification arose with the state cases: because many state prosecutors responded that they lacked sufficient resources to make materiality determinations in a timely fashion or failed to respond at all to repeated requests for materiality determinations, the Task Force notified those prosecutors that in the absence of a materiality determination by the prosecutors, it would refer those cases to the FBI for independent review.

Upon learning of cases where the prosecutor determined that the evidence handled by 1 or more of the 13 examiners was material to a defendant's conviction, the Task Force did not communicate with the prosecutors – federal or state – about steps they should take to fulfill their disclosure obligations. Specifically, the Task Force did not provide any direct guidance to the prosecutors about what they should do in cases where the prosecutor determined that the Lab evidence was material to the defendant's conviction, such as a recommendation that the prosecutor disclose to the defendant or defense counsel that a Department case review was underway concerning potentially unreliable FBI Lab analysis or testimony material to the defendant's conviction. We found no documents and learned from no witnesses why the Department did not direct the Task Force to include such guidance.

C. Referrals for Review by Independent Scientists

Once the Task Force decided to obtain an independent scientist's review of a case (because a prosecutor either determined that the Lab evidence was material to the defendant's conviction or requested an

independent review without such a determination), it sent a referral letter to the FBI requesting such a review.[23] Although the Task Force requested independent reviews on a rolling basis, the FBI permitted the accumulation of referred cases until, in its view, there were enough to justify bringing scientists to FBI Headquarters to conduct reviews.

According to the documents we found, the Task Force sent 37 separate referral letters concerning 338 cases to the FBI between July 1998 and January 2004. The letters identified each case by examiner, case name, associated FBI-assigned identification numbers and, sometimes, the type of analysis performed by the Lab. Although we found no documentation reflecting a Department or Task Force decision to prioritize capital cases, former Task Force staff members told us they did make these cases their top priority. According to those witnesses, they color-coded and separated capital cases from non-capital cases. However, the impact of this segregation was not apparent to us. The Task Force case referral letters did not flag for the FBI that any of the referred cases involved a defendant on death row, as we discuss further below.

For example, the first Task Force referral letter in July 1998 contained 60 cases, including cases for 4 death penalty defendants, 3 of whom were awaiting execution at the time and 1 of whom had been executed 4 weeks earlier. Yet the referral letter did not provide any of the death penalty or execution information to the FBI for those cases. Also noteworthy was that when the FBI Office of General Counsel (OGC) transmitted the July 1998 case list to the Lab for reviews by independent scientists, it made no mention of the death penalty cases included on the list or of a priority for the review of those cases, even though the FBI had knowledge of which defendants were on death row because it originally identified such cases.

D. Review by Independent Scientists

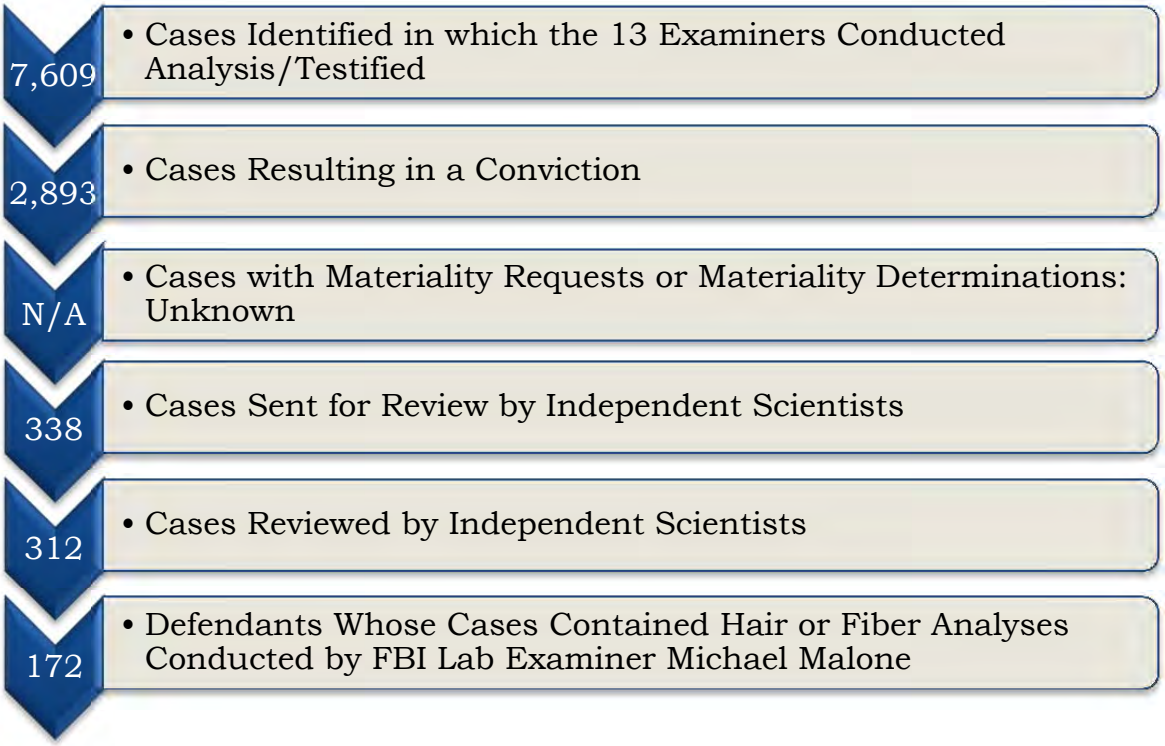
The FBI retained 14 scientists (10 independent scientists and 4 from the FBI Lab) with expertise in a variety of disciplines – including 2 scientists with hair and fiber expertise – to review written materials related to the cases the Task Force referred. In total, we found these scientists reviewed 312 cases related to 402 defendants. Of the 312 cases, 162 contained hair and fiber analyses performed by Malone relating to 172 defendants. The independent scientists' reviews did not involve examination of the physical

[23] There were some cases, mostly from Florida, for which prosecutors requested an independent review without regard to the materiality of the evidence to the defendants' convictions. The Task Force granted such requests when made. In addition, if the Task Force did not receive a response to a request for a materiality determination, it referred the case to the FBI for an independent review.

evidence. Rather, their evaluation was strictly a "paper" review of the Lab examiners' work and testimony, as described below.

Figure 3 shows the total universe of cases identified and defendants whose cases were evaluated during the Task Force case review process.

FIGURE 3: TOTAL UNIVERSE OF CASES



Sources: FBI, "Lab Task Force Summary," (2007) and OIG analysis.

1. Protracted Identification and Retention of Experts

The FBI took responsibility for identifying and retaining qualified experts for each scientific discipline associated with the referred cases and for working through the needed security clearance for each outside scientist. The FBI Lab employee responsible for overseeing the independent review process from 1997 to 2003 explained that the independent scientists were generally brought to FBI Headquarters using a "batching" system. This meant that, although the Task Force requested independent reviews on a rolling basis, the FBI did not respond in like manner – at least with respect to the two hair and fiber scientists who lived and worked outside the Washington area. In those cases, the FBI allowed the hair and fiber cases referred by the Task Force to accumulate in its offices until there was a large enough set to justify, in its view, the scientists' travel to FBI Headquarters to conduct the reviews. Then, the FBI copied the relevant case materials (bench notes, lab reports, correspondence, and testimony transcripts) for the scientists' reviews, set up physical space for the reviews

(located on a different floor from the Lab), and made arrangements for the scientists' travel to Washington.[24]

Although the Lab did not wait for case referrals from the Task Force before beginning to identify potential scientific experts, the process of identifying, retaining, and bringing several experts to Washington to perform case reviews was protracted, taking as many as 6 years in one instance before an expert was retained. For example, in October 2000, 2 years and 3 months after the Task Force referred the first 60 cases to the FBI for independent review in July 1998, the FBI wrote to the Task Force that it still had not been able to identify an explosives expert necessary to review some of the referred cases. As of early spring 2002, the FBI was still attempting to identify military weapons and shoeprint experts. Remarkably, it was not until April 2004, that the FBI located an independent scientist to review five pending cases with plant evidence, all of which had been analyzed by Malone. The independent scientist reviewed those plant cases on September 22, 2004.

With regard to hair and fiber experts, the FBI began to identify potential expert scientist candidates in the summer of 1997 but did not contact state law enforcement agencies for the purpose of hiring such experts until after the Task Force referred the first 60 cases to the FBI for independent review in July 1998. Furthermore, the first (and only) two hair and fiber scientists the FBI retained did not begin their case reviews until mid-May 1999 – over 10 months after the Task Force requested the reviews. Notably, included in the first set of cases sent for independent review were five death penalty cases, each of which had been handled by Malone.[25] In one of those cases, *Texas* v. *Boyle*, the defendant had been executed 8 weeks before the FBI identified his case as having been handled by one of the criticized examiners. We discuss the *Boyle* case in more detail in Chapter Five of this report.

2. Nature of the Independent Review: "Paper" Review

In the course of setting parameters for the independent scientists' case reviews, the FBI took the lead on making certain decisions about how the reviews would be conducted. In particular, the FBI decided that the scientists would review the Lab examiners' bench notes and reports, trial

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[24] The FBI required the independent scientists to travel to FBI Headquarters to conduct the paper review of case materials. Not until late in the process, after the events of September 11, 2001 made air travel more burdensome, did the FBI permit at least one scientist, Steve Robertson, to review the materials at an FBI field office.

[25] Those defendants were Benjamin H. Boyle, Brett A. Bogle, Billy Rae Irick, and Bryan M. Jones (who was a defendant in two of the five cases).

transcripts, and any other related materials provided by the Task Force, but would not re-examine the physical evidence originally analyzed by the 13 examiners. The decision not to re-examine any physical evidence led a senior Task Force attorney to characterize the scientists' review, in an August 1997 memorandum to the DAAG then overseeing the work of the Task Force, as a "cursory paper review." In documents we examined, that senior Task Force attorney expressed concern to senior Department officials about the process the FBI had designed, including the decision not to have the physical evidence re-examined and the FBI's stated intent to have scientists review as many as 100 cases per day. There was no indication from witnesses we interviewed or documents we reviewed, however, that Department officials agreed with the views expressed by the Task Force attorney or took issue with the FBI's approach.

Through our file reviews and interviews, we found that the decision to conduct a paper review was not viewed uniformly within the FBI as the most appropriate or meaningful method for evaluating the examiners' work. We found that some Lab employees expressed their disagreement with this approach, commenting that it "severely limited" the review project. In particular, in a document that appears to have been drafted by an FBI attorney and purports to summarize comments from a meeting with Lab employees, the attorney's notes state: "As a matter of practice, our laboratory would never review the case work of another laboratory or examiner solely on the basis of documentation (without conducting a re-examination of the items of evidence)."

Former FBI Lab personnel and the FBI-retained independent scientists we interviewed also commented on the inherent limitations of paper-only reviews. In particular, the FBI Deputy Section Chief of the Scientific Analysis Section stated that the paper-only reviews were "the reason why this process was really form over substance – there was an inherent limitation in not having the physical evidence to review." Independent scientist Steve Robertson told us, "[W]hen it comes to hair examinations . . . the only thing you have [are] the examiner's handwritten notes. There are no spectra, machine printouts, [or other analytical data]. . . . It's just what [the examiner] writes down." Robertson stated that the examiner "can write down almost anything [he] want[s] and say it's a hair match . . . and so there's really no way, just from looking at written notes, particularly for the hair exams" to determine if the examiner correctly made a comparison. As explained further in this report, although some did not regard the paper review as an effective means to provide a thorough review of the Lab examiners' work, it was ultimately sufficient to confirm, at a minimum, that there were problems associated with some of the examiners' Lab analyses, reports, and testimony provided at trial.

We also found that the independent scientists were directed to review the hair and fiber analyses in each case, considering the forensic techniques in practice at the time the analyses were conducted by the Lab examiners, rather than considering the forensic techniques in practice by the scientific community at the time of the Task Force case review work. This direction appears to have reflected the original intent of the Task Force scope but failed to take into consideration compelling reasons to modify the review based on findings and technological advances. Specifically, the FBI had begun using mitochondrial DNA (mtDNA) analysis in conjunction with microscopic hair comparisons in 1996, a technique which, used in combination with microscopic analysis, can provide a stronger analysis than microscopic hair comparisons alone.[26]

Thus, the independent scientists had no opportunity to consider examinations of the physical evidence using the microscopic standards in practice at the time of the Task Force case review or the aid of mtDNA analysis.[27] Moreover, with one exception – a Tennessee case in which the mtDNA testing was ordered by the court and did not exclude the defendant as a suspect – we did not discover any documents or learn from any witness that the FBI or the Department considered re-testing evidence material to the conviction of any of the defendants encompassed in its case review using mtDNA analysis. Nor did our review reveal that any discussions took place among senior management in the Department or the FBI concerning broadening the scope of the case review to include other pre-1996 cases in which microscopic hair comparison analysis was used alone.

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[26] FBI press release, "FBI Clarifies Reporting on Microscopic Hair Comparisons Conducted by the Laboratory," July 13, 2012, http://www.fbi.gov/news/pressrel/press-releases/fbi-clarifies-reporting-on-microscopic-hair-comparisons-conducted-by-the-laboratory (accessed February 28, 2014).

[27] We recognize that the two scientists who reviewed Malone's hair and fiber work were not qualified to perform or interpret DNA analysis. Therefore, the FBI would have had to contract with additional scientists if it had elected to include the review of physical evidence in the Task Force case review – a step that would have added time and cost to the overall process.

To implement the process it designed, the FBI developed a form and corresponding guidelines for the independent scientists to use in each of their case reviews. Known as the Independent Case Review Report (independent report form), the independent report form required the scientists to respond to five questions (see text box, below) with one of three fixed responses: "Yes," "No," or "Unable to Determine." The scientists were required to provide comments for any "No" or "Unable to Determine" responses. The independent report included supplemental blank pages for the scientists to summarize their findings or add comments. Appendix F contains a blank Independent Case Review Report and the corresponding Independent Review Guidelines.

Independent Case Review Report Questions

(1) Did the examiner perform the appropriate tests in a scientifically acceptable manner, based on the methods, protocols, and analytic techniques available at the time of the original examination(s)?

(2) Are the examination results set forth in the laboratory report(s) supported and adequately documented in the bench notes?

(3) Testimony consistent with the laboratory report(s)?

(4) Testimony consistent with the bench notes?

(5) Testimony within bounds of examiner's expertise?

In Chapter Three we describe the remaining elements of the Task Force case review process, including the FBI's retention of independent scientists, the FBI's transmissions of the scientists' reports to the Task Force, the Task Force's transmissions of the reports to prosecutors, and the prosecutors' disclosures to defendants. We also discuss our findings related to the timeliness of each of these stages.

CHAPTER THREE:
INDEPENDENT SCIENTISTS' REVIEWS AND REPORTS

The timeliness of the independent scientists' case reviews and the content of the correspondence transmitting the independent scientists' reports were critical to a successful implementation of the Task Force case review process. We examined these two aspects in detail and describe our findings below.

I. Timeliness of Independent Scientists' Reviews

In his initial January 1996 memorandum creating the Task Force and in his subsequent correspondence, Acting AAG Keeney described in very broad terms how the case review would proceed. We found no evidence, however, of a target timeframe the Department, the Task Force, or the FBI contemplated for completing each step of the case review process. To measure the timeliness of the review as it actually occurred, we examined specific time intervals in the review process after the Task Force referred cases to the FBI.

As discussed below, we examined the FBI's efforts to retain all 14 scientists (10 from independent agencies and 4 from the FBI Lab) for the disciplines associated with the referred cases. We concluded that there were significant delays associated with those efforts. We also calculated the length of time between the date the Task Force referred each case to the FBI and the date the FBI transmitted the independent scientists' reports to the Task Force. By studying these time intervals, we determined that for all 312 cases that the 14 scientists reviewed, it took the FBI an average of 380 days – more than a full year – to provide the Task Force a completed independent scientist's report.[28]

During our review, we learned that Malone had handled a disproportionately greater number of referred cases than those involving any other Lab examiner. It also became clear during our review that the two independent scientists who reviewed Malone's hair and fiber cases found the most egregious errors. For these reasons, we narrowed most of our analysis of the timeliness of the scientists' reviews to the 162 hair and fiber cases involving Malone. We determined there were other delays, in addition to those associated with the retention of hair and fiber experts, leading up to

[28] The shortest interval between a Task Force referral and an FBI transmittal of the corresponding completed report was 28 days; the longest was 6 years and 3 months. For the Malone hair and fiber cases alone, the average time from Task Force referral to the FBI's transmission of the scientists' reports was 231 days.

the reviews of the cases Malone handled. To analyze the time that elapsed between the Task Force referrals to the FBI of Malone's hair and fiber cases and the independent scientists' reviews of those cases, we examined the time allotted for those scientists to conduct their reviews, the FBI's "batching" of the scientists' visits to the FBI to conduct their reviews, and other delays between the scientists' visits.

We also examined the length of time those scientists spent reviewing each hair and fiber case handled by Malone. According to the time reported by the scientists on the independent report forms, they completed each of those reviews in approximately 1 hour, excluding the 16 hours required to review the *Boyle* case. We concluded, therefore, that the delays between the Task Force case referrals and the FBI's transmission of the completed independent scientists' reports to the Task Force were not attributable to the scientists.

As explained below, we concluded that the delays in the scientists' reviews were largely attributable to the FBI for the following reasons: (1) the agreed upon independent scientists' review criteria and other factors caused difficulties in identifying and retaining scientific experts; (2) the relatively small number of expert scientists the FBI retained to conduct the reviews and insufficient time the FBI allotted these few scientists to review the large number of cases rendered the scientists unable to complete their reviews in a timely manner; and (3) the FBI's process of accumulating or "batching" of numerous cases before arranging for the scientists to conduct the reviews caused some cases to languish without review long after the Task Force referred them to the FBI. In addition, there were significant, unexplained delays between the two hair and fiber scientists' visits to the FBI to review cases. As discussed below, these delays in the scientific review process had significant, adverse effects on some defendants' cases.

We do not know whether the delays associated with the scientists' reviews of cases involving examiners other than Malone were caused by the same factors, other than those related to the retention of experts. Our findings regarding the FBI's treatment of cases involving Malone hair and fiber cases, however, create concern that the FBI handled the reviews of the other 12 examiners' cases in a similar manner.

A. Difficulties in Retaining Experts

A significant factor that contributed to the delay of the FBI's retention of independent scientists was the need to locate and engage experts with the appropriate educational and professional qualifications and ability to obtain security clearances for the review. This difficulty was exacerbated by the small number of qualified scientists in certain disciplines and the need to retain experts for each scientific discipline associated with the 13 criticized

examiners. As a result of these challenges, it took the FBI more than 6 years to hire all the scientists required to complete the reviews.

Former FBI and Task Force participants we interviewed recalled the FBI's difficulty in retaining scientists to perform the independent reviews. According to those witnesses and the terms of the FBI's solicitation for the scientists, the scientists were required to: (1) have at least 5 years of experience as a "senior court qualified examiner" in the specified disciplines; (2) have provided forensic analysis services at the competency level of a Senior Forensic Examiner; (3) have provided expert witness testimony in court at least 100 times; and (4) obtain a security clearance at the Secret level.

The limited availability of independent scientists due to competing work responsibilities and, in the hair and fiber area, the few experts employed in federal, state, and local crime labs, constituted additional obstacles the FBI confronted in its effort to retain experts, according to the former Deputy Section Chief of the Scientific Analysis Section of the FBI Lab. In addition, a former FBI Assistant General Counsel involved in hiring the scientists told us that the FBI did not seek scientific experts from academia or private industry because the latter sources were not likely to employ scientists with experience in law enforcement. Further, a few of the witnesses we interviewed stated that some candidates viewed the FBI's contract requirements as too rigid and that other experts were simply not interested in participating. Another former FBI Assistant General Counsel also stated that outside labs were reticent to get involved in the case reviews because of their work with the FBI and concerns about their future relationships with the FBI.

The first set of cases the Task Force referred to the FBI illustrates the impact on the timeliness of the case reviews resulting from the delays in the FBI's retention of scientists in the hair and fiber discipline. There were 31 hair and fiber cases involving Malone among the first 60 cases the Task Force referred to the FBI for independent review in July 1998. The 31 cases included 5 death penalty cases (involving 4 defendants).[29] However, the FBI had not yet hired scientists with hair and fiber expertise at the time of those case referrals. The two hair and fiber scientists the FBI ultimately hired did not begin reviewing cases until May 1999 (Visit 1) – more than 10 months after the first set of case referrals. As a result, those 31 cases – plus an additional 17 cases the Task Force referred to the FBI prior to Visit 1 (48 total) – all suffered delays in the timeliness of their review attributable to the lengthy time taken to retain experts.

[29] As previously noted, the defendants were Boyle, Bogle, Irick, and Jones (who was a defendant in two of the five cases).

Below, we discuss the additional factors we identified as significant to the delays in the scientists' reviews of the 162 hair and fiber cases involving Malone.

B. Too Little Time Allotted for the Scientists to Conduct Reviews

The FBI did not allot sufficient time for the two hair and fiber scientists to review all the cases that awaited them during their scheduled trips to the FBI. Put another way, the FBI failed to hire enough experts to handle the number of cases awaiting review within the time period it allotted for the scientists' visits. Either way, the effect was the same: the scientists were unable to review all cases awaiting them at the start of each visit.

We determined that two hair and fiber experts, Cathryn Levine and Steve Robertson, reviewed the 162 Malone hair and fiber cases in 10 visits to the FBI between May 1999 and August 2004. Robertson reviewed most of the cases in 9 of the 10 visits because Levine resigned after the first visit (for reasons we discuss in Chapter Four). Levine and Robertson were employed by state crime labs in New York and Texas, respectively. Though the contract between the FBI and the scientists' employers did not stipulate the number of cases to be reviewed or the amount of time the reviews would require, the FBI told us in April 2014 that, prior to Levine's departure, both scientists were scheduled to travel to Washington to review cases for 1 week every 4 months. However, as we describe below, 1-week visits were insufficient for the scientists to conduct their reviews and we found delays of over 14 months between some visits.

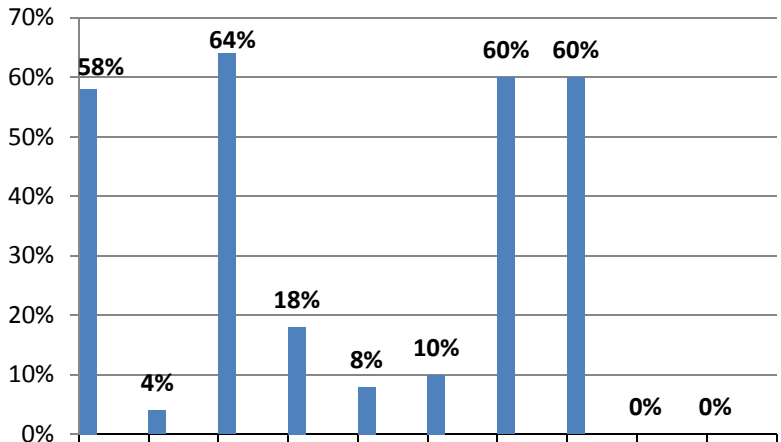
To illustrate the insufficient time allotted for Levine and Robertson to conduct their reviews, Figure 4 (below) shows the hair and fiber cases involving Malone that the scientists did not review during their visits. During 8 of the 10 visits, the scientists were unable to finish reviewing all the cases – up to 64 percent in 1 visit. Yet, the FBI neither extended the time period allotted for the scientists to conduct the reviews nor retained additional scientists after Levine resigned.

In addition, the FBI's initial requirement that, with limited exceptions, the reviews be conducted at FBI Headquarters in Washington compounded the limitation on the scientists' time available for case reviews.[30] For Levine and Robertson, who lived and worked in New York and Texas, this travel

[30] The FBI's contract with the scientists stipulated that all reviews be performed at Headquarters "except as specifically directed by the FBI." The contract stated that this was due to "the nature of this work and for security purposes." FBI, attachment to contract with independent scientist Steve Robertson for the contract period November 1, 1998 through October 31, 1999, Section 6, Work Location and Equipment.

consumed valuable time that they otherwise could have spent conducting the reviews had they initially been permitted to do so close to their workplaces. The FBI's travel requirement also limited the scientists' ability to complete the cases awaiting their review because they needed to travel back home at the end of the prescribed review period. The FBI's initial requirement that the reviews be conducted in Washington seemed unnecessary in view of the fact that the scientists' reviews encompassed access only to bench notes, lab reports, correspondence, and testimony, not a re-examination of any physical evidence. It was not until travel became more burdensome following the events of September 11, 2001, nearly 2½ years after the reviews began, that the FBI sent files to a field office geographically convenient to Robertson so that the reviews could be accomplished more quickly.

FIGURE 4: MALONE HAIR AND FIBER CASES *NOT* REVIEWED BY INDEPENDENT SCIENTISTS DURING EACH VISIT, 1999–2004



	Visit 1	Visit 2	Visit 3	Visit 4	Visit 5	Visit 6	Visit 7	Visit 8	Visit 9	Visit 10
Percentage of Cases Not Reviewed	58%	4%	64%	18%	8%	10%	60%	60%	0%	0%
Number of Cases Awaiting Review	48	28	56	56	26	20	5	5	6	2
Number of Cases Reviewed	20	27	20	45	23	17	2	2	6	2
Number of Cases Not Reviewed	28	1	36	10	2	2	3	3	0	0

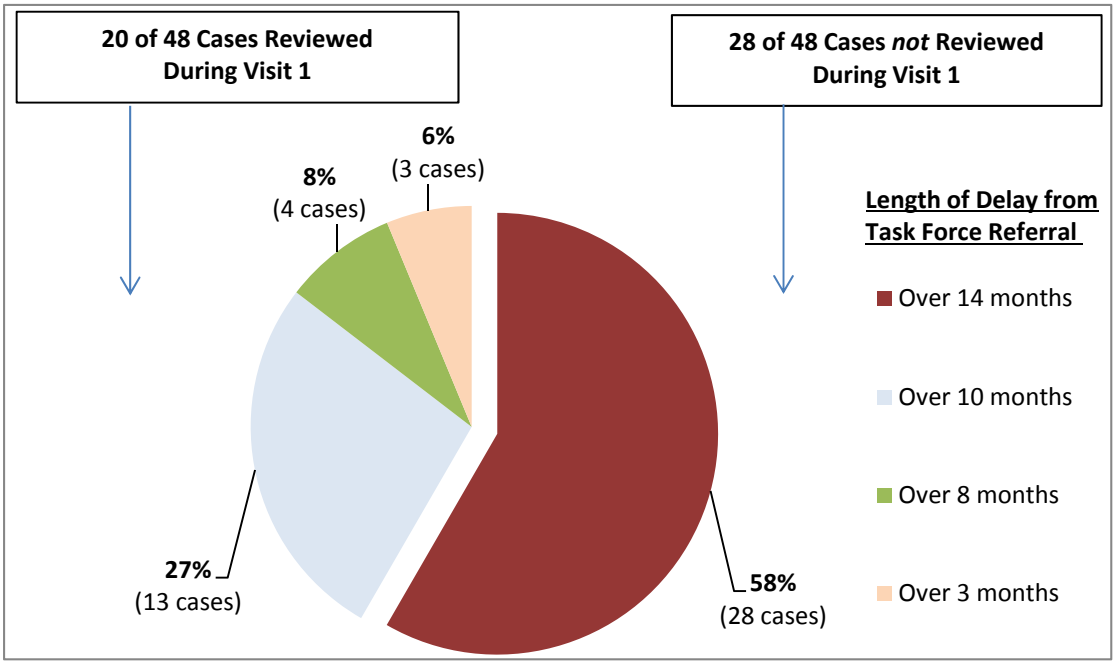
Notes: "Cases Awaiting Review" includes any cases not reviewed from the prior visit plus new cases the Task Force referred to the FBI after the prior visit. "Cases Reviewed" reflects cases the scientists reviewed during each visit. "Cases Not Reviewed" reflects cases the scientists were unable to finish reviewing during a given visit and deferred to a future visit. Some cases were reviewed more than once in more than one visit and others awaiting review were later eliminated from the review scope. For these reasons, the number of cases reviewed and not reviewed during each visit do not always equal the number of cases awaiting review.

Source: OIG analysis.

These delays are best illustrated by examining Levine and Robertson's visits to FBI Headquarters in 1999. The Task Force had referred the first 31 hair and fiber cases to the FBI for review in July 1998. By the time the FBI retained Levine and Robertson and brought them to Washington in May 1999, the Task Force had referred another 17 hair and fiber cases, bringing the number of cases awaiting review to 48. During the 5 days the FBI scheduled for Levine and Robertson to review cases, the scientists reviewed 20 of the 48 cases. Levine subsequently resigned from the project for reasons we describe in Chapter Four, leaving only Robertson to review the remaining 142 Malone hair and fiber cases. The FBI did not bring Robertson back to Washington to review the remaining 28 cases for another 4 months (in September 1999), more than 14 months after the Task Force had referred some of those cases to the FBI. Figure 5 shows the delays

related to the reviews of the first 48 Malone hair and fiber cases the Task Force referred to the FBI.

FIGURE 5: DELAYS IN INDEPENDENT SCIENTISTS' REVIEWS OF THE FIRST 48 MALONE HAIR AND FIBER CASES THE TASK FORCE REFERRED TO THE FBI



Source: OIG analysis.

Among the defendants whose cases were not reviewed during the first visit and were delayed by over 14 months were Brett Bogle and Bryan M. Jones, both of whom were on death row. Also among the cases not reviewed was that of John Norman Huffington, whose case awaited review of Malone's flawed testimony for over 14 months after referral to the FBI. We discuss the *Huffington* case later in this chapter.

Similarly, during Robertson's third 5-day trip to the FBI to conduct reviews in November 2000, Robertson completed 20 out of 56 cases awaiting his review, leaving a balance of 36 cases for the next visit, nearly 4 months later. During his fourth visit in March 2001, Robertson completed 45 out of 56 cases, the balance of which was not reviewed until more than 7 months later. We observed, based on our analysis of the timeliness of the Malone hair and fiber reviews, that Robertson was able to complete the later reviews of Malone's cases more quickly than the earlier reviews.

C. Delays Caused by Batching

The FBI's process for independent reviews involved accumulating numerous cases before arranging for the independent scientists to conduct

the reviews. This "batching" system meant that the FBI allowed cases for which the Task Force had requested independent reviews to remain unexamined until the FBI determined there were enough to warrant bringing a scientist from his or her lab of employment to FBI Headquarters to conduct the reviews. Because we focused most of our analysis of the review timeliness on the 162 hair and fiber cases involving Malone (for reasons described above), we did not calculate the review timeliness of cases handled by the other 12 independent scientists the FBI retained. However, in April 2014, the FBI provided for the first time documentation showing that three independent scientists who worked in the Washington, D.C. area reviewed cases involving examiners other than Malone on a more frequent basis – approximately once per month in some instances – than the two independent scientists who reviewed Malone's hair and fiber cases.

In an example of the Malone hair and fiber case review delays caused by batching, the Task Force referred 55 new Malone hair and fiber cases to the FBI between January and October 2000, after Robertson's second visit in September 1999. Yet, it was not until November 2000 – nearly 14 months after the second visit – that Robertson returned to Headquarters to start reviewing the new cases. When Robertson returned for the third visit in November 2000, there were more cases for him to review than was feasible in the time allotted, just as there had been during the first visit. Robertson reviewed 20 cases and departed, leaving 36 cases still awaiting review.

One case, *Florida* v. *John Walter Smith*, was not reviewed by a scientist for 2 years and 7 months after the Task Force referred the case to the FBI. Rather than arranging for Robertson to review the *Smith* case as soon as possible after it was referred in July 1998, the FBI waited until more referred cases had accumulated. Although one of the delays in this case was attributable to a second independent review of wood particles conducted after Robertson's hair analysis review, we concluded that other serious delays occurred as a direct result of both the FBI's batching and the insufficient time it allotted for scientists to review cases during each visit.

Even if the batching approach made sense from a resource perspective, the approach caused significant delays in the review of many defendants' cases, the disclosure of the independent scientists' reports, and judicial determinations about whether the defendants should be released from custody because they were wrongfully convicted based on tainted FBI Lab analysis or testimony. By our analysis, the FBI batched cases for review for 8 of Robertson's 10 visits, causing many delays for defendants whose convictions or sentences may have resulted from tainted Lab analysis or testimony.

Two cases illustrate the adverse effects of this batching approach. In *United States* v. *Donald Gates,* the defendant spent 27 years in prison and was ultimately exonerated on the basis of DNA testing. Among the delays contributing to the injustice in Gates's case was that the FBI did not have the independent scientist review Malone's analysis in the case until December 4, 2003, more than 7½ months after it received the request from the Task Force. It took the independent scientist only 45 minutes to review Malone's Lab report and related case materials and to complete his report in the *Gates* case.

In *United States* v. *Bragdon*, the defendant was convicted and sentenced to 30 years on the basis of tainted FBI Lab analysis and false testimony concerning fiber analysis Malone provided. Bragdon spent nearly 11 years in prison before his conviction was set aside on the grounds that, without Malone's unreliable testimony, the jury might have reached a different verdict. In addition to other delays in this case, almost 14 months elapsed between the Task Force's referral of Bragdon's case to the FBI (January 31, 2000) and the date when the independent scientist reviewing Bragdon's case signed his completed report (March 14, 2001). It took the independent scientist only 2 hours to review the case materials and complete his report.[31]

In addition to the FBI's batching of cases the Task Force sent for independent review, we also found unexplained time lapses between scientists' trips to the FBI to review cases. The intervals between visits ranged from 9 days to almost 14 months, when at least 1 and as many as 36 Malone hair and fiber cases awaited review. We were unable to determine the reasons for these delays using the available documents and witness interviews. Nor did we find any evidence of discussions among FBI officials, the Task Force, or Department officials of the need to minimize the time between scientists' visits to the FBI, even after one of the scientists, Levine, found egregious mistakes in Malone's analysis. Specifically, Levine determined in May 1999 that Malone's analyses were scientifically unsupportable and that his testimony was overstated and incorrect in the capital cases of *Boyle* (executed prior to Levine's review) and Billy Rae Irick (currently on death row). Such early, serious findings should have motivated the FBI to ensure that the scientists reviewed the remaining cases as soon as the Task Force referred them.

[31] The delay caused by the FBI's batching was further compounded by the prosecutor, who forwarded the report to the defendant's counsel more than 4 months after receiving it. The defendant's conviction was vacated 19 months later.

II. Transmissions of Scientists' Reports

The internal FBI protocol for the independent scientists' reviews called for the FBI Lab, which managed the scientists' visits, to send the completed reports to the FBI OGC for review. The OGC then would transmit copies of the reports to the Task Force. Upon receipt, the Task Force was to transmit the reports to the prosecutors for their determination of whether the reports should be disclosed to defendants or defense counsel. Below, we describe our findings on how this process worked in practice.

A. Transmissions from FBI to Task Force Not Timely

Based on our review of the available FBI and Task Force correspondence, we believe the FBI OGC reviewed some or all of the completed independent reports it received from the Lab, although no witnesses we interviewed described such reviews. From our interviews with former FBI OGC staff, we learned only that the Lab sent the reports to the OGC and that an OGC administrative employee was responsible for copying and transmitting the reports to the Task Force. We focused our analysis on the transmission of reports in hair and fiber cases referred for independent review and for which Malone had served as an examiner. We examined the report transmittal letters and the transmission intervals in those cases. Our analysis of the FBI transmissions to the Task Force was based on 160 Malone hair and fiber cases with available data.

We examined 30 OGC transmittal letters to the Task Force and found that an OGC attorney signed all the letters and identified the cases for which reports were enclosed. The first four such letters contained references to the findings of the independent scientists' reviews, such as that they had identified problems or raised "issues of concern." However, the 26 subsequent letters from the OGC to the Task Force that we examined made no such references to the independent scientists' findings.

With regard to the timing of the FBI OGC's transmission of the scientists' reports to the Task Force, we found that in the Malone hair and fiber cases, the transmissions occurred on average within about 1 month of the scientist's signature on the completed reports. It took the OGC between 1 week and 2 months to transmit most (84 percent or 134 of 160 cases) of those cases to the Task Force; the remaining 16 percent were transmitted over a period that ranged from 9 weeks to over 2 years in one case (the *Smith* case). We also noted that in the seven death penalty cases handled by Malone, the FBI's transmission of the completed reports to the Task Force occurred on average almost 3 months after completion of the scientists' work. The reasons for the substantial delays in transmissions of completed reports to the Task Force were unclear from Task Force and FBI documents and our interviews. However, we found that for each of the

scientists' 10 visits, the FBI OGC sent the completed reports to the Task Force in batches, rather than when they were completed by the scientists at the end of each visit.

B. Transmissions from Task Force to Prosecutors Provided Limited Information and Little Guidance

The protocol for the Task Force transmission of the scientists' reports to prosecutors, as articulated by senior Department management, was described only in very broad terms. Although Department management approved a standard letter for transmission to prosecutors, it did not provide specific guidance to the Task Force regarding: (1) language to address the findings of the scientists' reports; (2) the necessity or presumption, based on the findings and the law, that prosecutors disclose the scientists' reports to defendants; (3) whether, how, and when prosecutors should inform the Task Force about their disclosure determinations regarding the scientists' reports and the reason for any non-disclosure; or (4) tracking the reports transmitted to prosecutors and any disclosures of such reports by prosecutors.

As a general rule, the Task Force sent a transmittal letter with boiler-plate language notifying prosecutors of the report being transmitted and requesting that the prosecutors determine whether disclosure of the report to the defendant or defense counsel was warranted. The letters contained no reference to the independent scientists' findings about the Lab reports or trial testimony provided in the defendant's case. Nor was there any language in the letters to alert prosecutors that the reports contained any issues of concern warranting immediate attention. This was true in the death penalty cases as well as in the non-death penalty cases. For example, in the *Bragdon* case, the Task Force letter to the state prosecutor contained standard language, which we determined from our analysis was approved by senior Department officials. The letter stated:

> Enclosed are the results of the independent scientific review of the forensic work performed by FBI laboratory examiner Michael Malone in the *Bragdon* case. The review was limited to the laboratory file and trial transcript. Also enclosed for your information is a copy of the laboratory report(s) reviewed by the scientist.
>
> Please review the enclosed documents, the OIG report, and any other information you may have to determine whether the report of the independent scientist should be disclosed to the defendant or to the defendant's counsel pursuant to *Brady* v. *Maryland* and its progeny.

The Task Force letters to federal prosecutors also contained no guidance about disclosure of the scientific report to the defendant or defense counsel, other than simply enclosing the *Brady* Memorandum, which was a general statement of well-established law. The letters did not provide any case-specific guidance about the prosecutor's obligations. The transmittal letters to state prosecutors contained less information because those letters generally did not include the *Brady* Memorandum or any other disclosure guidance. Further, all the transmittal letters to prosecutors were silent on a timeframe for making disclosures and conveyed no urgency for making any required disclosures to defendants.

Through our file review, we found that for the first 10 months of report transmissions, the standard Task Force letters requested that prosecutors send copies to the Task Force of any disclosures made to the defense. However, there was no deadline attached to the request and, after the senior trial attorney on the Task Force left the Department in June 2000, the request for copies of any disclosures was omitted from subsequent transmittal letters to prosecutors enclosing the scientists' reports. According to one former Task Force member we interviewed, the new Task Force lead attorney decided to remove the language requesting copies of disclosures to the defense, reasoning that because the Task Force had no control over prosecutors and was not tracking disclosures, there was no point to continue requesting copies of the prosecutors' disclosure letters.

The Task Force did receive copies of a limited number of letters from prosecutors indicating they had disclosed the scientists' reports to defendants or defense counsel. However, according to former Task Force members we interviewed, the Task Force did not generally follow up with prosecutors from whom it did not receive disclosure notifications to determine whether a disclosure had been made. For this reason, after the prior Task Force senior attorney left the Department in June 2000, the Task Force received few notifications from prosecutors and was unable to track disclosures to defendants in the vast majority of cases.

Our file reviews and interviews showed that the Task Force members believed they had an important role but limited authority when it came to ensuring that prosecutors satisfied their legal disclosure obligations in cases where the independent scientist found that the Lab analysis or testimony was problematic. Although we found no memoranda addressing the authority delegated to the Task Force, the former Task Force members we interviewed uniformly stated they believed, based on statements from senior management, that they did not have authority to tell prosecutors, federal or state, how to handle their cases, including providing guidance on their disclosure obligations. Instead, they were told by senior management that the Task Force's role was to facilitate the identification of cases involving the 13 examiners, to coordinate with the FBI by providing cases for the

independent scientists' review, and to transmit the independent scientists' reports to the prosecutors. Upon completing those duties, the former Task Force members told us, they believed the Task Force would have fully discharged its responsibilities.

With regard to the timeliness with which the Task Force transmitted the scientists' reports to prosecutors, we found that in most cases (79 percent or 125 of 158 cases with available data), the Task Force transmitted the reports to prosecutors in 3 weeks or less – most commonly between 8 and 14 days – of receiving them from the FBI.[32] However, there were some exceptions, including one death penalty case (*Irick*), where the Task Force did not transmit the report to the prosecutor until more than 10 weeks after receiving it from the FBI. We also learned from one former Task Force member we interviewed that, although the Department did not expect the Task Force to follow up with federal or state prosecutors to ensure receipt of the scientists' reports, or to track disclosures made by prosecutors to defendants, the Task Force ensured that the prosecutors received the reports it sent. This witness stated that the Task Force staff called the prosecutors in advance of sending the reports and sent the packages by Federal Express so that the delivery could be tracked and confirmed. According to this witness, after these confirmations, the Task Force took no further action to communicate with the prosecutors about whether disclosures of the independent reports were made.

C. Prosecutors' Disclosures to Defense Counsel Not Tracked

With regard to the prosecutors' disclosures of the independent scientists' reports to defendants or defense counsel – a critical step resulting from the work of the Task Force – we found very little documentation in the Task Force files evidencing disclosure to defendants. As a result, we had a limited basis on which to determine whether and when prosecutors disclosed the scientists' reports. Our review established that there were 402 defendants for whom the independent scientists completed reports. We identified evidence of confirmed disclosures by prosecutors to only 15 defendants. For 13 of those disclosures, the Task Force files included copies of transmittal letters from prosecutors to defense counsel. In two instances, court records established that the defendants received copies of the independent report. We provided the list of 402 defendants to the FBI and the Department in September 2013 to enable them, without awaiting completion of this report, to begin remedial action we anticipated recommending. The list is shown in Appendix H.

[32] Our analysis of the Task Force transmissions to prosecutors was based on 158 Malone hair and fiber cases with available data.

Additional defendants may have received copies of the independent scientists' reports, but we were unable to confirm disclosure from our review of the Task Force's files. For example, we found correspondence from prosecutors and Task Force members' notes memorializing conversations with prosecutors who expressed their intention to disclose the reports to 43 additional defendants or defense counsel. However, the Task Force files contained no documentation confirming transmission or receipt by the defendants or their counsel of those reports.

We also found two instances in which prosecutors definitely did not disclose the independent scientists' reports to defendants. In the well-publicized *Gates* case, the U.S. Attorney's Office for the District of Columbia failed to transmit Robertson's report documenting Malone's inaccurate and scientifically unreliable analysis.[33] In December 2009, approximately 6 years after the Task Force transmitted the report to the prosecutor, Gates's conviction was vacated. Gates was exonerated on the basis of DNA testing, requested and performed before Gates or his counsel learned of Robertson's report, which Gates' counsel received later in response to a *Freedom of Information Act* request to the FBI. Gates's counsel wrote in Gates's Motion to Vacate Convictions on the Ground of Actual Innocence that the U.S. Attorney's Office never notified Gates or any of his past defense counsel of Robertson's report.

In the *Huffington* case, the defendant learned of Robertson's report, which described Malone's testimony as false, misleading, and unscientific, when an investigative reporter informed his defense counsel of the independent scientist's report more than 12 years after the Task Force transmitted the report to the state prosecutor. In a court filing in support of Huffington's petition for a finding of actual innocence on the basis of DNA evidence, Huffington's counsel asserted that neither he nor his client had been aware of Robertson's report until the reporter contacted them. The filing stated that Huffington, through counsel, had "for many years" attempted repeatedly without success to obtain information from the FBI regarding Malone's hair analysis and that the FBI had claimed it was unable to locate any relevant files. Yet, Task Force files reflect that the Task Force sent a copy of Robertson's report to the state prosecutor 1 week after the FBI transmitted the report to the Task Force.

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[33] Although Gates was most harmed by the failure by the U.S. Attorney's Office for the District of Columbia to forward to Gates's counsel the independent scientist's report, the FBI contributed to the delay in Gates's ultimate release because it took over 7½ months to complete the independent report and return it to the Task Force. By the time the Task Force forwarded Gates's report to the prosecutor, over 9 months had passed since the Task Force referred the case to the FBI for independent review.

We also found that while some prosecutors disclosed the independent reports to the defendants they prosecuted, they did not do so immediately after receiving the reports from the Task Force. For example, in the case of Anthony Bragdon, the Florida state prosecutor waited 4 months before sending the Robertson report to the defendant. Bragdon's conviction was reversed on appeal on the basis of the independent report; he had served 11 years in prison. Thus, in addition to the tainted convictions of defendants like Gates and Bragdon, the failure of the prosecutors to transmit the reports to these defendants in a timely fashion delayed these defendants' appeals and extended their incarcerations.

Finally, it was also important for prosecutors to disclose reports to those defendants already released from prison because of the potential collateral damage those defendants suffered if, in fact, they would not have been convicted but for the unreliable Lab analysis or testimony used against them. Those defendants should have been notified in a timely way so that they could pursue their legal remedies.

There was a lack of evidence in the Task Force files that the independent scientists' reports were consistently provided to defendants. In addition, we found cases firmly evidencing non-disclosure of reports. The failure to disclose any reports that found flawed Lab analysis or testimony deprived those defendants of the opportunity to challenge their convictions on the basis of potentially unreliable evidence.

We asked each Department and Task Force witness we interviewed to explain why the Task Force failed to consistently document prosecutors' completion of this critical step in the case review process. Former Task Force members we interviewed all stated that senior Department management never directed the Task Force to follow up with prosecutors to ensure that necessary disclosures had been made or to track the prosecutors' disclosures. Rather, Task Force members told us, as we discussed above, that senior Department managers limited the final role and authority of the Task Force to transmitting the completed independent scientific reports to prosecutors. We found no other information in the Task Force's files to explain why the Department did not follow up with prosecutors about whether disclosures were made.

In Chapter Four we discuss the forensic analysis and testimony by former FBI Lab Hairs and Fibers Unit examiner Michael Malone. We describe the independent scientists' findings about Malone's work and how the FBI and the Department responded to those findings.

CHAPTER FOUR:
FORENSIC ANALYSIS AND TESTIMONY BY MICHAEL MALONE

Of the 13 FBI Lab examiners whose work the Task Force reviewed, 1 examiner, Michael Malone, repeatedly created scientifically unsupportable lab reports and provided false, misleading, or inaccurate testimony at criminal trials. At the height of his career with the FBI, Malone was a senior examiner for the Hairs and Fibers Unit and handled a disproportionately large number of cases. We include this discussion to illustrate the significance of the problems that became known to the Task Force and the FBI about Malone's work and testimony in criminal cases. The stark revelations about Malone resulting from the Task Force's work, and the lack of a corresponding response by the Department, the Task Force, or the FBI exposed a major deficiency in the Department's implementation of the Task Force's mission.

I. Background

Michael Malone earned a Bachelor's Degree from Towson State University in Baltimore, Maryland in 1968 and then became a high school teacher where he taught biology and general science in Maryland, Virginia, and Florida. In 1970, Malone earned a Master's Degree in Biology from James Madison University in Harrisonburg, Virginia. He joined the FBI in the same year as a Special Agent. In 1974, Malone transferred to the Hairs and Fibers Unit in the Lab, then located at FBI Headquarters in Washington, D.C., where he received training to become a hair and fiber examiner. Upon completion of his training, Malone was designated a Forensic Microscopist specializing in trace evidence. In that capacity, Malone analyzed evidence as the primary examiner, testified about his analyses in criminal trials, and served as a "confirming examiner" of his colleagues' hair and fiber analyses.

Malone became well known to many judges and the law enforcement community because of his forensic work on several high profile cases, including those of Jeffrey MacDonald, a Green Beret Army surgeon convicted of murdering his wife and children at Fort Bragg, North Carolina, and John Hinckley, who attempted to assassinate President Ronald Reagan. In Florida, Malone was instrumental in helping to achieve multiple capital convictions of a serial killer, Robert (Bobby) Joe Long.

Problems with Malone's analyses and testimony began to surface publicly in Florida, starting in the late 1980s, when several courts reversed murder convictions on the grounds that microscopic hair comparisons were

insufficiently reliable to constitute a basis for positive personal identification without other evidence to link a defendant to the murder with which he was charged. In several of these Florida cases, Malone had been the hair and fiber expert who conducted the forensic examinations and testified at trial. In one murder case, *Florida* v. *Jackson*, the court also found that Malone's hair analysis was unreliable because it failed to identify hair strands of other potential suspects found on the victim's body and submitted by local authorities for examination.

Malone's credibility also came under attack as the result of his testimony in 1985 before the Investigating Committee for the Judicial Council of the Eleventh Circuit regarding the proposed impeachment of then-federal Judge Alcee Hastings. In particular, William Tobin, an FBI Lab metallurgy expert whom OIG investigators interviewed for the 1997 Report, alleged that Malone had testified falsely, outside his expertise, and inaccurately. The OIG expanded the scope of its 1994–1997 review to include Tobin's allegations about Malone's testimony and found that Malone had testified falsely before the Committee when attesting that he had performed a tensile test which he had not done.[34] The OIG also found that Malone had testified "outside his expertise and inaccurately" concerning the tensile test results. The OIG recommended in the 1997 Report that the FBI assess the need for disciplinary action against Malone for this misconduct and monitor his testimony in future cases. However, the FBI did not take disciplinary action against Malone, deferring such a decision to the Department. The Department also elected not to take any action against Malone. By the time the OIG issued its report in 1997, Malone had already left the Lab to return to work as a Special Agent in the field. He was assigned to the Norfolk, Virginia office. Malone retired from the FBI in 1999.

Just 3 years after his retirement, however, Malone began conducting background investigation services for the FBI. In May 2014, the OIG learned, and the FBI confirmed, that since 2002, Malone had been actively employed by Background Investigative Contract Services, an FBI contractor, performing background investigations. After we brought Malone's employment to the attention of the FBI and the Department, the FBI reported that, effective June 17, 2014, Malone's association with the FBI was terminated. Although not the focus of this report, we believe that Malone's employment as an FBI contractor was a consequence of the failure of the FBI and the Department to discipline Malone for the misconduct we identified in our 1997 Report.

[34] A tensile test measures the force required to break material, such as a leather strap.

II. Findings of Independent Scientists Regarding Malone's Forensic Evidence Analysis and Testimony

In 1999, the FBI hired two hair and fiber experts, Cathryn Levine and Steve Robertson, to serve as independent scientists for the Task Force review.[35] Both scientists began their reviews on May 17, 1999. After the first week's review, however, Levine withdrew from the project, unhappy with the way the FBI had designed the review and the terms of her engagement. Levine expressed these concerns in a resignation letter to the FBI and in our interview with her (see text box below). The findings and conclusions Levine reached regarding the cases she reviewed during her week at FBI Headquarters were consistent with those reached by Robertson who, thereafter, reviewed all of the Malone hair and fiber cases the Task Force referred to the FBI for independent review. The FBI did not hire another hair and fiber expert scientist to take Levine's place, despite comments from Levine and Robertson during an FBI debriefing that it had been helpful to work in tandem for the purpose of consultation.

Cathryn Levine's Main Reasons for Withdrawing from the FBI's Team of Independent Reviewers

1. The FBI's lack of standard operating procedures governing examiners' work at the time prevented the independent scientists from verifying the examiners' analysis methods; the examiners' bench notes did not include information on methods used. Levine said the FBI's case review form should have asked whether the testimony was accurate instead of whether the testimony was consistent with the bench notes.
2. The FBI's policy of not permitting the independent scientists to retain copies of their case notes or their completed case review forms compromised her independence and would expose her to criticism when she would inevitably have to testify in future litigation of the cases she reviewed.
3. The FBI's requirement that independent scientists not disclose their review findings created a "moral and ethical dilemma" by preventing Levine from reporting Malone to the ethics committee of the forensic science board to which they both belonged.

According to Levine and Robertson, due to the inherent limitations of the paper-only reviews and the fact that the FBI Lab was not accredited until 1998, they inquired about established Lab policies or protocols that guided the Unit examiners and that Robertson and Levine could use to evaluate the Lab examiners' compliance. The head of the Hairs and Fibers Unit informed them that no policies or protocols existed within the FBI at the time Malone and his colleagues performed their analyses of the cases

[35] The FBI hired these experts through their state crime laboratories. The scientists were not personally compensated by the FBI for their work.

Robertson and Levine were reviewing.[36] The lack of policies or protocols rendered it extremely difficult for the independent scientists to assess the consistency or accuracy of the scientific approach used by Malone. The same would have been true had the scientists been asked to review the forensic work of any other examiners in the Hairs and Fibers Unit.

As mentioned above, of the 312 cases the independent scientists reviewed for the Task Force, 162 cases contained hair and fiber analyses performed by Malone, relating to 172 defendants. Approximately one-third of those 162 cases also included testimony provided by Malone. According to the former Deputy Section Chief of the FBI Lab's Scientific Analysis Section, Malone handled significantly more cases than any other Hairs and Fibers Unit examiner, causing many examiners in the Lab to question the integrity of Malone's methodology. The fact that the number of cases handled by Malone and reviewed by the independent scientists was disproportionate to the number of cases handled by the 12 other Lab examiners subject to the Task Force review may also have reflected other factors. For example, the Tampa, Florida, State Attorney's Office had requested that the Task Force refer all cases in his district involving Malone's work to the FBI for review by the independent scientists.

We determined that the independent scientists deemed approximately 96 percent of the Malone cases to be problematic in one or more areas corresponding to the five questions on the case review form and as defined by the Independent Review Guidelines the FBI provided to the scientists at the start of the case reviews. The guidelines are in Appendix F. In summarizing his reviews of Malone's cases, Robertson, who reviewed over 150 Malone cases, told us the most significant, recurring problems with Malone's work were:

1. His testimony that an individual hair could be determined to belong unequivocally to only one person in the world, based solely on microscopic analysis, had no scientific basis at the time Malone testified. Robertson described Malone's testimony to this effect in many cases as "outlandish."
2. His testimony to the statistical probability of a match was inappropriate in hair analyses based solely on microscopic analysis.

[36] At the outset of this review, the FBI did not produce in response to our request any FBI manuals or other internal guidance concerning hair or fiber analysis. However, we subsequently located on the Internet a 1977 FBI manual that specifically addressed how to analyze hair and testify in court about findings derived from hair microscopy analysis: John W. Hicks, Special Agent, *Microscopy of Hairs: A Practical Guide and Manual*, Federal Bureau of Investigation, U.S. Department of Justice (Jan. 1977).

3. His conclusions, as described in his reports, had unclear and unsupported bases.
4. His documentation was inadequate and often indecipherable.
5. His testimony included analysis that was not documented in his lab report or bench notes.

Levine and Robertson found serious and consistent flaws in Malone's work. They concluded that Malone had failed to use appropriate tests in a scientifically acceptable manner and that Malone's testimony was often unsupportable on the basis of his bench notes, lab reports, or accepted standards in the scientific community. Further, they told us that had the FBI Lab been accredited at the time Malone conducted his forensic work and provided testimony, Malone's work would not have satisfied the standards then required of accredited hair and fiber laboratories (discussed further below). Finally, the scientists concluded that Malone testified outside his area of expertise in almost half of the cases involving testimony.

We analyzed the independent scientists' responses to the five questions using a sample of 50 reports concerning hair and fiber cases handled by Malone. The scientists concluded in 94 percent (47 of 50) of the cases that either the appropriate forensic tests were not conducted or it was impossible to determine whether Malone conducted the appropriate tests (Question 1). Similarly, in the same percentage of cases, the scientists concluded that the results Malone described in his lab reports were not supported by his bench notes (Question 2). Testimony was available for the independent scientists' review in 26 of the 50 reports we analyzed. The scientists concluded that in 54 percent (14 of 26) of the cases, Malone's testimony was inconsistent with his lab reports (Question 3) and that in 65 percent (17 of 26) of the cases, his testimony was inconsistent with his bench notes (Question 4).

With regard to whether Malone's testimony in cases involving both hair and fiber analyses was within the bounds of his expertise (Question 5), Levine and Robertson found that Malone's testimony was consistently overstated and much stronger than either his lab reports or bench notes supported, resulting in misleading and inaccurate testimony. Moreover, Malone testified in some cases to conclusions that were outside his area of expertise – the same criticism we noted of Malone in the OIG Report.

With regard to fiber analyses, the scientists wrote in their reports that they did not believe Malone understood the appropriate use and limitations of an instrument known as a microspectrophotometer and, therefore, that he often came to scientifically inaccurate conclusions in his reports and testimony. For example, testifying about carpet fibers in the 1994 trial involving Bryan M. Jones, who was convicted of murder and sentenced to

death, Malone stated that "we have a machine that can get it down to one specific dye from all others . . . [and] they had exactly the same dyes." Robertson wrote in his independent report that Malone's statement was incorrect and misleading: "The microspectrophotometer is used to measure color. Articles published in the *Journal of Forensic Sciences* [the professional scientific journal of the American Academy of Forensic Sciences] in 1988 and 1990 specifically point out that spectra cannot be used to identify dyes – they only allow determination of color." Robertson also wrote in an additional report that Malone failed to use other fiber tests available to him at the time of his lab work.

Levine and Robertson also told us that Malone's notes regarding both fiber and hair analyses he performed were inadequate. For example, Levine told us that Malone's bench notes about his fiber analysis did not indicate which tests he performed, such as how he identified a particular fiber. Without knowing the specific tests Malone used to conduct his examinations – and without conducting her own forensic analysis of the evidence – Levine could not verify the accuracy of Malone's analyses. Robertson also told us that hair comparisons are typically described in an examiner's handwritten notes. However, Malone's notes often lacked detail or were indecipherable, leaving Robertson no choice but to select the "unable to determine" response on the independent report form.

Similarly, whereas accreditation standards would have required that all notes be in permanent ink, initialed, and dated by the examiner, Malone's notes were in pencil and not dated. According to the former Deputy Section Chief of the FBI Lab's Scientific Analysis Section, there were no peer reviews of hair and fiber examinations performed by the FBI Lab, also required by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board standards.[37] Robertson stated that there was no evidence of annual monitoring of testimony provided by Hairs and Fibers Unit examiners at trial – yet another Accreditation Board requirement (then and now). In addition to a lack of documentation standards, the FBI Lab's Hairs and Fibers Unit did not adhere to its own standards and protocols for hair analysis – the 1977 FBI manual we located and cited above. We did not find any standards or protocols for fiber analysis.[38]

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[37] In the course of our file review, we identified a limited number of documents reflecting confirmations of hair and fiber examinations, but the documents did not indicate the nature of the reviews conducted.

[38] The FBI Lab had not yet been accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board at the time the first OIG Report was published in April 1997. In response to the 1997 OIG Report recommendations, the FBI Lab applied for accreditation in December 1997 and received the accreditation in

(Cont'd.)

In their independent reports of Malone's hair and fiber analysis and testimony in four cases (including two capital cases), both Levine and Robertson documented Malone's work as particularly unreliable, inaccurate, and unscientific. In *Texas* v. *Boyle*, a death penalty case in which the defendant was executed 4 days after the OIG Report was published and 2 years before Levine's independent review in 1999, Levine noted many serious problems with Malone's analysis and testimony. Levine answered "no" to all five questions on the independent report form and provided eight pages of detailed commentary (see text boxes above and in Chapter Two). In addition, she wrote 18 pages of notes about the case to support her findings, all of which were transmitted to the Task Force. In total, Levine spent 16 hours reviewing Malone's work and testimony in the *Boyle* case. Among her findings, Levine noted that the conclusions Malone reached when comparing nylon and acrylic fibers (using microspectrophotometer data) were unacceptable because the comparisons lacked supportable documentation. Levine noted a misidentification of fibers in another evidence sample in the case and recommended that the fibers be re-examined to clarify the issue. She also wrote that Malone's trial testimony about his fiber findings was overstated and incorrect.

Excerpt from Independent Scientist Cathryn Levine's Findings on Malone's Trial Testimony in *Boyle*

Malone "does not understand this [microspectro-photometer] instrument – its limitations and/or its inability to identify certain dyes. The testimony does not support that he understands this instrument."

"[T]his testimony would not be generally accepted as scientifically accurate by the majority of hair and fiber examiners."

— *Boyle* Independent Report, pages 7-8.

With regard to Malone's testimony in the *Boyle* case about hair comparisons, Levine found that Malone's statement about the "uniqueness" of hair was without scientific basis and that his statement "that only on 2 occasions had he found similar hair in the 10,000 people he [had] examined" was confusing and misleading. Levine further wrote that Malone's testimony in *Boyle* that "at least 15 characteristics are needed for a hair comparison" was scientifically unsupportable, and she took issue with testimony in which Malone claimed to have conducted certain examinations which were, in fact, conducted by a technician in the Lab. Such testimony was both inaccurate and inconsistent with Malone's bench notes, she wrote. In *Boyle*, the Task Force requested a materiality

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September 1998. The FBI maintains, and we have no basis to question, that there were no universally accepted standards and protocols approved by the scientific community at the time of Malone's examinations.

determination from the prosecutor, who responded that but for Malone's testimony, Boyle would not have been convicted of the capital offense that rendered him eligible for the death penalty.

In another death penalty case, that of Billy Rae Irick, who is still on death row, Levine wrote about Malone's hair analysis conclusions as reflected in his lab report and explicitly found that he had omitted exculpatory evidence:

> The [Lab] report [references] 'some individual microscopic characteristics.' The word 'individual' is confusing and may be misleading. Examples exist (see [Malone's] handwritten notes) where exculpatory evidence is not in [the Lab] report. Hairs that may be exculpatory are identified in notes and testified to – but they are omitted from [lab] report . . . . Omitting possible exculpatory evidence is problematic and possibly unethical.

In *Irick*, the Task Force transmitted Levine's report to the prosecutor who, in turn, disclosed the report to defense counsel. The defendant took broad discovery and unsuccessfully sought a new trial on the basis of the independent scientist's report.

Robertson's reviews of Malone's cases resulted in similar findings. In the *Gates* case, the file provided to Robertson for review did not contain testimony, so his review was limited to bench notes, lab reports, and letters from the submitting law enforcement agencies. Robertson indicated that he was unable to determine whether Malone performed the appropriate tests in a scientifically acceptable manner due to inadequate documentation (see text box).

Excerpt from the Independent Scientist Steve Robertson's Findings on Malone's Bench Notes in *Gates*

"The [lab report] results are not adequately documented in the [bench] notes. The notes are not dated and are in pencil instead of ink. Abbreviations are used that are hard to interpret. There is documentation that hairs were recovered from suspect [Gates's] clothing, but there is no documentation that hairs were recovered from the victim's items. Documentation is lacking that explains if the examiner looked only for Negroid hairs on Q1-Q4 or if there were other hairs on them. If other hairs were detected, one must wonder if they are the victim's hairs."

— *Gates* Independent Report, page 3.

In the review of another case, that of Derrie Nelson, Robertson's comments also echoed those of Levine in her report on the *Boyle* case. In particular, Robertson wrote that Malone had "testified that hair must have at least 15 characteristics to have value for comparison. This has no scientific basis known to this reviewer." In support of

Robertson's comment above, we found in our review of the January 1977 FBI manual on hair microscopy the following statement:

> It is pointed out that hairs do not possess a sufficient number of unique microscopic characteristics to be positively identified as having originated from a particular person to the exclusion of all others.[39]

In cases involving hair analysis, Robertson also found that Malone frequently and inappropriately testified to the probability of a match when there was no scientific basis for doing so. In his independent report on the Nelson case, Robertson commented:

> In response to the question, "What percentage of the Negro population would have hairs with all 20 of these characteristics?" examiner testified "one in 5,000." The same answer was given to the same question concerning Caucasian hair . . . . While the examiner bases his answer on his experience, there has been no published scientific study to confirm this. In fact, the only published study concerning probability of a hair match has been criticized and debated and does not have the support of the forensic community.

According to a document the FBI provided to us summarizing a debriefing of Robertson at FBI Headquarters in September 1999, the experts recommended that the physical evidence in some of the Malone cases be re-examined, if available. Our review of the Task Force files and interviews of former Task Force members and FBI personnel revealed, however, that no re-examinations of physical evidence were conducted, whether recommended by the independent scientists or requested of the Task Force by a prosecutor.

III. FBI and Department Response to Independent Scientists' Findings Regarding Malone's Analyses and Testimony

Our file review and interviews of former Task Force members and FBI personnel made clear that beginning in May 1999 and July 1999, respectively, the FBI and the Department learned that the independent scientists were finding almost all of the cases involving hair or fiber evidence analyzed by Malone to be seriously flawed. The *Boyle* case was one of the first of such cases. Yet, we found no indication in the thousands of Task Force and FBI documents we reviewed or from the interviews we conducted

[39] John W. Hicks, Special Agent, *Microscopy of Hairs: A Practical Guide and Manual*, Federal Bureau of Investigation, U.S. Department of Justice (Jan. 1977), p. 41.

to suggest that the FBI or Department ever considered submitting for independent review all cases handled by Malone where the evidence was material to the conviction, regardless of the length or nature of sentence imposed or the date of conviction. Nor was there any documentation to suggest that the FBI or Department considered reviewing all cases Malone had handled (in any capacity) at any time that had been eliminated from the Task Force review process for one or more of the categories listed in Chapter Two or for other reasons listed in Appendix C.[40]

Similarly, it appeared that neither the FBI nor the Department considered the potential for a more widespread set of problems in the Hairs and Fibers Unit, which had handled many cases prior to 1985, having opened sometime in the 1960s. Nor did the FBI or the Department consider the wisdom of expanding the scope of the review to include other examiners in the Unit.[41] Our research revealed that between 1975 and 1996, at least seven FBI Hairs and Fibers Unit examiners testified to the probability of a hair match using testimony very similar to that which Malone so frequently offered at trial. Finally, we found no evidence that any consideration was given to disclosing broadly, to prosecutors or defendants, the nature and extent of the problems with Malone's analyses and testimony.

To ensure that all defendants are notified about deficiencies in the FBI Lab analysis or testimony in their cases – whether by Malone or another examiner, including cases reviewed and not reviewed by the Task Force – we make several recommendations to the Department. Chapter Seven contains a full list of those recommendations.

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[40] Malone also analyzed and testified about plant evidence in an unknown number of criminal cases. Our file review reflected that the Task Force referred only five Malone plant cases to the FBI for review by an independent scientist. The independent plant scientist the FBI retained found that Malone did not perform appropriate tests in a scientifically acceptable manner and that Malone testified outside the bounds of his expertise.

[41] We found one Criminal Division memorandum referencing "the specter that the other examiners in the [Hairs and Fibers] unit were either as sloppy as Malone or were not adequately conducting confirmations [of Malone's work]. This issue has been raised with the FBI but not resolved to date." Maureen Killion, Director, Office of Enforcement Operations, Criminal Division, memorandum to Michael Chertoff, Assistant Attorney General, Criminal Division, through John C. Keeney, Principal Deputy Assistant Attorney General, Criminal Division, Pending Considerations Regarding the Criminal Division's Case Review Related to the Inspector General's Investigation and Report on the FBI Laboratory, July 11, 2002, footnote 1. It was unclear from Task Force and FBI documents we reviewed and our interviews whether other Hairs and Fibers Unit examiners had received the same training and applied the same standards, to the extent they existed, as those received and applied by Malone.

In Chapter Five we discuss the death penalty cases that fell within the Task Force's review scope. We describe how the Task Force and the FBI identified and reviewed captial cases and how the Task Force notified prosecutors of the independent scientists' reviews of those cases.

CHAPTER FIVE:
DEATH PENALTY CASES

The OIG closely examined the capital cases falling within the scope of the Task Force's review. We identified two serious deficiencies in the way the Department and the FBI approached these cases.

First, following publication of the OIG Report in April 1997, and before any defendants on death row had been identified, the Department did not provide immediate notice to the relevant prosecuting authorities of the potential need to stay the imminent executions of defendants whose capital convictions may have been tainted by FBI Lab analysis and testimony. As a result, the executions of at least three defendants, Benjamin Boyle, Michael Lockhart, and Gerald E. Stano, were carried out prior to a case review by the Task Force.[42] Boyle was executed just 4 days after the OIG Report was published.

Second, the Department and the FBI did not design and implement case review procedures to ensure that the handling of capital cases would be the Task Force's top priority, despite recommendations from a senior Task Force attorney to a senior Department official that they do so. As a result, the FBI identified capital cases no differently from non-capital cases and with no particular urgency. It took the FBI almost 5 years, from 1996 through 2001, to identify all the death penalty cases falling within the 1985–1996 timeframe the FBI and Department had established for cases subject to review. Eventually, the FBI identified 64 defendants on death row whose cases involved analysis or testimony handled by 1 or more of the 13 examiners.

In our view, these two deficiencies show that the Department and the FBI failed to recognize the priority that the Task Force should have given to capital cases and to adjust the Task Force's priorities as information became known about the effects of tainted Lab analysis and testimony on death penalty cases. Moreover, these deficiencies resulted in a lack of uniformity and urgency in the way capital cases were treated by the Task Force and the FBI. For example, case-specific determinations about the reliability of the Lab analysis and testimony were made in some capital cases but not others, and delayed notice or no notice at all was provided to

[42] According to the FBI, although Stano and Lockhart were executed before the Task Force reviewed their cases, the OIG-criticized examiner who analyzed the evidence in those cases did not find any positive associations linking either of the defendants to the crimes for which they were convicted and executed.

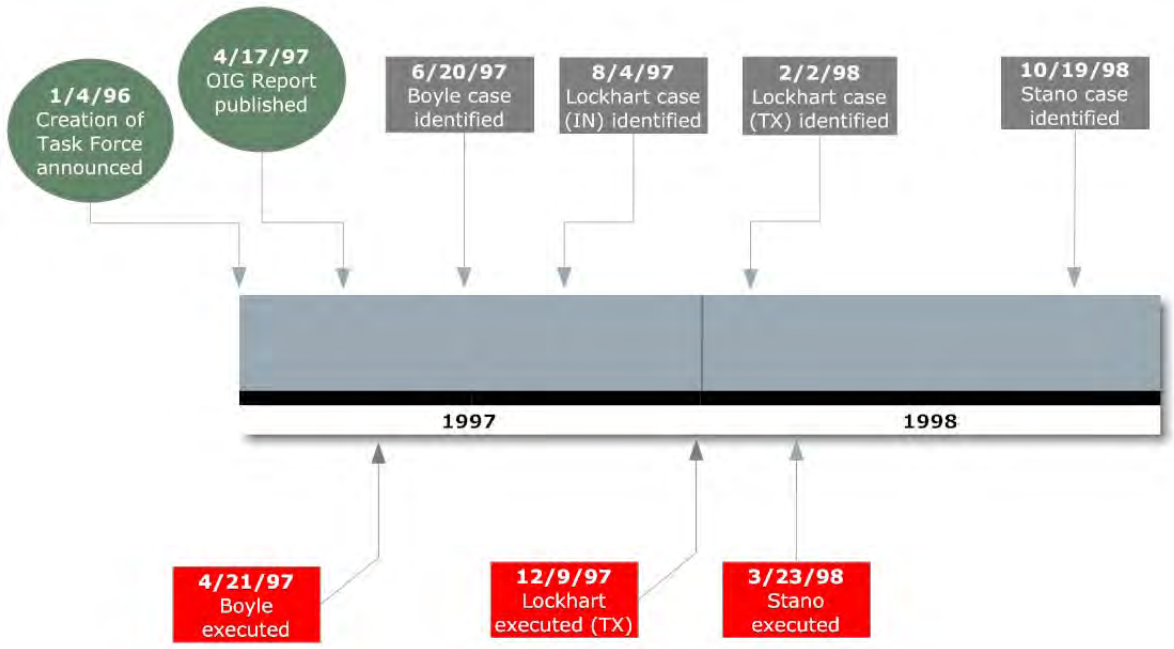
defendants convicted of capital offenses about the Task Force's case review process.

I. Failure to Provide Immediate and Broad Notice

In our file review and witness interviews, we found no evidence that immediately after publication of the 1997 OIG Report and before any death penalty cases were identified, the Department provided, or even considered providing, notice to relevant state and federal prosecuting authorities of the potential that death row inmates had been convicted on the basis of tainted Lab analysis or testimony. No steps were taken or considered to reduce the likelihood that a condemned defendant could be executed without a case review. In particular, we found no evidence that anyone in the Department or the FBI contacted governors' offices or state attorneys general, or attempted to swiftly identify federal death row prisoners whose convictions could have been affected by tainted Lab analysis or testimony. Nor did the Department inform or consider informing defense organizations or death penalty organizations of the potential grounds to challenge imposition of the death penalty. Had the Department or the FBI provided such notice, three defendants – Boyle, Stano, and Lockhart – would have had grounds to argue for a stay of their executions while they litigated the impact of this discovery on their cases.

Boyle and Stano were executed after the OIG Report was published, but before the FBI had identified their cases as involving 1 or more of the 13 examiners. In those cases, the Task Force had 4 days and 11 months, respectively, to provide notice but failed to do so (see Figure 6, next page). The FBI identified 2 death penalty convictions for Lockhart – 1 in Indiana and 1 in Texas – that involved 1 or more of the 13 examiners. The FBI had identified the Indiana case 8 months prior to the defendant's execution by the State of Texas, but did not identify the Texas case until after Lockhart was executed.

FIGURE 6: BOYLE, LOCKHART, AND STANO DEATH PENALTY CASE TIMELINE



Source: Task Force case files.

II. Failure to Design and Implement Case Review Procedures to Ensure Expedited Handling of Capital Cases

The Department and the FBI did not design and implement case review procedures to ensure that the handling of capital cases would be the Task Force's top priority, despite recommendations from a senior Task Force attorney to a senior Department official that they do so. We found no Department correspondence to the FBI that discussed the need for the Task Force to make identification and handling of capital cases its top priority. We also found no evidence that the Department directed the Task Force to promptly gather information about pending execution dates. We found two memoranda from a senior Task Force attorney to DAAG DiGregory raising the issue of capital case review prioritization. The first memorandum, dated August 19, 1997, explicitly stated, "The Criminal Division should request expedited review of death row cases." The second memorandum, dated September 15, 1997, listed proposed questions for an upcoming meeting with the FBI regarding independent reviews. Among the questions was whether the FBI had designated a "priority order" for the scientists' case reviews based on factors such as length of sentence, including death penalty cases. DAAG DiGregory told us during his interview that he did not recall whether capital cases were prioritized.

Further, although all the former Task Force members we interviewed recalled that they had made capital cases their top priority, we found no evidence suggesting that this prioritization was done immediately after the Task Force narrowed its scope in June 1997 to focus on the 13 criticized examiners. We found one document listing some capital cases, dated April 30, 1998, 1 year into the Task Force project. That document did not indicate anything, however, about how the Task Force treated those cases or the priority of those cases among the universe of cases under review. We found a second Task Force document addressing only federal death penalty cases, none of which involved the 13 examiners.[43] That document was dated April 10, 2000, more than 4 years after the Task Force began its work. Similarly, we found no FBI documents that referenced a specific protocol for handling capital cases, and two FBI employees actively involved with the case review whom we interviewed told us they did not recall making these cases a priority.

Below, we describe the key stages in the case review process at which both the Department and the FBI could have made, but did not explicitly make, capital cases their top priority. We also explain how our examination of the review process for death penalty cases revealed repeated and material delays traceable to the Task Force, the FBI, and state prosecutors.

A. The FBI Failed to Immediately Identify Death Penalty Cases

We found no evidence that when the FBI first identified the 7,609 cases involving the 13 examiners, it explicitly requested its field offices to prioritize the identification of capital cases. The FBI had created a case identification checklist for use by its field offices, but did not include a line dedicated to the identification of defendants on death row. We concluded that neither the FBI field offices nor FBI Headquarters treated the capital cases differently from the other cases in the identification process. It appears that the FBI directed its field offices to focus on identifying cases based on the examiner involved and that the field offices followed those instructions.[44] In addition, we found no evidence that when the FBI sent all 7,609 identified cases to the Task Force, it segregated or flagged the death

[43] Our review of the Task Force death penalty files yielded no federal cases between 1985 and 1996 involving any of the 13 Lab examiners at issue.

[44] This direction was referenced in an August 1997 internal Task Force memorandum, which indicates that in prioritizing the review of cases by FBI field offices for purposes of determining which prosecutions resulted in convictions, the FBI's "examiner priority" identified Malone as top priority. We did not find any document in our file review that explained why the FBI made Malone its top priority. We determined, however, that prior to July 1999, the Task Force had no reason to suspect that Malone's analyses and testimony would be deemed by the independent scientists to be any more unreliable than those of the other 12 examiners.

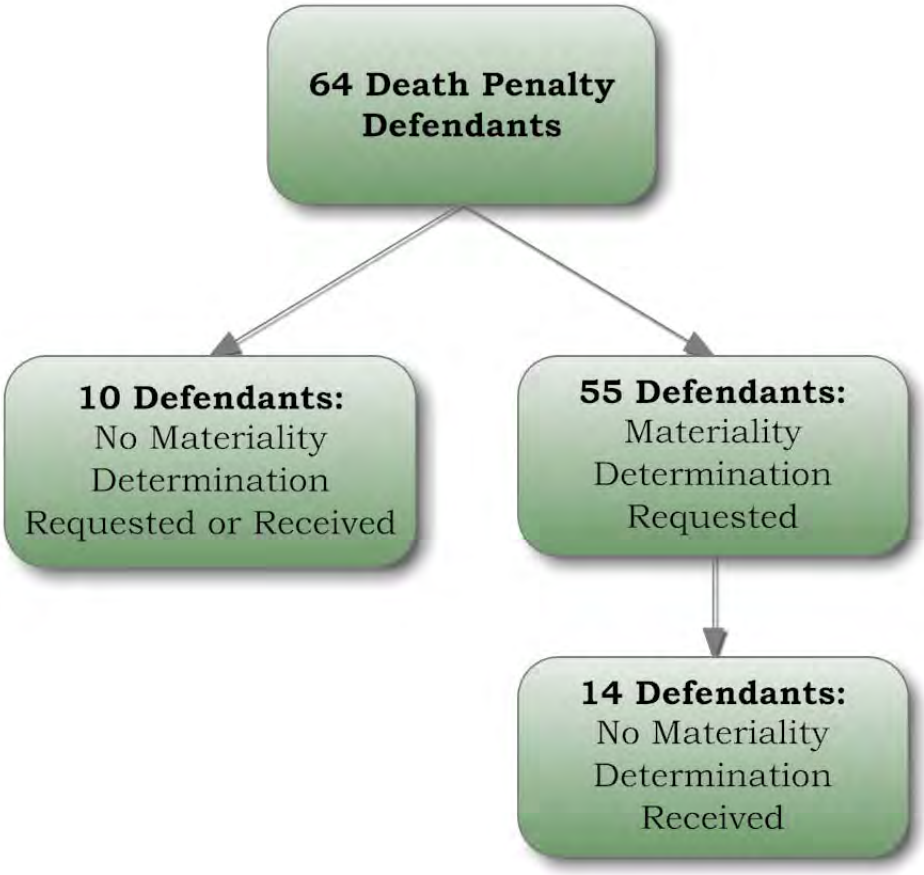
penalty cases to alert the Task Force to their urgency. The death penalty cases were among thousands of identified cases and, therefore, the Task Force could not readily determine which defendants were at risk of imminent execution.

B. The Task Force Did Not Request or Receive Materiality Determinations from State Prosecutors for All Capital Cases

The Task Force did not request or receive a materiality determination on the Lab analysis or testimony for all capital defendants. Our review showed the Task Force requested materiality determinations in cases related to only 55 of the 64 defendants on death row. We found no evidence that the Task Force requested or received a materiality determination for the remaining 10 defendants, 6 of whose cases involved analysis or testimony handled by Malone.[45] With regard to the 55 defendants for whom the Task Force requested materiality determinations, the Task Force did not receive determinations for 14 defendants, as illustrated in Figure 7 (next page). In total, our review revealed that the Task Force did not obtain determinations from prosecutors about the materiality of the evidence for 24 of the 64 (38 percent) death penalty defendants.

[45] The fact that Lockhart was sentenced to death in two separate jurisdictions and that his cases were handled differently by the Task Force accounts for the total number of materiality determination requests having been increased by one.

FIGURE 7: DEATH PENALTY MATERIALITY DETERMINATIONS



Note: As discussed above, one defendant, Lockhart, was sentenced to death in two separate jurisdictions and his cases were handled differently by the Task Force. As a result, the total number of materiality determination requests reflected in this figure is increased by one.

Source: OIG analysis.

Using available case file documentation for 34 of the 55 death penalty defendants for whom materiality determinations were sought, we determined that it took the Task Force an average of approximately 5 months after the FBI's identification of a death penalty case to request a materiality determination from the prosecutor. In the case of *Tennessee* v. *Wayne Bates*, the Task Force requested a materiality determination very quickly – only 2 days after the case was identified. However, it took the Task Force between 6 months and 1 year to request a materiality determination from the prosecutor for nine other defendants. In the case of *Idaho* v. *David Card,* the Task Force requested a materiality determination from the prosecutor approximately 1 year and 4 months after first becoming aware of the case. It is noteworthy that the Task Force neither requested that prosecutors respond quickly in the capital cases nor set any deadline to respond with the requested information.

We also found that state prosecutors contributed to the delays at this stage in the case review process for some defendants on death row. Among the 39 cases for which we could determine the length of time between the Task Force request for a materiality determination and the prosecutor's response, we found that it took an average of approximately 5 months for prosecutors to respond to the Task Force. In one case, the prosecutor responded in a single day; in another, the prosecutor took almost 2½ years to respond. These delays had the potential for obviously severe and irreparable consequences.

C. The Task Force Did Not Refer All Capital Cases to the FBI for Independent Review

The Task Force referred to the FBI for independent review capital cases involving eight defendants.[46] It did not refer for independent review all capital cases for which the prosecutor deemed the evidence material to the defendant's conviction or for which the prosecutors provided no materiality determination at all. For example, in the case of *Pennsylvania* v. *Young*, the prosecutor deemed the evidence material to the defendant's conviction, but the Task Force did not refer the case for an independent review (see below). Young was sentenced to death in 1987 but died of natural causes in 1996 while awaiting execution. We discuss his case in more detail in Part III of this chapter. In addition, as reflected in Figure 7 (above), the Task Force requested from prosecutors but did not receive materiality determinations related to 14 of the 64 defendants and did not refer those cases to the FBI for an independent review.[47]

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[46] The eight defendants whose capital cases the Task Force referred to the FBI for independent review are: (1) Brett Bogle, (2) Benjamin H. Boyle, (3) Michael T. Crump, (4) Billy Rae Irick, (5) Bryan M. Jones (two cases), (6) Robert (Bobby) Joe Long, (7) Michael Mordenti, and (8) Hector R. Sanchez. Cases related to all but one of these eight defendants (Sanchez) involved hair and/or fiber evidence handled by Malone. Yet, there were 27 additional death penalty defendants with hair and/or fiber evidence that Malone handled which the Task Force did not send for independent review.

[47] The 14 defendants for whom the Task Force requested materiality determinations from prosecutors but received no response, represented in Figure 7, were: (1) Oscar R. Bolin (2 cases), (2) Victor J. Cazes, (3) Jeffery R. Ferguson, (4) Donald H. Gaskins, (5) Anthony Larette, (6) Michael Lockhart (2 cases), (7) Alan Matheney, (8) Hugh W. Melson, (9) Leon J. Moser, (10) Kenneth W. O'Guinn, (11) Nathan J. Ramirez, (12) Danny H. Rolling, (13) Gerald E. Stano, and (14) Laron R. Williams. According to comments the Department provided to a draft of this report, these cases were not referred for an independent review for 1 or more of the following reasons: they involved Lab work that resulted in "no match" to the defendant; they involved a defendant who died before the Task Force began its review; they involved a primary FBI examiner who was not among the 13 criticized examiners who conducted the analysis; the defendant knew of the criticisms in the OIG Report and was pursuing litigation; no Lab exam was actually performed; the defendant had been executed for a crime for which no FBI Lab work was performed; or the examiner

(Cont'd.)

Further underscoring our finding that the Task Force did not make death penalty cases a priority, we determined that although there were cases involving 4 defendants on death row among the first 60 cases the Task Force sent to the FBI for independent review in July 1998, the Task Force letter to the FBI did not specifically identify those death penalty cases or request that they be reviewed first. Nor in later Task Force requests to the FBI for independent reviews was there specific identification of cases involving defendants on death row, much less a request that the FBI give priority to their review.

D. The FBI Caused Delays in Death Penalty Case Reviews

The FBI also contributed to the delays in the review process for defendants in capital cases. In particular, we found that the FBI took a full year, on average, from the time the Task Force requested an independent review in the capital cases to return a completed report to the Task Force. In one case, *Florida* v. *Bobby Joe Long*, the FBI responded within a month; in another case, *Florida* v. *Michael T. Crump,* the FBI responded 2 years and 3 months later. Moreover, just three of the seven FBI letters to the Task Force transmitting independent reports involving defendants on death row mentioned that the enclosed independent reports included some for defendants sentenced to death.

E. Task Force Transmittal Letters to Prosecutors Enclosing Scientists' Reports Did Not Highlight Capital Cases

As explained above and in Chapter Three, for both death penalty cases and non-death penalty cases, the Task Force used a form letter with boilerplate language to notify prosecutors that it was transmitting the independent scientists' reports and to request that prosecutors determine whether disclosure of the reports to the defendants or defense counsel was warranted. For the death penalty cases, the Task Force did not highlight in any of its transmittal letters to prosecutors that the enclosed reports warranted immediate attention because they concerned defendants sentenced to death. Nor did the letters include any direction, instruction, guidance, or suggestion to the prosecutors to disclose the reports promptly to the defendants or defense counsel for the affected defendants. The strongest language suggesting that prosecutors disclose the reports read as follows:

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analyzed hair of a suspect who was not the defendant. The Department also stated that in a number of these cases, the defendants had admitted guilt and accepted responsibility (through a plea or an insanity defense, through unchallenged confessions, or through post-sentencing acceptance of responsibility).

> Please review the enclosed documents, the OIG report, and any other pertinent information you may have to determine whether the report of the independent scientist should be disclosed to the defendant or to the defendant's counsel. . . . If you decide to disclose any of these documents to the defense, please provide a copy of the transmittal letter to the Task Force.

The last sentence of the excerpt, requesting that prosecutors notify the Task Force if they disclosed any of the documents to the defense, is the language that appeared in the first 10 months of the Task Force's letters but was omitted from subsequent letters after the senior Task Force attorney left the Department in June 2000. We found that only four of the eight Task Force letters to prosecutors transmitting independent reports for death penalty cases contained this direction because they pre-dated June 2000. Furthermore, as discussed in Chapter Three, these transmittal letters did not impose a deadline for the prosecutors to notify the Task Force of disclosures made, let alone a deadline for disclosure of the reports to the defendants.

F. The Task Force Did Not Track Prosecutors' Disclosures to Defendants

Of the cases involving the eight defendants on death row referred to the FBI for independent review, we found evidence of disclosures of the completed reports by prosecutors to defense counsel for only two living defendants – Irick and Bogle, as illustrated below in Figure 8. The prosecutor in Irick's case disclosed the independent scientist's report to the defendant's counsel within 3 weeks of his receipt of the report from the Task Force. The prosecutor in Bogle's case did not make the disclosure to the defendant's counsel for almost 9 months. In total, the length of time between the FBI's case identification and the prosecutors' disclosures of the independent reports to the defendants in both the Irick and Bogle cases was more than 2 years.

FIGURE 8: INDEPENDENT REPORT DISCLOSURES IN CAPITAL CASES

Source: OIG analysis.

III. Case Studies Demonstrating Inconsistent Treatment

We concluded that the lack of a formal protocol for handling death penalty cases resulted in irregular treatment and handling of those cases by the Task Force, as evidenced by the following cases.

Pennsylvania v. *Joseph Young*

In *Young*, although the prosecutor determined that the FBI Lab analysis and testimony were material to the defendant's conviction, the Task Force did not refer the case to the FBI for independent review. Malone was the FBI Lab examiner in Young's case. Upon review of Malone's testimony, we determined that Malone had testified in a manner strikingly similar to that in other cases where the independent scientists concluded that Malone's testimony was overstated and inaccurate. Whether the outcome of Young's trial and his sentence would have been different without Malone's testimony is a serious question in view of the fact that the analysis and testimony Malone provided in others cases was deemed scientifically inaccurate, exaggerated, and unreliable. Young was sentenced to death in 1987 but died of natural causes in 1996 while awaiting execution. He had served 9 years.

Texas* v. *Benjamin Boyle

In *Boyle*, discussed previously, the Task Force requested a materiality determination from the prosecutor, who responded that but for Malone's testimony, Boyle would not have been convicted of the capital offense that rendered him eligible for the death penalty. The case review form the Task Force sent to the prosecutor, which was based on information the FBI collected during its case identification process, indicated that Boyle had been executed on May 21, 1997.[48] Aware that Boyle was deceased, the Task Force still referred Boyle's case to the FBI for independent review – a review which did not occur until 2 years later – in May 1999. None of the Task Force or FBI documents we reviewed and none of the witnesses we interviewed revealed why the Task Force referred the *Boyle* case, but not the *Young* case for independent review.

The Task Force's subsequent transmission to the prosecutor of the independent report in the *Boyle* case seems to illustrate an effort by the Task Force to follow the case review process as designed, regardless of the defendant's incarceration status. The independent scientist's report in the *Boyle* case unequivocally concluded that Malone's analysis lacked scientific integrity. As set forth in Chapter Four, the independent scientist, Cathryn Levine, described Malone's hair and fiber examinations and testimony as "confusing," "incorrect," "not consistent," "misleading," "overstated," "without scientific basis," and "not generally accepted as scientifically accurate by the majority of hair/fiber examiners." Levine also noted a misidentification of fibers in an evidence sample and recommended that the fibers be re-examined.

Yet, in its letter transmitting Levine's report to the prosecutor, the Task Force said nothing about the substance of the report or the fact that Boyle had already been executed. Instead, the Task Force letter contained the standard boilerplate language used in all such letters, including a sentence that stated, "Please review the enclosed documents . . . to determine whether the report of the independent scientists should be disclosed to the defendant or the defendant's counsel." The letter further requested the prosecutor to advise the Criminal Division in the event of developments or litigation, including "motions for new trial, motions attacking the validity of the conviction, or ongoing prosecution, related appellate issues, and *Brady* disclosures of FBI laboratory-related documents." The Task Force files we reviewed contained no written response from the prosecutor; instead, there was merely a Task Force letter

[48] Although the FBI's case review checklist indicated Boyle's execution date was May 21, 1997, the correct date was April 21, 1997. This error had no bearing on the consequences of the Task Force's actions.

to the FBI requesting, on behalf of the prosecutor, a copy of supplemental notes Levine mentioned in her report. Neither the FBI nor the Department publicly acknowledged that Boyle's conviction was tainted.

To ensure that all defendants involved in the 52 death penalty cases reviewed by the Task Force are notified about deficiencies in the Lab analysis or testimony in their cases, we make several recommendations to the Department. Chapter Seven contains a full list of those recommendations.

In Chapter Six we provide our analysis and conclusions of the Department's design, implementation, and management of the Task Force.

CHAPTER SIX:
OIG ANALYSIS AND CONCLUSIONS

We concluded that there were serious deficiencies in the Department's and the FBI's design, implementation, and management of the 1996 Task Force case review process. We found that the process lacked adequate planning for cases and scenarios that the Department and the FBI should reasonably have anticipated. We also identified significant, avoidable delays in multiple phases of the case review process and the primary reasons for those delays. For many defendants, the delays were very prejudicial and, for some, they caused irreversible harm. Finally, although we found that the individuals assigned to the Task Force were dedicated, hardworking, and conscientious, the Department seriously understaffed the Task Force for the scope of the review assigned to it.

The Department's lack of adequate planning resulted in its failure to define as the Task Force's main priorities the identification and review of capital cases with a sense of urgency commensurate with the consequences of a tainted conviction or, worse, the conviction of an innocent person in such cases. The failure to adequately plan also: (1) limited the universe of cases subjected to the Task Force review process, unjustifiably leaving unreviewed categories of convictions that were potentially based on faulty or unreliable Lab analysis or testimony; (2) resulted in the Department not providing case-specific guidance to prosecutors that would have allowed them to make timely disclosures of potentially unreliable Lab analysis, testimony, or both that they had already determined was material to a conviction; and (3) led to the Task Force not tracking information about any disclosures made by prosecutors to defendants with potentially tainted convictions.

The planning deficiencies and the delays in the case review process had a significant adverse impact on defendants whose convictions relied upon Lab analysis or testimony handled by Malone. Some of the affected defendants are among the seven defendants whose tainted convictions were not discovered until after they had served many years in prison and, in two instances, were deceased, either by execution (Boyle) or natural causes (Young). (See Appendix A for all seven cases.) Furthermore, the case review process was narrowed to exclude from review potentially tainted convictions of numerous other defendants, at least two of whom have since been exonerated of crimes for which they served over 21 years in prison, Santae A. Tribble and Kirk L. Odom.[49] Although the allocation of limited

[49] As explained in Chapter One, it was the combination of the FBI's exclusion of cases pre-dating 1985 and the Task Force's failure to expand the scope of review to include (Cont'd.)

resources always presents difficult choices for management, we believe that some of the cases excluded from the Task Force's review on account of the Department's and the FBI's resource allocation concerns were difficult to justify.

Below, we discuss the major deficiencies of the Task Force case review, all of which had the potential to adversely affect defendants' rights. In order of greatest consequence and concern, this chapter finds that: (1) death penalty cases were not handled with sufficient urgency and priority; (2) the Task Force review scope for non-death penalty cases should have been expanded based on information about Malone during the Task Force's case review process; (3) categories of cases were inappropriately eliminated from the Task Force's review scope for resource-related reasons; (4) Task Force resources were insufficient; (5) the FBI caused significant delays to the independent scientists' reviews; (6) independent scientists' reviews were limited to a paper review; (7) inadequate efforts were made to ensure appropriate and timely disclosures to defendants; and (8) the Task Force failed to track disclosures to defendants. At this juncture, 17 years after the commencement of the Task Force review, only some of these deficiencies can be remedied by corrective action, a matter we discuss in the next chapter.

I. Death Penalty Cases Not Handled with Sufficient Urgency and Priority

The Department and the FBI should have made the handling of death penalty cases their highest priority. Yet, we found that no one involved in developing and implementing the Task Force case review process placed a sufficiently high priority on the identification and review of death penalty cases to ensure they were handled in an effective and time-sensitive manner. In fact, at no time did Department leadership, the FBI, or Task Force members take any meaningful action to treat death penalty cases differently from other cases or to develop a strategy for doing so. As discussed in Chapter Five, none of the Task Force letters to prosecutors transmitting independent reports for capital cases stated that the enclosed reports warranted immediate attention because they concerned defendants sentenced to death. Nor did the Department broadly notify federal or state prosecutors that the Task Force review included cases of defendants on death row.

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cases involving all Hairs and Fibers Unit examiners that resulted in the Task Force's failure to identify the Tribble and Odom cases.

A reasonable and expected design of the review process would have included direction by Department leadership to the Task Force and the FBI to make every effort to identify as quickly as possible all death penalty cases involving any of the 13 examiners. Then, the Department could have attempted to expedite the state prosecutors' determination of the materiality of the Lab evidence to convictions by closely coordinating and encouraging state officials to establish and enforce deadlines for those determinations. Alternatively, the Department could have described to the public, in more detail, the case review it was undertaking. This would have allowed defendants, defense organizations, and others to be notified of the potential effect on capital convictions.[50]

In addition, a reasonable and expected case review design would have included explicit direction to the Task Force to promptly gather information about pending execution dates. This would have allowed the Task Force to have ordered the priority of death penalty cases for review or provided information to the appropriate authorities to enable informed decision-making on whether any impending executions should be stayed based on the possibility that the capital conviction relied on unreliable Lab analysis or testimony. The failure to treat death penalty cases with any sense of urgency resulted in one defendant, Boyle, not having the opportunity to challenge his conviction and death sentence on the ground that the capital conviction relied on analysis and testimony that an independent expert retained by the FBI found "confusing," "incorrect," "not consistent," "misleading," "overstated," "without scientific basis," and "not generally accepted as scientifically accurate by the majority of hair/fiber examiners." The prosecutor in the Boyle case, when asked about the materiality of the evidence presented at trial, stated that "the examiner's testimony was 'material' on the issue of whether the defendant committed capital murder by murdering the victim in the course of committing or attempting to commit the offense of kidnapping."

With respect to the capital cases involving analysis, testimony, or both handled by Malone, the Department and the FBI had ample reason by July 1999 to be concerned that virtually all of those convictions may have been tainted. By then, the Department had learned about the scientifically unsound examinations Malone conducted and his consistently overstated and scientifically unsupportable testimony. In our view, the Department should have directed that all of Malone's death penalty cases – including those where he served as the confirming examiner for analysis performed by another examiner in the Lab – be referred for immediate review by the

[50] This latter approach would have reached a greater number of defendants whose capital convictions were supported by unreliable evidence because the Task Force review did not include all cases handled by the 13 examiners. The review excluded cases before 1985.

independent scientists. In each of those capital cases, it was important to the integrity of the justice system to establish whether the forensic analysis and testimony underlying the conviction and sentence of the defendant were free of material defect, even if the defendant had already been executed or died in prison.

Apart from the failure of the Department and the FBI to react in a focused and meaningful way to the severity of the problems found in the Malone cases, we also concluded that the Task Force, supervised by the Department, failed to handle all death penalty cases in a similar manner without reason. We concluded that the inconsistent handling of death penalty cases demonstrated the inattentiveness of everyone involved in the process and a lack of focus on the need to treat those cases with urgency and as the Task Force's highest case review priority. For example, the Task Force treated differently capital cases in two different states involving the same defendant (Lockhart), where the evidence in both cases was handled by 1 or more of the 13 criticized examiners. Upon learning that the defendant had already been executed, the Task Force requested a materiality determination only from the prosecutor in Texas, where the defendant had been executed, and not from the prosecutor in Indiana, where the defendant had also been sentenced to death. Thereafter, the Task Force did not refer either case to the FBI for review by an independent scientist. We attribute the Task Force's poor handling of these cases to the fact that the Department had not developed specific protocols or guidance for the Task Force or the FBI with regard to death penalty cases. Moreover, to ensure the thoroughness and integrity of the review process, the Department should have directed the Task Force to thoroughly review *all* identified death penalty cases, even if the defendants had been executed or had died in prison before publication of the 1997 OIG Report.

Finally, the Department and the FBI did not acknowledge publicly in a timely way that the conviction that led to Boyle's execution was tainted. In *Boyle*, the prosecutor stated that there would not have been a capital conviction without the testimony presented by the FBI examiner at trial and the independent scientist stated that the evidence presented by the FBI examiner at trial (Malone) was "incorrect" and "without scientific basis." While we understand that this is not dispositive as to whether Boyle's conviction would have been overturned and his execution halted in light of this new evidence, we do believe it raises a serious question as to whether execution would have been the outcome. We concluded that Boyle was not given an opportunity to challenge his conviction and death sentence based upon this new and compelling evidence. Failures of this nature undermine the integrity of the United States' system of justice and the public's confidence in our system. Moreover, the failure to acknowledge contemporaneously the error also injured the reputation of the FBI and the Department.

II. Inadequate Task Force Review Scope for Non-Death Penalty Cases

Although we did not examine in detail all the non-death penalty cases in which 1 or more of the 13 examiners were involved, our review was thorough enough to enable us to conclude that an unknown number of defendants, including some sentenced to decades or life in prison, were convicted in cases where the labanalysis or testimony was deficient. These deficiencies, if challenged, might not have caused a defendant's conviction to be overturned because there could have been other evidence to sustain the conviction. However, the defendants should have had the opportunity to challenge their convictions. This was particularly true in cases where Malone performed the forensic analysis or provided testimony. The *Bragdon* case is one example of a case (shown in Appendix A) where a court found that there was a significant possibility that the outcome of the defendant's trial would have been different had the state not used Malone's faulty analysis or testimony. In the *Gates* case, in which Malone performed the Lab analysis and testified at trial, the court found that the defendant was actually innocent.

We believe the Department should have directed the Task Force to review all cases Malone handled at any point during his tenure in the FBI Lab beginning in 1975, whether as a primary, secondary, or confirming examiner, where the evidence was deemed material to the defendant's conviction. A discussion about potential scope expansion should have occurred no later than fall 1999, since the FBI and the Department learned in May and July 1999, respectively, after the glaring findings by the independent scientists, that Malone's forensic analysis and testimony were unreliable. Plus, the Department and the FBI were already aware of the OIG's 1997 finding that Malone falsified testimony in the *Hastings* matter. Finally, the fact that the FBI was not accredited and could not locate standard protocols for hair and fiber analysis during Malone's tenure at the FBI Lab constituted additional bases to compel the Department and the FBI to consider expanding the scope of review.

We also believe the Department should have considered directing the Task Force to review a sampling of cases handled by examiners in the Hairs and Fibers Unit other than Malone where the evidence was deemed material to the defendants' convictions. Given the lack of FBI Lab accreditation, the questionable reliability of microscopic hair comparisons within the scientific community, and Malone's inappropriate testimony regarding the probative value of hair evidence, we seriously question whether the work of Malone's peers may have also suffered the same or similar deficiencies, as was later determined to be the problem in the Tribble and Odom cases. To determine the scope of the problem and to assess the reliability and scientific integrity of the analysis and testimony used in those cases, the Department should

have called for a review of at least a sampling of cases performed by the Unit where the forensic evidence was material to the defendants' convictions.

III. Categories of Cases Inappropriately Eliminated from the Task Force's Review Scope

We recognize that resource management is an appropriate consideration in the Department's decision-making. Clearly, categories of cases were eliminated to reduce the number of cases to a more manageable level. Although resource management is an understandable consideration in decision-making, we concluded that by eliminating case categories to make the review process more manageable, the Task Force and the FBI inappropriately excluded certain cases involving defendants with potentially tainted convictions. Below are the most significant categories of cases eliminated from the Task Force's scope that we believe should have been reviewed.

- *Cases Pre-Dating 1985.* We concluded that the Department acquiesced to the FBI's unilateral decision not to search for cases pre-dating 1985 during the case identification phase. We recognize that FBI Lab databases did not contain pre-1985 cases and that additional labor would have been required to review paper files to identify these cases, including those identified in the manual log of hair and fiber cases back to 1982. However, as initially revealed by media reporting and confirmed by our review, challenges to two pre-1985 cases, Tribble and Odom, involving hair and fiber examiners others than Malone, resulted in the exoneration of these defendants. In our view, Acting AAG Keeney's guidance to federal prosecutors to use "appropriate efforts" to identify pre-1985 cases should have been much more prescriptive, requiring federal prosecutors to conduct a more comprehensive search for cases not retrievable through a database search. In addition, the Department should have engaged directly with state prosecutors and state attorneys general to identify pre-1985 state cases involving the 13 examiners. The Department should also have given greater consideration to engaging other resources, such as associations of criminal defense attorneys, to discover additional cases warranting review by the independent scientists.[51] As a result of the Department's acquiescence in the FBI's decision to limit its searches, there still may exist unreviewed, pre-1985 cases involving the FBI Lab in which potentially tainted

[51] The Department and the FBI announced that they are taking these very measures in connection with their ongoing 2012 review of hair cases referenced in footnote 12, above.

convictions were supported by unreliable analysis and testimony including, but not limited to, Malone's cases.

- *Five of the 18 categories of cases described in Chapter Three.* Between 1998 and 2003, the Department and the FBI identified 18 categories of cases they decided would be eliminated from the review process (see Appendix C). Those categories included cases where: (1) the defendant had died; (2) the defendant "should have finished [his] sentence more than 6 years ago; (3) the defendant had been prosecuted in a foreign country; (4) the defendant had been deported; or (5) Malone only confirmed the lab results of another examiner. In our view, the decision not to review these five categories of cases devalued the liberty and collateral consequences potentially suffered by the defendants in these cases whose convictions may have been supported by unreliable FBI Lab analysis or testimony. In addition to the loss of liberty for any period of incarceration to which these defendants may have been subjected, criminal convictions can have many collateral consequences, including: loss of job, housing, and educational opportunities; loss of the right to vote; harm to family and other personal relationships; loss of physical and mental health; and the possibility of an enhanced prison sentence in the event of a subsequent conviction. In our view, the Department fell short of the Task Force's articulated mission when it excluded these cases from review.

IV. Insufficient Task Force Resources

The findings and deficiencies we identified throughout this review led us to conclude that the Department failed to staff the Task Force with sufficient personnel to implement a case review of the magnitude it undertook. At no time during its 8 years of operation did the Task Force include more than two attorneys, three paralegals, and a few student interns. For much of that time, the staffing level was even lower. Only one individual served on the Task Force continuously, initially as a student intern, then as a contractor, and finally as a Department paralegal. Although the Task Force worked diligently to accomplish its mission, its numbers were simply too small relative to the task at hand. Despite the language of various memoranda and statements by Department leadership about the importance and priority of the Task Force's work, the Task Force's staffing level clearly demonstrated that the Department did not dedicate the resources required to accomplish its mission. Similarly, we concluded that the FBI did not always maintain the project as a sufficiently high priority. During one time period, for example, the FBI transferred some attorneys and support staff from Task Force-related work to other pressing matters. We found no indication that the FBI assigned other staff to replace the

CDRU team to ensure that progress on the Lab review would not be impeded as a result of this staffing depletion.

We also concluded that while the Department's senior leaders assumed responsibility for critical decisions regarding the Task Force's case review process and its implementation, the lack of continuity in senior Department leaders overseeing the Task Force undermined the Task Force's mission. The lack of continuity contributed to delays, changes in the case review approach and priorities, and a lack of authoritative guidance the Task Force was able to provide in its dealings with the FBI and prosecutors. In addition, the lack of focused attention by senior Department officials on the developments of the case review process resulted in the Department's failure to address the grave problems the Task Force staff identified with cases handled by Malone.

We recognize that the Department's resources were finite and that its decisions reflected a valuation of how its resources should be allocated to meet the varied needs of the Department and the public. However, having appropriately undertaken the Task Force's important mission of ensuring that convictions had not been tainted by faulty and unreliable FBI Lab analysis and testimony, the Department was obligated to devote sufficient resources to the project throughout its tenure to enable the Task Force to accomplish its mission. That the scope of the review was great and would take substantial resources to complete did not lessen the compelling nature of the Task Force's mission or the Department's responsibility to ensure that the case reviews were completed in a timely and effective manner.

In our view, enhanced Task Force staffing would have led to quicker case identification, closer attention to the cases warranting highest priority, and potentially more informed judgments about how to achieve effective, timely case reviews and disclosures to defendants. Greater attentiveness by senior Department leadership to the work of the Task Force would have kept the reviews moving in a more timely manner and would likely have resulted in more disclosures to defendants that Lab analysis or testimony lacking scientific integrity was material to their convictions. In addition, as discussed below, a larger staff could have enabled the Task Force to create and maintain more comprehensive and accurate documentation and to achieve a faster resolution for those defendants whose cases were adversely affected by faulty and unreliable Lab analysis or testimony.

In addition to not adequately staffing the Task Force, the Department did not produce a final written report of the Task Force's work for any audience. There was no written summary of the total number of cases the Task Force reviewed, how many independent reports the FBI generated through its retained experts, the results of the prosecutors' disclosure determinations, or the impact of the disclosures and non-disclosures on the

defendants affected by the FBI Lab's erroneous handling of the analysis or testimony in their cases. The lack of any such assessment reflects the low priority that Department and FBI leadership placed on the importance of this project by the end of its 8-year operation.

V. FBI Caused Significant Delays to Independent Scientists' Reviews

We concluded that the FBI was responsible for significant, avoidable, and costly delays in the independent scientists' reviews of cases the Task Force referred. We based our conclusion on our interviews, close examination of case files, and analyses of multiple time intervals relating to when the FBI began its efforts to retain experts, when the Task Force referred specific cases for independent review, and when the reviews occurred. The first delay occurred early on. Once the Department identified in June 1997 the 13 FBI examiners whose cases would be subject to scrutiny, the FBI was in a position to identify the scientific disciplines for which it would need to retain experts. As discussed in Chapter Three, however, the FBI did not move expeditiously to retain the needed experts and, in fact, took more than 6 years to hire some of the experts it needed to complete the reviews. This was true in several scientific disciplines, but it had the largest impact on hair and fiber cases, including eight capital cases referred for review by independent scientists.

The second cause for delays stemmed from the FBI's initial decision that all reviews by the independent scientists would be performed at FBI Headquarters. This on-site requirement added delays to the reviews because of the travel logistics and the scientists' competing professional responsibilities and busy schedules. We are not convinced that the case reviews needed to be conducted at Headquarters or that there was any benefit to this practice given that the experts reviewed only copies of paper files and were not permitted to re-examine physical evidence or to discuss their case reviews with any Lab members or attorneys involved in the cases. That the FBI later permitted at least one expert, Steve Robertson, to review case files in an FBI field office following the events of September 11, 2001, further demonstrates that the requirement that reviews be conducted at Headquarters was unnecessary.

The third cause of delays was revealed in our analysis of the number of cases Malone handled that the hair and fiber experts were not able to review during their visits to Headquarters. The FBI knew how many cases required the expertise of these scientists at the beginning of each visit, including after the first visit when only Robertson remained. Yet, the FBI did not allocate sufficient time for the scientists to conduct their reviews or, alternatively, failed to retain enough scientists to conduct the reviews in a timely fashion. Either way, the result was that for 8 of the 10 visits, the

scientists were unable to finish reviewing all the cases – up to 64 percent in 1 visit. The remaining cases were not reviewed until Robertson could return to the FBI, which ranged from 4 to more than 14 months later (see below).

The fourth cause of delays was the FBI's decision to "batch" cases for the independent scientists' reviews, which resulted in cases unnecessarily sitting at FBI Headquarters for lengthy periods of time awaiting review – over 2½ years in one case. Although we analyzed data related only to the hair and fiber cases handled by Malone, an FBI Lab witness we interviewed described this approach as having been used for all the case reviews. Finally, our analysis revealed there were unexplained delays of up to 14 months between visits by the hair and fiber expert, leaving as many as 36 hair and fiber cases handled by Malone awaiting review between each visit. Given the egregious findings about Malone's analyses and testimony, which had been made at the outset of the independent experts' reviews, we believe the FBI should have ensured an expeditious review of these cases.

VI. Limited, "Paper" Review by Independent Scientists

At no point during the Task Force review was any of the forensic evidence in any of the cases at issue physically re-examined. Instead, the FBI explicitly limited the independent scientists' reviews to a paper review of the available testimony, lab reports, lab notes, and other papers created during or associated with the original physical examination. However, in some cases, including *Boyle*, the independent scientists who reviewed the FBI Lab work expressly recommended that the evidence be re-examined; in other cases, prosecutors requested a re-examination of the physical evidence. Yet, our review confirmed that the FBI made no effort to search for or provide the evidence for such re-examination in *Boyle* or any other case. We also concluded that the Department and the FBI gave no meaningful consideration to these recommendations and requests.

We believe this approach to the reviews was short-sighted. We recognize that the evidence would likely not have been available in every case and that where it was available, physical re-examination of the evidence would have added considerable time to an already lengthy review and additional cost to the overall case review project. However, that time and cost should have been weighed against the serious issues the Task Force identified regarding the scientific integrity and reliability of Lab analysis and testimony supporting convictions in capital cases as well as other serious crimes. Moreover, while the number of cases that fell within the scope of the Task Force review was overwhelming, independent paper reviews were conducted only in cases involving the 13 examiners and, with limited exceptions, only where a prosecutor had opined that the Lab analysis or testimony was material to the conviction – a total of 312 cases.

Moreover, physical re-examination appears to have been requested or recommended only in a very small subset of those cases. We believe, therefore, that to ensure justice was done, the FBI should have arranged for a physical re-examination of available evidence in all instances where prosecutors requested that it be done or where an independent scientist concluded that a physical re-examination was necessary to fairly evaluate the scientific integrity and reliability of the evidence.

VII. Inadequate Efforts to Ensure Appropriate and Timely Disclosures to Defendants

Senior Department officials made critical decisions about when and what to communicate to federal and state prosecutors about the 1997 OIG Report, findings of materiality, and constitutionally required disclosure obligations. These decisions had the potential for enormous impact on defendants whose convictions were tainted by unreliable or faulty Lab analysis or testimony, particularly given how many years the case review process lasted. We were troubled by the failure of Department leadership to require federal prosecutors to make disclosure of the independent scientists' reports to convicted defendants. We recognize that the Department does not have authority to mandate that state prosecutors take any action, including disclosures that may be required by constitutional standards. However, the Department could have directed the Task Force to engage more assertively with state prosecutors and state attorneys general on the importance of making timely and meaningful disclosures in the affected cases and to strongly urge state prosecutors to do so.[52]

The Task Force's request that prosecutors determine whether the Lab evidence was material to the defendants' convictions was apparently designed to identify cases in which the government might have an obligation to disclose such information to defendants or their counsel. When the Task Force received a prosecutor's determination that Lab evidence handled by 1 of the 13 examiners was material to a defendant's conviction, and an independent scientist concluded that the Lab evidence, testimony, or both was faulty or could not be verified, the Task Force should have provided the prosecutor with guidance about the independent report's relevance to the prosecutor's disclosure obligation. Yet, the Task Force provided no such case-specific guidance to the prosecutors when it transmitted the completed reports.

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[52] Pending cases, whether at the trial or appellate level, were handled differently: federal and state prosecutors notified defense counsel of Lab examinations conducted by the 13 examiners criticized by the OIG, providing an opportunity to litigate the admissibility of the subject Lab reports and testimony.

We believe the Department, through the Task Force, should have required federal prosecutors, and strongly encouraged state prosecutors, to disclose the independent scientists' reports to the defendants or defense counsel when the reports concluded that the material Lab analysis or testimony was unreliable. This would have afforded affected defendants the same opportunity to pursue legal recourse that was given to defendants in pending cases. As discussed in Chapter Three, the Task Force never articulated to any prosecutor, federal or state, the Department's position about whether disclosure of the independent reports to defendants was legally required when it transmitted the completed reports. We believe the Department, through the Task Force, should have provided firm guidance to federal and state prosecutors about the effect of an independent scientist's conclusion that the Lab analysis or testimony was unreliable on a prosecutor's disclosure obligation.[53]

The consequence of the Task Force's silence on the prosecutors' disclosure responsibilities was that some prosecutors may have made an erroneous determination that disclosure was unnecessary. This would have precluded defendants who should have been notified of the problems identified in their cases from seeking legal recourse. Indeed, in one Task Force case, the failure of federal prosecutors to disclose the independent scientist's report likely lengthened the sentence served by an innocent man who was subsequently exonerated by DNA testing. In *Gates*, the Task Force verified that the U.S. Attorney's Office for the District of Columbia received the letter containing an independent review of Malone's analysis. The U.S. Attorney's Office, however, never transmitted that report to Gates or his counsel. At the time the Task Force sent the letter to the U.S. Attorney's Office in 2004, Gates had served approximately 21 years for a rape and murder he did not commit. Gates was exonerated on the basis of DNA testing in 2009, after serving 27 years in prison, approximately 6 of which were served after he should have received a copy of the independent report finding fault with Malone's analysis.

VIII. Failure to Track Disclosures to Defendants

The Task Force also failed to require that prosecutors notify the Task Force of their disclosure decisions – whether or not they decided to disclose the independent reports to defendants or defense counsel. Nor was there

[53] Our conclusion is focused on those independent reports that document problems with the FBI Lab's work in cases where the prosecutor determined that the Lab evidence was material to the conviction. If the reports concluded that the FBI Lab work was not problematic, then there would be no constitutional requirement that the prosecutors disclose those reports to defendants even if the evidence were material. See *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) and *United States* v. *Bagley,* 473 U.S. 667, 682 (1985).

any mention in the Task Force letters to prosecutors about the importance of acting swiftly to make disclosures to defendants or their counsel, even in death penalty cases.

The Task Force's failure to track prosecutors' disclosures or follow up with the prosecutors reflects the same deference to prosecutors that appears to have led the Department not to take a more active role in providing guidance to prosecutors about disclosures the law would seem to clearly require. From our review of Task Force files, we believe many disclosures that should have been made may not have been made. We identified a limited number of case files that included copies of independent report disclosure letters that prosecutors sent to defense counsel; most files we reviewed did not contain any evidence that any such disclosure was made. Appendix H shows that copies of such letters were contained in case files for only 13 of the 402 defendants whose cases were reviewed by independent scientists. Although the FBI has informed us that it has identified additional cases where disclosures were made, the Task Force's decision not to track prosecutors' disclosures of independent reports to defendants precluded the Task Force from alerting Department leadership to cases that may have required their intervention to avoid the denial of defendants' rights.

These failures, some alone and some in combination, played a crucial role in determining whether a given defendant received the full benefit of the case review process originally envisioned by the Department when it created the Task Force, and as its mission was refined in response to the 1997 OIG Report. Therefore, while the Department satisfied the Task Force's mission for many of the affected defendants, it failed to achieve the Task Force's objectives and to perform its core function of ensuring that justice was served in matters within its purview when it came to defendants adversely affected by deficiencies in the process.

In Chapter Seven, we make five recommendations to the Department and the FBI to address those deficiencies we believe can still be remedied.

CHAPTER SEVEN:
RECOMMENDATIONS TO THE DEPARTMENT AND THE FBI

Deficiencies identified in this report warrant action on the part of the Department and the FBI. We make five recommendations regarding certain deficiencies. These recommendations address specific categories of cases involving a conviction and evidence handled by 1 or more of the 13 Lab examiners. Other deficiencies we identified cannot be remedied at this juncture. However, we recommend that the Department consider these other deficiencies in designing, implementing, setting priorities for, and making resource allocation decisions in future reviews of a similar nature it may undertake.

In view of the potential effect of our review on individual defendants' cases, we have taken steps during this review to enable the Department to move forward with ensuring that affected defendants receive notice, even if long overdue, of unreliable Lab analysis or testimony that may have affected their convictions. To that end, we provided information to the Department and the FBI at several points during this review to enable them to begin remedial action we anticipated recommending without awaiting completion of this report. For example, in January 2013, after completing our initial analysis of capital defendants whose convictions or sentencing may have relied on evidence handled by 1 or more of the 13 examiners criticized in the 1997 OIG Report, we provided the names of these defendants and their case-related data to the Department and the FBI. The list of capital defendants – which includes those who received reduced sentences of life or a lesser amount – that we provided to the Department and the FBI is included in Appendix G. In addition, in September 2013, we provided the Department and the FBI with identifying information on 402 defendants for whose cases independent scientists completed reports. We were able to determine in only 15 of those cases that the reports were disclosed to the defendants or their counsel. The list of these 402 defendants provided to the Department and the FBI is included in Appendix H.

During our review, the Department informed us of its efforts to notify potentially affected defendants of the 1997 OIG Report and Task Force review. We acknowledge and appreciate representations by the Department concerning its efforts to effectuate meaningful notice to certain potentially affected defendants. We are not in a position at this juncture, however, to evaluate the adequacy of the Department's recent efforts in response to the interim briefings we provided.

We encourage the Department and the FBI to consider working with defense organizations, such as the National Association of Criminal Defense Lawyers or entities which work to ensure protection of defendants' rights,

such as the Innocence Project and the American Civil Liberties Union, to ensure a comprehensive and effective plan designed to achieve maximum and effective notice to all potentially affected individuals. We further encourage the Department and the FBI to coordinate with and use the resources of state attorneys general, district attorneys, public defenders, and the federal, state, and local courts to implement these recommendations.

With respect to three categories of cases listed below, we recommend that the Department and the FBI take the following corrective actions:

52 State Death Penalty Cases Reviewed by the Task Force[54]

1. Provide case-specific notice to defense counsel for 26 defendants currently on death row or awaiting resentencing or retrial. The notice should include the following information:
    a. The 1997 OIG Report;
    b. A brief description of the 1997 Criminal Division Task Force review;
    c. Whether the prosecutor made a determination of the materiality of the FBI Lab evidence;
    d. Whether the Task Force referred the case to the FBI for review by independent scientists;
    e. Whether an independent scientist completed a report for the defendant's case; and
    f. Completed independent scientist's report for defendant's case, if applicable.

    Exceptions – No notice is necessary if there is:

    - A determination that the materiality and integrity of the evidence was previously litigated, specifically with regard to the deficiency of the Lab examiner's analysis or testimony;
    - Definitive evidence of prior notification, regardless of whether the matter was litigated; or
    - A prior determination by a prosecutor that the Lab evidence was not material to the conviction and there is no indication undermining the objectivity of the prosecutor's determination.

[54] This figure represents the 64 death penalty defendants discussed in this report less 12 defendants who were resentenced to a term of life or less.

2. Urge states to allow FBI retesting of physical evidence, if available, for 24 of the 26 death row defendants who were executed or who died in prison while on death row.[55]
    a. Request assistance from state attorneys general and district attorneys to obtain physical evidence for testing;
    b. Retest using the most scientifically reliable and accurate technology available today; if Lab evidence included hair analysis, retest using mitochondrial DNA analysis;
    c. If test results are contrary to original Lab finding or are potentially exculpatory or impeaching, work with offices and organizations such as state attorneys general, district attorneys, defense counsel, the Innocence Project, and the National Association of Criminal Defense Lawyers to ensure effective and appropriate notification; and
    d. If physical evidence is not available, conduct a review of available testimony, Lab report, bench notes, and any other relevant materials to assess the integrity of the Lab evidence in the case.

Exceptions – No retesting is necessary if there is:

- A determination that the materiality and integrity of the evidence was previously litigated, specifically with regard to the deficiency of the Lab examiner's analysis or testimony;
- Definitive evidence of prior notification, regardless of whether the matter was litigated; or
- Prior determination by a prosecutor that the Lab evidence was not material to the conviction and there is no indication undermining the objectivity of the prosecutor's determination.

Non-Death Penalty Cases Reviewed by Task Force

3. Provide *case-specific* notice to currently and previously incarcerated defendants whose cases were reviewed by the Task Force (approximately 2,900). The notice should include

[55] This number excludes 2 defendants (Victor Cazes and Anthony Larette) because the Department recently learned and informed us that their convictions and death sentences did not rely on the work of any of the 13 criticized FBI Lab examiners.

elements a through f described in Recommendation 1 concerning death penalty defendants.

a. Start by providing notice to the 402 defendants for whom the independent scientists completed reviews (101 defendants in federal cases; 301 defendants in state cases).[56]
b. For state and local cases, coordinate with offices and organizations such as state attorneys general and district attorneys, public defenders, defense organizations, and state and local courts to maximize likelihood of effective notice or constructive (broad, public) notice.

Exceptions – No notice is necessary if there is:

- A determination that the materiality and integrity of the evidence was previously litigated, specifically with regard to the deficiency of the Lab examiner's analysis or testimony;
- Definitive evidence of prior notification, regardless of whether the matter was litigated; or
- Prior determination by a prosecutor that the Lab evidence was not material to the conviction and there is no indication undermining the objectivity of the prosecutor's determination.

Cases Not Reviewed by the Task Force

4. Provide the broadest possible notice to offices and organizations such as defense and civil liberties groups, state attorneys general and district attorneys, governors' offices, and federal, state, and local courts. The notice should state that the Task Force did not review all criminal cases resulting in a conviction that involved 1 or more of the 13 FBI Lab examiners and that, as a result, notification may not have been provided to convicted defendants about deficiencies in the Lab analysis or testimony used in their cases.

[56] The OIG previously provided the list of 402 defendants to the FBI. See Appendix H. The 301 state defendants include 7 sealed cases for which jurisdictions were not identified.

Tracking for all Three Case Categories

5. Consistently track the notice provided to specific defendants or defense counsel and the steps taken to provide constructive notice to categories of defendants whose identities are unknown or unidentifiable.

APPENDIX A:
SELECT DEFENDANTS REFERENCED IN REPORT

Defendant	Sentence Year and Penalty	Time Served from Date of Conviction Until Date of Death or Release	Case Status as of June 2014
Benjamin H. Boyle	1986 Death	11 years	Executed 4/21/97, prior to identification and review by the Task Force. Would not have been eligible for death sentence without Lab evidence.
Joseph L. Young	1987 Death	9 years	Died of natural causes on 2/28/96 while awaiting execution.
Donald E. Gates	1982 20 years to life	27 years	Exonerated.
Santae A. Tribble	1980 20 years to life	27 years	Exonerated.
Kirk L. Odom	1981 22 to 66 years	21.5 years	Exonerated.
Anthony E. Bragdon	1992 30 years	11 years	Conviction reversed and remanded. Defendant not retried.
John N. Huffington	1981 Two consecutive life terms	32 years	Conviction reversed and remanded. State appealing ruling.

Sources: Court records, Task Force files, and other information provided by the Department and the FBI.

APPENDIX B:
THIRTEEN CRITICIZED FBI EXAMINERS

This table lists the 13 FBI examiners whose cases the Task Force determined in June 1997 warranted further scrutiny based on the OIG's April 1997 report.[57]

FBI Lab Examiner	FBI Lab Division Affiliation (Per 1997 OIG Report)	Year Examiner Joined FBI Lab
1. Richard Hahn	Explosives Unit	1987
2. Robert Heckman	Explosives Unit	1990
3. Wallace Higgins	Explosives Unit	1989
4. Alan Jordan	Explosives Unit	1983*
5. Lynn Lasswell	Chemistry-Toxicology Unit	1975
6. Michael Malone	Hairs and Fibers Unit	1974*
7. Roger Martz	Chemistry-Toxicology Unit	1980*
8. J. Christopher Ronay	Explosives Unit	1977*
9. Terry Rudolph	Materials Analysis Unit	1979*
10. James Thomas Thurman	Explosives Unit	1981
11. Robert Webb	Materials Analysis Unit	1976
12. Frederic Whitehurst	Materials Analysis Unit	1986
13. David Williams	Explosives Unit	1987

*Indicates a discrepancy we found in the examiner's employment date on Task Force and FBI documents. Some of the documents provided to us listed only an examiner's start date with the FBI, but not with the Lab specifically (Jordan and Ronay) whereas other documents listed two different employment dates.

Sources: 1997 OIG Report; Task Force and FBI correspondence; FBI employment dates.

At least six of the examiners joined the FBI Lab prior to 1985 – Lasswell, Malone, Martz, Rudolph, Thurman, and Webb. Another two examiners – Ronay and Jordan – likely joined the FBI Lab prior to 1985 but we could not verify those dates due to the discrepancies described above.

At least eight of the examiners had left the FBI Lab by the time the OIG Report was published in April 1997, including two who had temporarily transferred out of the Lab following issuance of the draft Report in January 1997 – Hahn, Williams, Lasswell, Malone, Martz, Rudolph, Webb, and Ronay.

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[57] John C. Keeney, Acting Assistant Attorney General, Criminal Division, memorandum to all United States Attorneys, First Assistant United States Attorneys, Criminal Chiefs, and Criminal Division Section Chiefs and Office Directors, Inspector General's Report on the FBI Laboratory, June 6, 1997.

APPENDIX C:
CATEGORIES OF CASES ELIMINATED BY THE TASK FORCE AND THE FBI

Case Category and Description		Proposed by	Reason Cited by the Task Force or FBI	Date Eliminated	Number of Cases Eliminated
1-10	**Cases falling into 10 "other" sub-categories:** 1. defendant deceased/deported 2. case dismissed/charges dropped/nolle prosequi 3. defendant pardoned 4. conviction vacated/overturned/reversed and defendant not retried 5. foreign prosecution 6. defendant not convicted for offense worked on by criticized examiner 7. defendant pleaded guilty before laboratory report was issued 8. criticized examiner did not work on case/ replaced by another examiner 9. no laboratory work performed or laboratory work was discontinued 10. insufficient evidence for examination/ comparison/identification.	FBI and Task Force	No reason given	December 1998	Not documented by the Task Force
11	**Cases where Malone only confirmed the lab results of another examiner:** Cases in which former FBI Lab examiner Michael Malone did not perform the examination but confirmed the hair examination of another examiner.	FBI and Task Force	No reason given	December 1998	Not documented by the Task Force

12	**Inconclusive lab evidence:** Cases that had "inconclusive" lab evidence, not defined by the Task Force but illustrated by the example of not finding a hair that matched the defendant at the scene of a crime. Exception: The Task Force stated that death penalty cases would be reviewed and materiality determinations obtained even if the lab results were inconclusive.[58]	FBI and Task Force	Rarely used by the prosecution in criminal cases so "the results are very rarely material to a conviction."	December 1998	Not documented by the Task Force
13	**Non-explosives Lasswell cases**: Cases in which former FBI Lab examiner Lynn Lasswell conducted non-explosives forensic work. (The Task Force stated that the majority of Lasswell's cases involved the identification of controlled substances, red dye on evidence from bank robberies, and other types of chemical analysis.) The Task Force stated it would review only those Lasswell cases involving explosives-related forensic work, the area of analysis for which Lasswell was criticized in the OIG Report.	FBI and Task Force	No evidence of any wrongdoing or routinely sloppy work by Lasswell.	January 2003	245 out of 1,652 cases Lasswell handled[59]

[58] Notwithstanding the Task Force's statement in its December 1998 correspondence that it would review death penalty cases and obtain materiality determinations even if the Lab results were inconclusive, we found that this did not occur.

[59] Of the 245 cases, 218 resulted in a conviction. In addition, there were 26 federal cases for which the conviction status was not determined and 1 case which was sealed with an unknown conviction status, according to an April 18, 2003, FBI summary document. We found no further information in Task Force or FBI documents to explain why the conviction status of the 26 federal cases was not determined.

14	**No record of case/files purged/unresponsive:** Cases where the records for a known defendant could not be located or the prosecutor was unresponsive to the Task Force's requests for materiality determinations. The Task Force stated that prosecutors' offices, law enforcement agencies, and courts occasionally purge case files – particularly older ones – after a certain number of years.[60]	FBI and Task Force	If files from these offices are not in existence and the prosecutor could not be identified or was unavailable, it would not be possible to obtain materiality determinations.	January 2003	Not documented by the Task Force[61]
15	**Ronay and Higgins cases:** Cases reviewed by former FBI Lab Explosives Unit Chief J. Christopher Ronay and Explosives Unit primary examiner Wallace Higgins.	FBI	The OIG Report criticized Ronay and Higgins for "lapses in judgment in their roles as supervisors," but not for their own lab work.	January 2003	27 cases, all of which resulted in a conviction (19 of 199 cases Higgins handled + 8 of 350 cases Ronay handled)
16	**Jordan cases:** Cases reviewed by former FBI Lab examiner Alan R. Jordan	FBI	The OIG Report found no evidence of any misconduct by Jordan and did not recommend any disciplinary action.	January 2003	6 of 291 cases Jordan handled, all of which resulted in a conviction

[60] A former Task Force member we interviewed told us that these cases differ from cases where there was no record of a defendant or a subject. The Task Force did not pursue materiality determinations for the latter case category.

[61] A January 2003 FBI letter to the Task Force stated that the Task Force forwarded to the FBI for independent scientific review nine cases in which the prosecutor's office did not respond to repeated requests by the Task Force for materiality determinations. Seven of the nine cases involved Malone analysis. The letter stated that both the FBI and the Task Force agreed to review those cases. Although we could not determine from Task Force documentation whether those nine cases represent the full universe of eliminated cases in this category, we found evidence that independent reviews were conducted for additional cases in this category. For example, we found Task Force letters to the FBI requesting independent reviews for cases where prosecutors were unresponsive to the Task Force's requests for a materiality determination, had insufficient records to make a materiality determination, or requested an independent review in lieu of making a materiality determination.

17	**Small cases:** Small cases, defined by the Task Force as cases in which the defendants "were fined, not incarcerated, or should have finished their sentence more than 6 years ago."[62]	Task Force	Reviewing these cases for both prosecutors and the Task Force would be labor and time-intensive because many were about 20 years old.	January 2003	170 cases, all of which resulted in a conviction[63]
18	**Cases with missing lab reports**: Cases in which the Task Force's files lacked the corresponding lab reports.	FBI	Without the lab reports and corresponding bench notes the examiners prepared, a meaningful independent scientific review could not be conducted.	January 2003	Not documented by the Task Force

Sources: Eight documents from December 1998 through January 2003 – seven letters and memoranda between the Task Force and the FBI and one FBI summary document – discussing cases to be eliminated from the review scope. The source for the 4 case categories that identified the number of cases eliminated (totaling 448 cases) was an April 18, 2003, FBI document, "Lab Task Force Summary 4/18/03."

These eight documents represented all relevant documents related to case eliminations the OIG discovered in the information provided by the Criminal Division and the FBI. Many of the case categories eliminated in January 2003 were also discussed and proposed for elimination in earlier correspondence.

[62] FBI letter to Office of Enforcement Operations, Criminal Division Re: FBI/DOJ Task Force to Review FBI Laboratory Cases, January 2, 2003, page 4.

[63] According to the FBI's April 18, 2003, document, the "small cases" category included 39 additional Lasswell cases; 6 additional Jordan cases; and 6 additional Ronay cases beyond those listed in the Lasswell, Jordan, and Ronay categories.

APPENDIX D:
FEDERAL CASE REVIEW (MATERIALITY) FORM

U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

FBI LABORATORY FEDERAL CASE REVIEW

INVESTIGATION/CASE NAME: _____

DISTRICT: _____ FBI CASE ID NO: _____

AUSA: _____ PHONE: _____

STATUS:
CONVICTION OBTAINED? ☐ YES ☐ NO
PURSUANT TO GUILTY PLEA? ☐ YES ☐ NO
TRIAL ON THE MERITS? ☐ YES ☐ NO
(If a conviction was obtained, please provide the information requested below. If there was no conviction, sign and submit this form to the Criminal Division Task Force.)

SENTENCE IMPOSED AND DATE(S): _____
IS DEFENDANT INCARCERATED? ☐ YES ☐ NO
APPEAL AND DATE(S): _____

COURT NUMBER: _____ JUDGE: _____

OFFENSES, DATE OF OFFENSE AND FACTS: _____

FBI LAB EXAMINER(S): _____

FORENSIC ANALYSIS PERFORMED BY FBI LAB: _____

WAS THE FBI LAB WORK MATERIAL TO THE VERDICT? ☐ YES ☐ NO
(If yes, or you need more information to made this assessment, please contact the Criminal Division Task Force at 202/616-2505. If no, attach a memo signed by the prosecutor with the reasons for this determination.)

Prosecutor's Signature Print Name Date

CRM - 18946

APPENDIX E:
REDACTED STATE AND LOCAL CASE REVIEW (MATERIALITY) FORM

U. S. Department of Justice
Criminal Division

Washington, D.C. 20530

Task Force on the FBI Laboratory
1001 G Street, N.W., Suite 200 West
Telephone 202-616 -2505 Facsimile 202-616-1012
FAX TO: _____

FBI LABORATORY STATE/LOCAL CASE REVIEW

INVESTIGATION/CASE NAME: _____

COURT NUMBER: FBIHQ FILE NO: _____

PROSECUTOR: _____ PHONE: _____

OFFICE/ADDRESS: _____

TITLE: CITY/STATE: _____

STATUS: TRIAL ON THE MERITS? X☐ GUILTY PLEA? ☐
SENTENCE IMPOSED AND DATE(S):
IS DEFENDANT INCARCERATED? X☐ YES ☐ NO
APPEAL AND DATE(S): _____
POST-CONVICTION MOTIONS: _____
FBI LAB EXAMINER(S): _____
LAB EXAMINER(S) TESTIFIED: ☐ YES X☐ NO
DATE LAB REPORT(S): _____
TRANSCRIPT: ☐ YES X☐ NO ☐ N/A

OFFENSES, DATE(S) OF OFFENSE(S) AND FACTS: _____

FORENSIC ANALYSIS PERFORMED BY **MARTZ**: _____

WAS MARTZ'S LAB WORK MATERIAL TO THE VERDICT? ☐YES ☐NO
If no, please attach a memo with the reason(s) for this determination.

_____
Prosecutor's Signature Print Name Title Date

CRM - 7411

APPENDIX F:
INDEPENDENT CASE REVIEW REPORT AND GUIDELINES

INDEPENDENT CASE REVIEW REPORT

Independent Review conducted by: _____

Area(s) of Expertise: _____

Review commenced at: ___:_____ (Time), ____/____/____ (Date)

File #: _____

Laboratory #(s): _____ _____

_____ _____

_____ _____

Examiner(s) & Symbols

	Reviewed	Not Reviewed		Reviewed	Not Reviewed
_____	☐	☐	_____	☐	☐
_____	☐	☐	_____	☐	☐
_____	☐	☐	_____	☐	☐

Materials Reviewed

Trial testimony transcript(s) of: _____

Testimony Date(s): _____ Pages: _____

Laboratory Report(s):

Laboratory Number: _____ Date: _____

Laboratory Number: _____ Date: _____

Laboratory Number: _____ Date: _____

Examiner Bench Notes of: _____

Laboratory Number: _____

Laboratory Number: _____

Laboratory Number: _____

Page _____ of _____

Initials: _____

Was any other material reviewed? ☐ Yes ☐ No

If yes, please identify and/or describe the material: _____

Results of Review

File #: _____ Item or Specimen # Reviewed: _____

Review of Laboratory Report(s) and Bench Notes:

Note: Numbered comments are required below or on additional pages for any "No" or "Unable to Determine" Responses

1) Did the examiner perform the appropriate tests in a scientifically acceptable manner, based on the methods, protocols, and analytic techniques available at the time of the original examination(s)?
☐ Yes ☐ No ☐ Unable to Determine

2) Are the examination results set forth in the laboratory report(s) supported and adequately documented in the bench notes? ☐ Yes ☐ No ☐ Unable to Determine

Review of Testimony:

Note: Numbered comments are required below or on additional pages for any "No" or "Unable to Determine" Responses

☐ Transcript not available.

3) Testimony consistent with the laboratory report(s)? ☐ Yes ☐ No ☐ Unable to Determine

4) Testimony consistent with the bench notes? ☐ Yes ☐ No ☐ Unable to Determine

5) Testimony within bounds of examiner's expertise? ☐ Yes ☐ No ☐ Unable to Determine

Page _____ of _____

Initials _____

Comments
(Set forth by above question #, if applicable.
Use "Additional Comments" Sheet, if needed)

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Review completed at: ___:_____ (Time) . ____/_____/____ (Date)

Total time spent conducting review (to nearest 1/4 hour): _____

I hereby certify that I conducted this review in an independent, unbiased manner and that the results of my review are fully documented on this report consisting of a total of _____ pages.

_____ _____
(Signature) (Date)

Page _____ of _____

Initials _____

Additional Comments
(Set forth by question #, if applicable)

File #: _____

Page _____ of _____

Initials: _____

INDEPENDENT REVIEW GUIDELINES

I. Documentation to be reviewed

a. Incoming correspondence/request;

b. Laboratory report(s);

c. Examiner bench notes and/or dictation; and

d. Trial transcripts of testimony.

II. Standards of Review

a. Were the appropriate test(s) performed in a scientifically acceptable manner based on the methods, protocols or analytic techniques available at the time of the original examination.

b. Are the examination results set forth in the laboratory report(s) supported and adequately documented in the bench notes?

c. Are the written laboratory report(s) and the examiner bench notes consistent?

d. Testimony

(i) Was the examiner's testimony within the bounds of the examiner's expertise? If not, explain briefly.

(ii) Was the examiner's testimony consistent with the laboratory report(s) and bench notes? If not, explain briefly.

III. Reporting Requirements

a. When a response of "No" or "Unable to Determine" is given to any question, the reviewer must explain why such a response was given.

b. Upon completion of the review, the independent scientist will document his or her findings and conclusions in the Independent Case Review Report (a copy of which is attached hereto).

c. The reviewer may also document the results of his or her review in the form of a narrative report, if the reviewer believes such a written report is necessary.

d. All notes, documents, communications and reports relating to the review are the property of the Federal Bureau of Investigation (FBI) and shall be provided to the FBI at the conclusion of the review or upon the FBI's request.

IV. Non-Disclosure

a. All information provided to the reviewing scientist by the FBI, including, but not limited to, scientific analyses, reports, bench notes, and transcripts, are considered sensitive property of the FBI and may not be released or disclosed by any party (including contractors) other than the FBI without the FBI's prior written authorization.

b. All reports or other analyses or information generated by the reviewing scientist are considered sensitive property of the FBI and may not be released or disclosed by any party (including contractors) other than the FBI without the FBI's prior written authorization.

V. Classified Material

a. Classified materials must be maintained pursuant to the FBI's policy concerning the control and use of classified information.

b. Any information prepared or maintained by a reviewing scientist involving a case which includes classified materials is to be considered classified and must be maintained as classified information unless and until determined by competent FBI authority to be unclassified.

I have been advised of and have read the above guidelines.

_____

Signature of Scientist Date

APPENDIX G:
DEFENDANTS WHO RECEIVED DEATH PENALTY, LIFE, OR LESSER SENTENCES
(OIG PROVIDED TO THE FBI AND CRIMINAL DIVISION IN JANUARY 2013)

Defendant Count	Jurisdiction	Last Name	First Name	Examiner(s)	Case Status as of January 2013
DEFENDANTS WHO RECEIVED DEATH PENALTY					
1	FL	Branch	Eric		On death row with no known pending appeals
2	FL	Hannon	Patrick	Malone	On death row with no known pending appeals
3	FL	Hendrix	Robert	Malone	On death row with no known pending appeals
4	CA	Jones	Bryan	Malone	On death row with no known pending appeals
5	FL	Krawczuk	Anton		On death row with no known pending appeals
6	CA	Letner	Richard	Malone	On death row with no known pending appeals
7	CA	Tobin	Christopher	Malone	On death row with no known pending appeals
8	FL	Bogle	Brett	Malone	On death row with pending appeals
9	FL	Bolin	Oscar	Malone	On death row with pending appeals
10	ID	Card	David	Malone	On death row with pending appeals
11	LA	Code	Nathaniel		On death row with pending appeals
12	TN	Cone	Gary	Malone	On death row with pending appeals
13	MO	Ferguson	Jeffery	Malone	On death row with pending appeals
14	FL	Happ	William	Malone	On death row with pending appeals
15	PA	Hughes IV	Robert	Malone	On death row with pending appeals
16	TN	Irick	Billy Ray	Malone	On death row with pending appeals
17	OH	Lawson	Jerry		On death row with pending appeals
18	FL	Long	Robert	Malone	On death row with pending appeals
19	FL	Mann	Larry	Malone	On death row with pending appeals
20	FL	Suggs	Donald	Malone	On death row with pending appeals
21	FL	Trepal	George		On death row with pending appeals
22	OH	Wogenstahl	Jeffery		On death row with pending appeals
23	FL	Wyatt	Tommy	Malone	On death row with pending appeals
24	PA	Copenhefer	David		Pending retrial or resentencing

Defendant Count	Jurisdiction	Last Name	First Name	Examiner(s)	Case Status as of January 2013
25	TN	Smith	Leonard		Pending retrial or resentencing
26	WA	Stenson	Darold "RJ"		Pending retrial or resentencing
27	FL	Mordenti	Michael	Malone	Capital conviction reversed; defendant released
28	TX	Boyle	Benjamin	Malone	Executed April 21, 1997
29	FL	Buenoano	Judy		Executed March 30, 1998
30	SC	Drayton	Leroy		Executed November 12, 1999
31	SC	Gaskins	Donald		Executed September 6, 1991
32	ID	Johnson	Gregory		Executed May 25, 2005
33	FL	Larette	Anthony		Executed November 28, 1995
34	MO	Link	Martin		Executed February 9, 2011
35	TX	Lockhart	Michael		Executed December 9, 1997
36	IN	Matheney	Alan		Executed September 28, 2005
37	PA	Moser	Leon		Executed August 16, 1995
38	TX	Narvaiz Jr.	Leopoldo	Malone	Executed June 26, 1998
39	AZ	Ortiz	Ignacio		Executed October 27, 1999
40	TX	Powell	James		Executed October 1, 2002
41	DE	Shelton	Nelson		Executed March 17, 1995
42	FL	Rolling	Danny		Executed October 25, 2006
43	FL	Schwab	Mark		Executed July 1, 2008
44	FL	Stano	Gerald	Malone	Executed March 23, 1998
45	MO	Brooks	Thomas		Died in prison 2000
46	TN	Cazes	Victor	Malone (confirming scientist)	Died in prison 2000
47	TN	Melson	Hugh	Malone	Died in prison 1999
48	FL	Mendyk	Todd	Malone	Died in prison 2002
49	TN	O'Guinn	Kenneth	Malone	Died in prison 1999
50	FL	Pettit	Samuel	Malone	Died in prison 2005
51	FL	Wike	Warfield		Died in prison 2004
52	TN	Williams	Laron	Malone	Died in prison 1985
53	PA	Young	Joseph	Malone	Died in prison 1996

Defendant Count	Jurisdiction	Last Name	First Name	Examiner(s)	Case Status as of January 2013
	DEFENDANTS WHO RECEIVED LIFE OR LESSER SENTENCES				
54	TN	Bates	Wayne	Malone	Reduced sentence: Life
55	PA	Bradley	Jerard		Reduced sentence: 13.5 to 32 years
56	FL	Crump	Michael	Malone	Reduced sentence: Life
57	FL	Lovette	Michael	Malone	Reduced sentence: Life
58	OH	Mason	Maurice	Malone	Reduced sentence: 15 years to life
59	DE	Outten	Jack		Reduced sentence: 20 years to life
60	FL	Ramirez	Nathan		Reduced sentence: Life
61	IL	Sanchez	Hector		Reduced sentence: Life
62	DE	Shelton	Steven		Reduced sentence: 20 years to life
63	WA	Smith	Randall		Reduced sentence: Life
64	MD	Wiggins	Kevin		Reduced sentence: Life

Note: The data in this table are a subset of the information the OIG provided to the FBI and the Department in January 2013 and reflect the status of those defendants' cases at that time.

APPENDIX H:
DEFENDANTS WHOSE CASES WERE REVIEWED BY INDEPENDENT SCIENTISTS
(OIG PROVIDED TO THE FBI AND CRIMINAL DIVISION IN SEPTEMBER 2013)

Defendant Count	Year Sentenced	Jurisdiction	Last Name	First Name	CDRU #	Examiner(s)	Definitive Evidence of Disclosure?	Notes
1	1987	US/VI	ABEDNEGO	CECIL	163	MALONE	No	
2	1982	US/CA	ABU-NADI	JAMAL	4503	RUDOLPH	No	
3	1988	AK	ADKINS	CHET	1813	RUDOLPH	No	
4	1984	CT	AILLON	GUILLERMO	6598	MALONE	No	
5	1994	TN	ALEXANDER	DAVID	1210	MALONE	No	
6	1984	US/OK	ALFORD	CLIFFORD	6720	THURMAN	No	
7	1987	NJ	ALLEN	BLAIR	4723	MARTZ/RONAY	No	
8	1983	US/MD	ALSTON	ROGER	6855	RONAY	No	
9	1985	FL	AMMAZ	LOUIS	6561	MALONE	No	
10	1982	AK	ANOHOUAK	STEVEN	6252	MALONE	No	
11	n/a	MS	ARMSTEAD	ROOSEVELT	6712	MALONE	No	
12	1992	US/IL	ARNOLD	JOHN	4464	LASSWELL/WILLIAMS	No	
13	1984	NJ	ARRINGTON	JOSEPH	4847	RUDOLPH/RONAY	No	
14	n/a	NJ	ARROYO	MIGUEL	6415 A	MALONE	No	
15	1984	NY	ASELTINE	GUY	1890	RUDOLPH	No	
16	1991	US/TX	ATOR	DEBORAH	3941	LASSWELL	No	
17	n/a	US/DC	AUSTIN	WAYNE	2558	LASSWELL	No	
18	1986	MD	BAKER	MARK	1513	MARTZ	No	
19	1991	WA	BALLARD	BILLY	1898	WEBB	No	
20	1979	IL	BARKNEK	PETER	7360	WEBB	No	
21	n/a	US/FL	BARR	DAVID	3838	HECKMAN	No	

22	n/a	GU	BAZA	JOSE	2184	WEBB	No	
23	1986	VA	BEASLEY	KEVIN	3309LL	WEBB	No	
24	1991	US/PA	BECKETT	JAMES	2956	HAHN	No	
	1991	US/PA	BECKETT	JAMES	5951	HAHN	No	
25	1990	OH	BEKTAS	TONY	2842	WEBB	No	
26	1992	WV	BENNETT	ELLOWOOD	7421	WEBB	No	
27	1988	US/DC	BENOIT	JEAN	274	MALONE	No	
28	1992	AK	BETZNER	GEORGE	6405	MALONE/MARTZ	No	
29	1996	CA	BLACK	KEITH	4924 LL	MARTZ/WHITEHURST/ WEBB	No	
30	1985	US/PA	BOGERT	RALPH	3266	RUDOLPH/MARTZ/ JORDAN	No	
31	n/a	US/DC	BONHOM	MICHAEL	6316	MALONE	No	
32	1991	PA	BORGER	ALLAN	5270	MARTZ	No	
33	1979	FL	BOSTIC	DWAYNE	7366	MALONE	No	
34	1996	ME	BOUTIN	DARLENE	979	MALONE	No	
35	1981	US/CA	BOYD	DAVID	3258	RUDOLPH/MARTZ	No	
36	1996	TX	BOYLE	BENJAMIN	195	MALONE	No	
37	n/a	US/FL	BRADFORD	JOHN	3838	HECKMAN	No	
38	n/a	US/FL	BRADFORD	STEVEN	3838	HECKMAN	No	
39	1990	US/SC	BRADLEY	TERRANCE	3430	WEBB	No	
40	1984	AK	BRIDEGAN	JAY	6488	MALONE	No	
41	1988	AK	BRIGGS	JOHN	513	MALONE	No	
42	1984	ME	BROCKELBANK	SCOTT	6569	MALONE	No	
43	1985	SC	BROOKS	ROY	6609	MALONE/RUDOLPH	No	
44	1985	MD	BROWN	DAVID	1452	MARTZ	No	
45	n/a	MD	BRYANT	DAVID	860	MALONE	No	

46	1987	US/NE	BUCKLEY	ROBERT	32	MALONE	No	
47	n/a	MD	BUCKLEY	JOHN	2171	HIGGINS	No	
48	1988	MO	BUTLER	MICHAEL	187	MALONE	No	
49	1979	US/MD	BYROM	JAMES	7050	RUDOLPH	No	
50	1984	SC	CAMPBELL	CLIFTON	4795	MALONE	No	
51	1986	MD	CARMICHAEL	JOHN	5150	RONAY	No	
52	1992	US/NY	CASTELLANOS	LUIS	3653	WHITEHURST/HAHN	No	
53	n/a	GU	CASTRO	RAMON	2184	WEBB	No	
54	1992	FL	CATHCART	KIMBERLY	2381	LASSWELL	No	
55	1992	FL	CATHCART	SCOTT	2381	LASSWELL	No	
56	1993	MD	CLARK	HADDEN	1357	MALONE	No	
57	1992	US/AR	CLARK	JAMES	3761	WHITEHURST	No	
58	1980	US/WI	CLENDENNY	JOEY	6883BB	MALONE	No	
59	1996	FL	CLEVELAND	WALTER	2249	WHITEHURST	No	
60	n/a	KS	COLE	JODY	2217	WHITEHURST	No	
61	1984	WV	COMBS	JUNE	4645	RUDOLPH	No	
62	1983	FL	COOK	DOUGLAS	6336	MALONE/WEBB	No	
63	1986	WA	COOPER	MARVIN	5259	MALONE	No	
64	1987	ME	COVELL	FRED	5151	RONAY/MARTZ	No	
65	1984	AZ	COX	KENNETH	4641	RUDOLPH/RONAY	No	
66	1993	TN	CRESONG	MICKEY	1274	MALONE	No	
67	1994	US/PA	CROUSHORE	MARK	3891	LASSWELL	No	
68	1987	FL	CRUMP	MICHAEL	226	MALONE	No	
	1987	FL	CRUMP	MICHAEL	466	MALONE	No	
69	1984	DE	CRUMP	BENJAMIN	6389A	MALONE	No	
	1984	DE	CRUMP	BENJAMIN	6389B	MALONE	No	
70	1986	US/MT	DANIELS	RAY	1050	MALONE	No	

71	1988	TX	DARNELL	CHARLES	2038	WEBB	No	
72	1985	NM	DAVID	SAMUEL	4841	MALONE/RUDOLPH	No	
73	1990	MD	DAVIS	TOMMIE	1686	MARTZ	No	
74	1990	DE	DENNARD	PEGGY	906	MALONE	No	
75	n/a	US/MD	DESSER	FRANK	4843	RUDOLPH	No	
76	1989	TN	DISNEY	DAVID	606	MALONE/WEBB	No	
77	1986	MD	DONN	DUANE	5150	RONAY	No	
78	1989	NJ	DORFLEI	ROBERT	4991	WILLIAMS	No	
79	1996	CA	DORRIS	ROBERT	4924 LL	MARTZ/WHITEHURST/ WEBB	No	
80	n/a	US/DC	DORSEY	ALVIN	2402	LASSWELL	No	
81	n/a	NM	DRAPER	n/a	4841	MALONE/RUDOLPH	No	
82	1996	MD	DUCKETT	DARRELL	5103	HECKMAN	No	
83	1985	IL	DUGAN	BRIAN	6706	MALONE	No	
	1985	IL	DUGAN	BRIAN	3LL	MALONE	No	
84	1986	US/CA	DUPONT	MICHAEL	1047	MALONE	No	
85	1986	US/CA	DUPONT	PEGGY	1047	MALONE	No	
86	1989	ME	ELDRIDGE	WOODBURY	812	MALONE	No	
87	1982	FL	FAULKNER	DONALD	6250	MALONE	No	
88	1983	PA	FENSTERMACHER	WILLIAM	6365	MALONE	No	
89	1984	US/OH	FIELDS	KENNETH	7197	THURMAN	No	
90	1984	US/DC	FINNEY	DON	6741	RUDOLPH/THURMAN	No	
91	1985	AK	FISHER	TERRY	1911	WEBB	No	
92	n/a	FL	FODOR	BRIAN	5152	RONAY/MARTZ	No	
93	1991	PA	FUNK	BYRON	2161	WEBB	No	
94	1983	OH	GALL	JACK	6329	MALONE	No	
95	1988	US/DC	GARAY	JOSE	463	MALONE	No	

96	1987	SC	GARCIA	JOSE	7467	MARTZ	No	
97	n/a	US/DC	GARRETT	GEORGE	1576	MARTZ	No	
98	1989	TN	GARRETT	CLIFFORD	2112	WEBB	No	
99	1989	TN	GARRETT	WILLIAM	2112	WEBB	No	
100	1979	US/KY	GASTON	LUIS	7432	MALONE	No	
101	1979	US/KY	GASTON	WILLIAM	7432	MALONE	No	
102	n/a	US/DC	GATES	DONALD	6321	MALONE	No	
103	1994	US/FL	GEOHEGAN	EDWARD	3838	HECKMAN	No	
104	1989	WV	GEORGE	CYRUS	412	MALONE/WEBB	No	
	1992	WV	GEORGE	CYRUS	7421	WEBB	No	
105	1992	TX	GILLIAM	THOMAS	735	MALONE	No	
106	1985	US/MD	GILLS	RODRIGUEZ	6759	THURMAN	No	
107	1984	FL	GLOVER	RONALD	6643	MALONE	No	
108	1994	US/IL	GOINS	ANTHONY	1366	MALONE	No	
109	1988	US/IL	GOMETZ	RANDY	2918	MARTZ	No	
110	1986	MA	GONZALEZ	FREDDY	1441	MARTZ	No	
111	1990	OH	GOSTICK	LESLIE	2842	WEBB	No	
112	1984	CT	GRAHAM	JOHN	6391	WEBB	No	
113	n/a	US/WI	GRZELAK	BROOKE	6256 BB	MALONE	No	
114	1985	GU	GUERRERO	ANTHONY	6470	MARTZ	No	
115	1988	US/CA	GUTIERREZ	ALEX	1047	MALONE	No	
116	1988	US/CA	GUTIERREZ	WALTER	1047	MALONE	No	
117	1987	US/MD	HAAFF	ERIC	40	MALONE	No	
118	1987	MR	HANADA	HIDEKI	449	MALONE	No	
119	1983	US/DC	HANSFORD	TERRENCE	6352	MALONE	No	
120	1987	ME	HANSON	DAVID	245	MALONE	No	
121	1985	AK	HANSON	JOHN	6510	MALONE	No	

122	1986	IN	HARRIS	TERRY	1540	WEBB	No	
123	1991	FL	HART	DOMINIC	995	MALONE	No	
124	1984	IL	HEINZ	FOREST	6538 LL	WEBB	No	
125	n/a	US/AL	HENRY	PATRICK	3746	LASSWELL	No	
126	1988	TX	HENSON	JAMES	1603	MARTZ	No	
127	n/a	FL	HERNANDEZ	DANNY	6524	MALONE	No	
128	1988	NY	HILL	CHARLES	2066	WEBB	No	
129	1986	NJ	HILL	CHRISTOPHER	6642	WEBB	No	
130	1989	CA	HOEPPNER	KAREN	5174	MARTZ/RONAY	No	
131	1984	US/DC	HONSMAN	WARNIE	6741	RUDOLPH/THURMAN	No	
132	n/a	FL	HORSTMAN	RODNEY	3471	MALONE	No	
133	1987	NC	HUDSON	JIMMY	318	MALONE	No	
134	1982	AK	HUF	JAY	6260	MALONE	No	
135	1987	MD	HUFFINGTON	JOHN	5196	MALONE	No	
136	n/a	FL	HUNTER	KEVIN	176	MALONE	No	
137	1979	US/MD	HUTTON	JOSEPH	7050	RUDOLPH	No	
138	1981	MS	HYDE	ANTHONY	7492	MALONE	No	
139	1988	MD	ICGOREN	NURI	553	WEBB	No	
140	n/a	GU	IGLESIAS	WILLIAM	2184	WEBB	No	
141	1995	TN	IRWIN	DOUG	1281	MALONE	No	
142	1986	SC	IVERSON	JAMES	295	MALONE	No	
143	n/a	FL	JACKSON	KEITH	563	MALONE	No	
144	1985	NM	JACOBS	BRYSON	4841	MALONE/RUDOLPH	No	
145	1982	SD	JACOX	DARREL	6236	MALONE	No	
146	1979	US/MD	JASON	PIERRE	7050	RUDOLPH	No	
147	1985	AK	JOHNSON	RUEBEN	1438	MARTZ	No	
148	n/a	MD	JOHNSON	WARREN	2177	HIGGINS	No	

149	n/a	KS	JOHNSON	DAVID	2217	WHITEHURST	No	
150	1981	US/CA	JOHNSON	RODNEY	3258	RUDOLPH/MARTZ	No	
151	1979	US/MD	JOHNSON	ARTHUR	7050	RUDOLPH	No	
152	1986	MO	JONES	ERROL	187	MALONE	No	
153	1994	CA	JONES	BRYAN	869	MALONE	No	
	1994	CA	JONES	BRYAN	867B	MALONE	No	
154	1989	US/MO	JONES	MICHAEL	3053	MARTZ	No	
155	n/a	US/FL	JONES	ROBERT	3838	HECKMAN	No	
156	n/a	US/CA	JONES	JEFFREY	3911	LASSWELL	No	
157	n/a	MD	JONES	ALAN	6379	WEBB	No	
158	n/a	WV	JUDE	YANCEY	7089	JORDAN/RUDOLPH	No	
159	n/a	KS	KAISER	DAVID	2217	WHITEHURST	No	
160	1982	MD	KANARAS	DENO	5196	MALONE	No	
161	1987	MR	KAWANO	EIICHI	449	MALONE	No	
162	1981	PA	KELINO	RICO	6897	WEBB	No	
163	1982	UT	KELLEY	RONALD	7488	MALONE	No	
164	1987	US/CA	KELLOGG	ARTHUR	1047	MALONE	No	
165	1985	TN	KENNEDY	RONALD	7177	JORDAN/RUDOLPH	No	
166	1987	MD	KNAPP	JAMES	5157	RUDOLPH/RONAY	No	
167	1991	MD	KOSMAS	STANLEY	253	MALONE	No	
168	1980	AK	KOUTCHAK	FREDDIE	7378	MALONE	No	
169	1984	US/OH	KRACK	CHARLES	7197	THURMAN	No	
170	1991	KS	KROUPA	JAMIE	2217	WHITEHURST	No	
171	1979	IL	KUCABA	GEORGE	7360	WEBB	No	
172	n/a	US/MD	LA FON	HERBERT	7050	RUDOLPH	No	
173	1984	AK	LAMBERT	NEWTON	6358	MALONE	No	
174	1983	US/SC	LANEY	DENNIS	6784	THURMAN	No	

175	1984	US/OK	LAUBACH	THOMAS	6720	THURMAN	No	
176	1991	FL	LEE	SAMMY	995	MALONE	No	
177	1994	FL	LEE	MICHAEL	995	MALONE	No	
178	1979	NC	LEWIS	JAMES	5866	MALONE	No	
179	1985	NJ	LINDSAY	RICARDO	4847	RUDOLPH/RONAY	No	
180	1989	TN	LOMBARDO	TERRY	702	MALONE	No	
181	1984	FL	LONG	ROBERT	2105	MALONE	No	
	n/a	FL	LONG	ROBERT	3559	MALONE	No	
	1985	FL	LONG	ROBERT	5319	MALONE	No	
	1985	FL	LONG	ROBERT	5521	MALONE	No	
	n/a	FL	LONG	ROBERT	5567	MALONE	No	
	1985	FL	LONG	ROBERT	5632	MALONE	No	
	n/a	FL	LONG	ROBERT	5747	MALONE	No	
	n/a	FL	LONG	ROBERT	5748	MALONE	No	
	n/a	FL	LONG	ROBERT	5749	MALONE	No	
	1985	FL	LONG	ROBERT	6649	MALONE	No	
182	1981	US/CA	LOO	CLDE	3258	RUDOLPH/MARTZ	No	
183	1991	AR	LOY	MICHAEL	2213	WHITEHURST	No	
184	1979	US/KY	LUNSFORD	DENNIS	7432	MALONE	No	
185	1987	LA	MAGOUIRK	KENNETH	310	MALONE	No	
186	1983	FL	MALONE	HENRY	6423	MALONE	No	
187	n/a	OR	MARCA	BRADLEY	4690	RUDOLPH/THURMAN	No	
188	1986	US/FL	MARKS	EDWARD	3113	MARTZ	No	
189	1988	NJ	MARTA	JUAN	1992	WEBB	No	
190	n/a	FL	MARTINEZ	ELEVIAL	6524	MALONE	No	
191	1985	FL	MARTINO	JOSEPH	6514	MALONE	No	
192	1979	PA	MASON	GERALD	6897	WEBB	No	

193	1991	FL	MATHIS	JOHNNY	995	MALONE	No	
194	1988	US/PA	MCFADDEN	RANDALL	3749	WHITEHURST	No	
195	1986	TN	MCGHEE	GEORGE	172	MALONE	No	
196	1982	FL	MCGOWAN	THOMAS	6269	MALONE	No	
197	1994	MD	MCINTURFF	PAUL	1249	MALONE	No	
198	1982	US/MN	MCIVOR	DONALD	6255	MALONE	No	
199	1983	US/DC	MCLAMORE	RAY	6352	MALONE	No	
200	n/a	WV	MEADOWS	JAMES	4855	RUDOLPH	No	
201	n/a	KS	MEDLEY	BRENT	2217	WHITEHURST	No	
202	1984	AK	MEDWIN	DANIEL	6405	MALONE/MARTZ	No	
203	1988	US/PR	MENA	EDUARDO	3285	MARTZ	No	
204	1990	WA	METCALF	TOMMY	7309	WEBB	No	
205	1994	FL	MILLER	GEORGIA	1280	MALONE	No	
206	1994	FL	MILLS	GARY L.	964	MALONE	No	
207	1993	FL	MILLS	GARY LORENZO	1023	MALONE	No	
208	1991	US/LA	MINOR	ADOLF	46	MALONE	No	
209	1995	ME	MITCHELL	THOMAS	1903	WEBB	No	
210	1993	CT	MONTESI	MARYBETH	2271	LASSWELL	No	
211	1987	US/NM	MORGAN	WAYNE	1065	MALONE	No	
212	1987	TN	MORRIS	SAM	450	MALONE	No	
213	1989	FL	MOSER	WILLIAM	1937	WEBB	No	
214	1985	NY	MUGGLEBERG	JOHN	4650	RUDOLPH	No	
215	1987	CO	MULROY	DANIEL	1626	MARTZ	No	
216	1994	FL	NAWARA	JASON	2252	WHITEHURST	No	
217	1986	US/DC	NELSON	DERRIS	130	MALONE	No	
218	1995	ID	NELSON	JOSEPH	2255	WHITEHURST	No	

219	1991	FL	NIXON	WILLIE	995	MALONE	No	
220	1986	US/MT	NORUNNER	HAROLD	1054	MALONE	No	
221	1990	MD	NOWLIN	JAMES	3442 LL	WEBB/HAHN	No	
222	1983	AK	OREAR	DAVID	6368	MALONE	No	
223	1991	FL	OWENS	TYRONE	995	MALONE	No	
224	1989	US/TN	OWENSBY	MARVIN	3372	JORDAN/WEBB	No	
225	1993	MD	PAGE	TYRONE	1222	MALONE	No	
226	1993	MD	PAGE	JEROME	1222	MALONE	No	
227	1982	MD	PAINTER	MICHAEL	4624	RUDOLPH	No	
228	1983	ME	PALLITO	RICHARD	6320	MALONE	No	
229	1986	AK	PANNINGONA	ROXY	1920	WEBB	No	
230	1985	NJ	PANTOJO	EDWIN	6415 A	MALONE	No	
231	1988	DE	PARKER	JOSEPH	576	MALONE	No	
232	n/a	US/CA	PAYNE	ZERRICK	3911	LASSWELL	No	
233	n/a	SC	PEAKE	ALLEN	5320	MALONE	No	
234	1990	AK	PELTOLA	RONALD	1727	MARTZ	No	
235	1991	FL	PEREZ	AUGUSTINE	967	MALONE	No	
236	1995	US/WA	PETRYKIEVICZ	OLIVER	2645	WILLIAMS	No	
237	1980	US/WI	PHILLIPS	GEORGE	6883BB	MALONE	No	
238	1987	US/CA	PILASKI	PETER	4353	RONAY/RUDOLPH	No	
239	1987	SC	PINCKNEY	MICKELL	7467	MARTZ	No	
240	1983	US/DC	PLATER	DARRYL	6352	MALONE	No	
241	1987	SC	POINDEXTER	RANDY	2036	WEBB	No	
242	1983	SC	POSTON	BILLY	6241	WEBB	No	
243	1986	MD	PREAST	TIMOTHY	4908	THURMAN	No	
244	1991	TX	RAMOS	GABRIEL	902	MALONE	No	
245	1989	MD	RANSON	GERALD	93	MALONE	No	

246	1987	MD	REDD	ALVIN	1596	MARTZ	No	
247	1987	US/KY	REED	CRAIG	3001	MARTZ	No	
248	1987	US/KY	REED	STEPHEN	3001	MARTZ	No	
249	1992	NH	REYNOLDS	DWIGHT	1172	MALONE	No	
250	1989	NJ	RICE	GAIL	1648	MARTZ	No	
251	n/a	NM	RICE	n/a	4841	MALONE/RUDOLPH	No	
252	n/a	MD	ROBB	MAURICE	5081	JORDAN	No	
253	1989	NJ	ROBINSON	MARK	2054	WEBB	No	
254	1983	FL	ROMPAEY	STEVEN	4494	RUDOLPH	No	
255	1984	IL	SANCHEZ	HECTOR	6538 LL	WEBB	No	
256	1988	GU	SANTOS	HENRY	1614	MARTZ	No	
257	1988	US/IL	SAUNDERS	PETER	5801	HECKMAN	No	
258	1982	FL	SCARBOROUGH	LARRY	6283	MALONE	No	
259	1988	IL	SCHINDLER	PATRICK	1625	MARTZ	No	
260	1988	US/CA	SCHUMAKER	CARL	4719	RUDOLPH/RONAY	No	
261	1989	US/MO	SCHWYHART	JASON	3053	MARTZ	No	
262	1990	RI	SCURRY	WILLIE	709	MALONE	No	
263	1995	NJ	SEEMS	GEORGE	5110	HECKMAN	No	
264	1983	NH	SEFTON	SCOTT	6277	MALONE	No	
265	1992	US/CA	SEILER	WILLIAM	3399	THURMAN/WEBB	No	
266	n/a	DE	SHAHAN	DAWSON	278	MALONE	No	
267	1986	MO	SHARP	CARL	187	MALONE	No	
268	1989	SD	SHAW	JOHNATHAN	837	MALONE	No	
269	1992	OH	SHEFFEY	ROLF	5116	LASSWELL/HECKMAN	No	
270	1994	FL	SHEREN	DAVID	1280	MALONE	No	
271	1987	US/CA	SMALL	SHAUN	4353	RONAY/RUDOLPH	No	
272	1991	FL	SMITH	JOHN	995	MALONE	No	

273	1993	ME	SMITH	VIRGIL	2490	LASSWELL	No	
274	n/a	US/PA	SMITH	EARL	2579	HAHN	No	
275	1985	PA	SMITH	MITCHELL	4752	LASSWELL/THURMAN/ RUDOLPH	No	
276	1983	US/DC	SMITH	THOMAS	6352	MALONE	No	
277	1989	CA	SNIDER	GEORGE	5174	MARTZ/RONAY	No	
278	1986	WA	SOLOMAN	JERRY	5259	MALONE	No	
279	n/a	HI	SOUSA	LEROY	1680	MARTZ	No	
280	1991	CA	ST. JACQUES	ROGER	4970LL	WHITEHURST	No	
281	1987	SC	STACKHOUSE	ANTHONY	430	MALONE	No	
282	1980	TN	STAFFORD	JIMMY	7225	RUDOLPH	No	
283	1982	US/ID	STONE	LEBURN	6299	MALONE	No	
284	1990	SD	STORDAHL	BRIAN	837	MALONE	No	
285	1990	AR	STRAWHACKER	LONNIE	846	MALONE	No	
286	1992	PA	STYER	BRETT	1165	MALONE	No	
287	1988	PA	TAFT	RANDY	468	MALONE	No	
288	1983	ME	TAIT	TIMOTHY	6282	MALONE	No	
289	1985	US/DC	TERRY	WALTER	6601	MALONE	No	
290	1987	FL	THEBERGE	BARBARA	2039	WEBB	No	
291	1985	FL	THOMAS	CURTIS	6437	MALONE	No	
	1985	FL	THOMAS	CURTIS	6446	MALONE	No	
292	1984	US/OH	THOMAS	CARL	7197	THURMAN	No	
293	1989	FL	THOMPSON	KEVIN	588	MALONE	No	
294	1983	CT	THOMPSON	WILLIE	6391	WEBB	No	
295	1985	FL	THORNTON	DAVIS	4495	RUDOLPH	No	
296	1991	FL	TIBBETTS	DAROLD	755	MALONE	No	
297	1987	OK	TILSON	MARTIN	5477	WEBB	No	

298	1981	CO	TOLERTON	KENYON	5911	MALONE	No	
299	1994	CA	TOMPKINS	THEODORE	5121	WHITEHURST/ HECKMAN	No	
300	1986	AK	TOOVAK	TIMOTHY	1493	MARTZ	No	
301	1990	TX	TREZELL-BURNS	MARTINNIE	742	MALONE	No	
302	1994	CT	TRINE	TERENCE	2271	LASSWELL	No	
303	1990	CT	TRUTT	FRAN	5022	WILLIAMS	No	
304	n/a	US/FL	TUTTLE	WILLIAM	3838	HECKMAN	No	
305	n/a	NJ	VALENCIA	HELMER	6415 A	MALONE	No	
306	1990	NC	VARNER	CHARLES	653	MALONE	No	
307	1987	TX	VELASQUEZ	MARIO	1978	WEBB	No	
308	n/a	KS	VINDUSKA	ERIC	2217	WHITEHURST	No	
309	n/a	NC	VINSON	JERRY	6906	MALONE	No	
	n/a	NC	VINSON	JERRY	7402	MALONE	No	
310	n/a	US/CA	WALLACE	CONKLIN	6755 BB	THURMAN	No	
311	n/a	US/CA	WALLACE	ARTHUR	6755 BB	THURMAN	No	
312	n/a	GU	WARAKIA	JOSEPH	2184	WEBB	No	
313	1989	DE	WATERMAN	JEROME	465	MALONE	No	
314	1988	NC	WEAVER	PATRICIA	2023	WEBB	No	
315	n/a	DE	WEBSTER	RICHARD	4787	RUDOLPH	No	
316	1984	FL	WHITE	CURTIS	4669	RUDOLPH	No	
317	1980	US/WI	WIENEKE	DENNIS	6883BB	MALONE	No	
318	1993	MI	WIKARYASZ	ROBERT	2459	LASSWELL	No	
319	1993	MI	WIKARYASZ	JASON	2459	LASSWELL	No	
320	1984	AK	WILKIE	JEFFERY	6577	MALONE	No	
321	1991	NY	WILKINSON	TIMOTHY	2136	WEBB	No	
322	1988	ID	WILLIAMS	ROY	680	MALONE	No	

323	1983	US/DC	WILLIAMS	RODNEY	6352	MALONE	No	
324	n/a	US/DC	WILLIS	JAMES	1806	RUDOLPH	No	
325	1993	US/AR	WILSON	ANDRE	1375	MALONE	No	
326	1991	US/ID	WINSLOW	ROBERT	3643	LASSWELL/HAHN/ WHITEHURST	No	
327	1986	US/VI	WONG	ALLAN	1517	MARTZ	No	
328	1984	NY	WOODWARD	JEFFREY	1890	RUDOLPH	No	
329	n/a	US/PA	WOODY	MICHAEL	3379	WEBB	No	
330	1988	SD	WRIGHT	BETTY	671	MALONE	No	
331	SEALED CASE				164	MALONE	No	
332	SEALED CASE				2323	LASSWELL	No	
333	SEALED CASE				4697	RUDOLPH	No	
334	SEALED CASE				5070	MARTZ	No	
335	SEALED CASE				5072	MARTZ	No	
336	SEALED CASE				5172	RONAY	No	
337	SEALED CASE				5552	LASSWELL	No	
338	1984	US/OK	YATES	STEPHEN	6720	THURMAN	No	
339	1988	AK	YEARTY	RICHARD	538	MALONE	No	
340	1989	FL	YELTON	JILL	2836	MARTZ	No	
341	1987	MR	YONEDA	KOICHI	449	MALONE	No	
342	n/a	HI	YOUNG	MELVIN	1680	MARTZ	No	
343	1979	US/MD	YOUNG	MICHAEL	7050	RUDOLPH	No	
344	1979	FL	ZOGRAFOS	IOANNIS (JOHN)	7404	MALONE	No	

345	1988	OH	OSWALT	CHARLES	586	MALONE	No	Task Force likely produced independent scientist's report (ISR) in response to defendant's Freedom of Information Act request.
346	1985	FL	DICKERSON	TROY	137	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
347	1988	FL	FRAME	JOHN	634	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
	1988	FL	FRAME	JOHN	635	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
348	1990	FL	GRADY	ISAIAH	793	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
349	1982	FL	IGLES	RUDENE	6345	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.

350	1994	FL	JONES	AUSTIN	124	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
351	1993	FL	KOHUT	MARK	1282	MALONE/LASSWELL	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
352	1998	FL	MCLENDON	DEWAYNE	6544	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
353	1992	FL	MILFORD	ROBERT	1207	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
354	1982	FL	MITCHELL	ROBYN	6345	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
355	1991	FL	MORDENTI	MICHAEL	808	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.

356	n/a	FL	PATE	STEPHEN	129	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
357	1993	FL	PELLETT	JEFFREY	1282	MALONE/LASSWELL	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
358	1988	FL	PERKINS	BRIAN	634	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
	1988	FL	PERKINS	BRIAN	635	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
359	1985	FL	PHOMMARNK	SOVKA	137	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
360	1989	FL	PILGRIM	WALTER	694	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.

361	1982	FL	REESE	ANGELA	6345	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
362	1991	FL	RICE	LARRY	2304	LASSWELL	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
363	1993	FL	ROURK	CHARLES	1282	MALONE/LASSWELL	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
364	1986	FL	SHEPARD*	CLAYBORN	254A	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
	1986	FL	SHEPARD*	CLAYBORN	254B	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
365	1993	FL	SMITH	DONALD	2055	WEBB	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.

366	1991	FL	TORRES	FELIX	920	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
367	1984	FL	WILLIAMS	TIM	6480	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
368	1990	FL	WILSON	BETTY	1642	MARTZ	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
369	1985	FL	XAYAVONG	SOMATH	137	MALONE	No	Hillsborough County case. St. Petersburg Times article in file referencing disclosure.
370	1984	FL	BARD	JAMES	6427	MALONE	No	Prosecutors communicated to the Task Force that they would disclose the ISR. Forms of communication include: call, fax, and letter.
371	1994	FL	BELL	WILLIE	5403	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.

372	1986	CA	BENDER	COLUMBUS	55LL	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
373	1986	CA	BENDER	GEORGE	55LL	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
374	n/a	NC	BRIDGER	FRANKLIN	6297	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
375	1996	NJ	COFFMAN	BRIAN	4934	HIGGINS/WHITEHURST	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
376	1984	FL	DAVIS	JOETTE	6523	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
377	1992	FL	DOLAN	MICHAEL	862	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
378	1993	FL	GREEN	ANTHONY	6300	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
379	1984	FL	GUNN	GREGORY	6523	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.

380	1986	TN	HODGE	TERRY	1466	MARTZ	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
381	1980	AK	KINGOSAK	JIMMY	7392	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
382	1988	TN	KYLES	TARRAN	352	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
383	1986	TN	RUTLEDGE	DAVID	250	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
384	1984	FL	SMITH	NATHAN	6558	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
385	1980	AK	SPENCER	RICK	6945	MALONE	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
386	1982	GA	WILLIAMS	WAYNE	5746	WEBB	No	Prosecutor communicated to the Task Force intent to disclose the ISR.
387	1989	FL	REUTTER	DAVID	5855	MALONE	No	St. Petersburg Times article referencing ISR findings.

388	1993	FL	BOGLE	BRETT	1029	MALONE	Yes	Evidence of disclosure referenced in court documents.
389	1992	US/DC	BRAGDON	ANTHONY	5497	MALONE	Yes	Evidence of disclosure referenced in court documents.
390	n/a	CT	ASHERMAN	STEVEN	5456	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.
391	1993	RI	BLEAU	CARLTON	591	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.
392	n/a	TX	CARSON	CLAUDE	1194	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.

393	1986	US/MO	CARTER	HERMAN	31	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defense/counsel and (2) copy of the disclosure letter.
394	1986	NY	DILORENZO	ALFRED	171	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.
395	1984	WA	GIFFING	RONALD	6596	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.
396	1986	TN	IRICK	BILLY	5284	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.

397	1992	TN	JACKSON	JAMES	996	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.
398	1987	IN	JACKSON	MICHAEL	1553	MARTZ	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defense/counsel and (2) copy of the disclosure letter.
399	1983	PA	MAYO	GERALD	4703	RUDOLPH/ LASSWELL	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defense/counsel and (2) copy of the disclosure letter.
400	n/a	US/TX	ORTLOFF	ROBERT	3405	THURMAN	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defense/counsel and (2) copy of the disclosure letter.

401	1986	NJ	PITTMAN	DONALD	168	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.
402	1988	WA	SUGATCH	ALEX	443	MALONE	Yes	Two letters in the file: (1) prosecutor letter to Task Force stating that the ISR was disclosed to defendant/counsel and (2) copy of the disclosure letter.

APPENDIX I:
DEPARTMENT RESPONSE TO OIG REPORT

U.S. Department of Justice

Office of the Deputy Attorney General

Office of the Deputy Attorney General *Washington, D.C. 20530*

July 9, 2014

MEMORANDUM

TO: Cynthia Schnedar
Deputy Inspector General

THROUGH: Nina S. Pelletier
Assistant Inspector General
Evaluation and Inspections

FROM: Brette L. Steele
Senior Advisor on Forensic Science
Senior Counsel to the Deputy Attorney General

SUBJECT: Department of Justice's Response to the Office of the Inspector General's *Assessment of the 1996 Department Task Force Review of the FBI Laboratory*

The Department of Justice (Department) appreciates the opportunity to respond to the Office of the Inspector General's *Formal Draft Assessment of the 1996 Department Task Force Review of the FBI Laboratory (Assessment)*. The *2014 OIG Assessment* details the findings of, and recommendations resulting from, the OIG's two-year review of the work of a Department Task Force (Task Force), which worked from 1996 to 2004 to conduct an unprecedented review of analysis and testimony performed by certain criticized examiners employed by the Laboratory Division of the FBI (FBI Lab). The Department created the Task Force to ensure that defendants' rights to a fair trial were not affected by the conduct of the criticized examiners. The *Assessment* recognizes the importance, magnitude, and complexity of the work undertaken by the Task Force, as well as the dedication of the persons who staffed the Task Force over that nine-year period. Despite the Task Force's efforts, the OIG concludes that there were deficiencies in the design and implementation of the Task Force review and makes five recommendations to address the deficiencies.

The passage of nearly 20 years since the Task Force began its work, the departure from the Department of all but one of the persons involved in the work of the Task Force, and incomplete Task Force records have made it difficult authoritatively to answer many of the criticisms lodged by the OIG. While a number of the OIG's criticisms are valid, below we discuss the areas in which the Department contends that the OIG's criticisms are unsupported. The Department nevertheless concurs in all five recommendations and, as noted below, already has taken significant steps towards their implementation.

It should be noted that the allegations of faulty lab work and testimony are historical in nature. Decades ago, the FBI corrected the deficiencies that led to the creation of the Task Force and the FBI Lab continues to provide reliable forensic analysis to law enforcement authorities around the world. In September 1998, the FBI Lab became accredited by the American Society of Crime Laboratory Director's/Laboratory Accreditation Board and has maintained such accreditation. In addition, the FBI Lab restructured the Explosives Unit; changed its report preparation methods and examiner roles; mandated peer review of all reports; instituted mandatory proficiency testing for examiners; and established requirements for case file documentation and retention. The FBI Lab also developed written training programs for each discipline; guidelines for the monitoring of examiner testimony; and formalized protocols for scientific analyses and evidence handling. In addition, as discussed below, the Department has partnered with the National Institute of Standards and Technology at the Department of Commerce to lead a government-wide effort to improve the quality and consistency of work in the area of forensic science.

1996 TASK FORCE REVIEW

I. Department Initiated Unprecedented Review of Work of Certain Criticized FBI Lab Examiners

In early 1996, the Department created a task force to conduct a preliminary review of allegations by Supervisory Special Agent Frederic Whitehurst (Whitehurst) impugning the qualifications and performance of certain FBI Lab examiners. Contemporaneous with the initial efforts by the Task Force, the OIG conducted its own evaluation of Whitehurst's allegations, which culminated in the issuance of a report entitled *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (1997 OIG Report)*. Although the OIG did not find merit in the vast majority of Whitehurst's allegations, it did identify problems with 13 examiners from three forensic units, and suggested that the work of the criticized examiners be reviewed. Thereafter, the Department tailored the scope of the Task Force review to address the concerns identified in the *1997 OIG Report*.

As recognized by the OIG, the Task Force review was unprecedented both in its magnitude and its complexity. Given both the volume and the age of cases potentially implicated by the findings in the *1997 OIG Report*, the Department understandably faced significant challenges defining the parameters and coordinating the logistics of the review. Despite the challenges, the Department made a diligent effort to conduct the review being faithful to its ultimate purpose, which was to ensure that no defendant's right to a fair trial was jeopardized by the performance of a criticized examiner.

II. Department Leadership Was Active in Formulation of Task Force Mission and Gave Adequate Consideration to Prosecutors' Disclosure Obligations

With the benefit of hindsight, the Department agrees that certain aspects of the Task Force review could have been more efficient or effective. However, the Department disagrees with the OIG's contention that "there was an absence of planning and forethought with regard to disclosures to defendants that may be required as a result of the Task Force's findings," and

that there is "no evidence that senior management considered the threshold for when disclosures of information to defendants would be legally required" in cases involving one or more of the criticized examiners.[1]

As reflected in numerous memoranda and other correspondence, some of which are discussed below, the Department's senior leadership was very active in the formulation of the Task Force and its mission, and went to great lengths to stress both the seriousness of the allegations against the questioned examiners and the importance of making disclosures to defendants where required by law or ethical obligations. For example, in a memorandum to all United States Attorneys, dated January 4, 1996, then Acting Assistant Attorney General John C. Keeney stressed the need for high-level involvement by supervisors in the United States Attorneys' Offices in the case-specific disclosure decisions:

> It is important at the outset for supervisory personnel in each affected U.S. Attorney's Office to participate in the decision-making process regarding the disclosure or nondisclosure of Whitehurst materials in individual cases [. . .] we request that the Chief of the Criminal Division for each U.S. Attorney's Office, or an equivalent or higher supervisory official, be involved in the decision-making process in every case in which the Government must decide whether Whitehurst materials should be disclosed.

To effectuate the OIG-directed review, on April 15, 1997 – the same date on which the *1997 OIG Report* was issued – the Department disseminated a copy of the report to all United States Attorneys, and requested that they share the report with their state and local counterparts. FBI leadership also disseminated the *1997 OIG Report* to its field offices, and directed agents to contact either the local law enforcement official who requested that certain evidence be examined by the FBI Lab, or the prosecutor who handled any related prosecution.

Moreover, on June 6, 1997, the Department disseminated to all United States Attorneys, and all Criminal Division Section Chiefs a memorandum both summarizing the *1997 OIG Report*, and providing specific guidance and instruction regarding the steps that both the FBI and federal prosecutors would need to take to ensure that every criminal defendant was, or had been, afforded a fair trial. The memorandum highlighted that the Department's receipt of the *1997 OIG Report* as well as certain responsive actions triggered consideration of prosecutors' constitutionally-mandated disclosure obligations. In addition, the Department provided federal prosecutors with guidance addressing prosecutors' obligations under both *Brady v. Maryland* and *Giglio v. United States* in the context of the specific allegations regarding the qualifications and performance of certain criticized FBI Lab examiners.

During the summer of 1997, the Department determined that (1) the review would encompass cases identified as involving the 13 examiners criticized by the OIG; (2) for cases that resulted in a conviction, the Task Force would seek from the responsible federal, state, or local prosecuting authority an assessment of whether the work of the criticized examiner was material to the conviction and, if not, to secure a written explanation of why the prosecutor did not consider it to be material; (3) if the prosecutor determined that the work of the criticized

[1] *2014 OIG Assessment* at 9.

examiner was material to the conviction, or if the prosecutor either did not provide a materiality assessment or requested further review of the examiner's findings or testimony, the FBI would contract with an independent scientist to conduct a complete review of the examiner's findings and any related testimony (Independent Scientific Review or ISR); and (4) once the ISR was completed, the FBI was to furnish the results to the Task Force, which would then provide the same to the responsible (federal, state, or local) prosecutor. The ISRs involved a review of the Lab examiners' bench notes, reports, and transcripts of any trial testimony; and did not involve re-examination of physical evidence.

Ultimately, the Task Force identified nearly 8,000 federal and state cases involving the 13 criticized examiners, of which cases approximately 2,900 resulted in convictions.[2] The Task Force provided notice of the *1997 OIG Report* to the prosecutors who handled the 2,900 cases. The Task Force referred to the FBI for ISRs approximately 312 cases, which figure includes both cases in which prosecutors made affirmative materiality determinations, and cases in which prosecutors either did not make a materiality determination or requested a review by an independent scientist. Notably, in the vast majority of cases, the prosecutors determined that the analysis or testimony of a criticized examiner was not material to the conviction. As the OIG notes, in almost eighty percent of cases, the Task Force transmitted the ISR report to the responsible prosecutor less than three weeks after the Task Force received the ISR report from the FBI.

III. The Task Force Provided Sufficient Information and Guidance to Prosecutors to Enable Prosecutors to Make Materiality Determinations and Satisfy Disclosure Obligations.

The OIG contends that the Department improperly left with field prosecutors the responsibility for making appropriate disclosures to defendants or defense counsel where ISRs were critical of the examiners' work. Regarding the ISRs, in particular, the OIG argues that the Department "should have required federal prosecutors, and strongly encouraged state prosecutors, to disclose the independent scientists' reports to the defendants when the reports concluded that the material Lab evidence was unreliable," and "should have provided firm guidance to federal and state prosecutors regarding the effect of an independent scientist's conclusion that the Lab analysis or testimony was unreliable on a prosecutor's disclosure obligation."[3]

As previously noted, in its communications with both federal and state prosecutors throughout the Task Force review, the Department stressed the significance of *1997 OIG Report* and provided guidance regarding related disclosure obligations. Although the guidance was not case specific, as the OIG suggests that it should have been in the context of the ISR report transmittals, it was tailored to the facts and circumstances surrounding the allegations contained in the *1997 OIG Report* regarding the qualifications and performance of specific criticized forensic examiners.

The Department disagrees with any suggestion that the decisions to rely on field prosecutors – whether federal or state – to both make materiality determinations and assess their

[2] *See 2014 OIG Assessment* at 26, Figure 3.

[3] *2014 OIG Assessment* at 89.

disclosure obligations was inappropriate. The decision to leave the materiality and disclosure obligations to prosecutors in the field recognized that such persons were the most familiar with both the underlying facts of a particular case and the governing case law and applicable rules and, therefore, in the best position to make such decisions in accordance with their ethical responsibilities to satisfy discovery obligations. The decisions also properly took into account that most of the affected cases were handled by state prosecutors over whom the Department did not, and does not, have supervisory authority.

As a general matter, the transmissions of the ISR reports included both a reminder that the prosecutor should consider the results in light of his or her disclosure obligations, and a copy of the aforementioned *Brady* Memorandum if the memorandum had not previously been shared. And transmittal of the ISR report often was the final step in what had been an ongoing exchange between the Task Force and the prosecutor in which the prosecutor already had reviewed the *1997 OIG Report* and made a materiality determination and, therefore, had considered the potential import of the independent scientist's conclusions, including whether the results may require disclosure to the defendant. In addition, the ISR reports were clear and concise, and a cursory review would have been sufficient to allow any prosecutor to discern whether there were deficiencies in the examiner's work.

The OIG correctly notes that the Task Force did not monitor, as a matter of course, whether prosecutors notified defendants or defense counsel of the results of the ISRs. But the Task Force's failure to monitor does not support the conclusion that prosecutors did not provide the results to the defendants or defense counsel.

IV. The Decision to Have Independent Scientists Conduct File Reviews Was Appropriate

The OIG faults the Department for relying on the above-described file reviews of the analysis and testimony of the criticized examiners, and for failing to require re-testing of physical evidence in certain circumstances,[4] yet the ISR process was reasonable and effective in identifying deficiencies in work performed by the criticized examiners, as the ISR process conformed to ASCLD/LAB accreditation criteria for technical review at that time. A re-examination of the physical evidence would have both extended an already protracted review, and hampered the Task Force's ability to timely notify prosecutors when deficiencies in the lab work were identified.

CONCURRENCE IN THE OIG'S RECOMMENDATIONS

Throughout the course of the OIG's review of the work of the 1996 Task Force, which culminated with the *Assessment*, the OIG shared some of its preliminary findings and recommendations with the Department – particularly those that the OIG believed required prompt action. The Department appreciates that the OIG shared information with Department leadership as this review progressed, which allowed the Department to begin taking corrective actions well before the OIG's *Assessment* issued.

In the spring of 2013, the Department initiated its own formal review of the Task Force

[4] *2014 OIG Assessment* at 80.

files (Current Department Review), and currently is reviewing all cases handled by the Task Force in an effort to determine whether defendants in cases for which the laboratory work was material to their conviction received actual notice of the criticisms reflected in the *1997 OIG Report* and, where applicable, a copy of any independent scientific review undertaken if it identified deficiencies in the work of the questioned examiner. If the Department is unable to confirm that the defendant received notice of the criticisms reflected in the *1997 OIG Report* or a copy of an ISR report critical of an examiner's work, the Department will attempt to locate such defendants and provide them with such notice and a copy of the ISR report. The Department is also reviewing cases where there was no materiality determination made by a prosecutor but where an ISR was nevertheless conducted. This typically occurred in a small number of cases where prosecutors failed to respond to the Task Force's request for a materiality determination. In such cases, if the ISR report is critical of the examiner's work, the Department will take steps to provide the defendant with a copy of the report.

The Department concurs in all five recommendations in the *2014 OIG Assessment* and, as noted below, already has complied with certain recommendations, either in whole or in part.

- Regarding the OIG's first recommendation, the Department prioritized the review of cases in which a defendant is currently awaiting execution. As of October 2013, the Department either had confirmed that all defendants currently awaiting execution (or awaiting resentencing or retrial for capital offenses) previously had received appropriate notice, or provided case-specific notice to those for which notice could not easily be confirmed through documents in the file or open source material.

- Regarding the OIG's second recommendation, in death penalty cases in which the defendant is deceased, the FBI will work with state prosecutors to facilitate the re-examination of available physical evidence previously analyzed by one of the criticized examiners or, if such reexamination is not possible, the review of the criticized examiner's reports, bench notes, or testimony.[5] And, if the "results are contrary to [the] original Lab finding or are potentially exculpatory or impeaching," the Department will coordinate with state prosecutors and defense organizations to "ensure effective and appropriate notification" to the decedent's next of kin.

- Regarding the OIG's third recommendation, the Department is reviewing files in which either a prosecutor determined that evidence provided by an FBI Laboratory examiner was material to a defendant's conviction, or where an ISR was performed irrespective of the materiality determination, to ensure the defendant was on notice of the criticisms reflected in the *1997 OIG Report*, and received a copy of the ISR report, if it contained any criticisms of the work of the questioned examiner. If such disclosures cannot be documented, the Department will seek to locate the defendant to make that disclosure. As noted above, this review process is well underway.

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[5] Consistent with Laboratory Quality Assurance Standards and ASCLD/LAB requirements, the FBI's ability to re-test physical evidence will depend on the quality and quantity of the physical evidence (e.g., whether it has been contaminated or degraded), and whether chain of custody can be established. At this time, it appears that evidence might be available and capable of retesting in at most one case out of the 9 cases that are subject to this recommendation.

- Regarding the OIG's fourth recommendation, the Department intends to partner with state prosecutors and defense organizations to ensure broad notice that "the Task Force did not review all criminal cases resulting in a conviction that involved 1 or more of the criticized FBI Lab examiners and that, as a result, notification may not have been provided to convicted defendants about deficiencies in the Lab analysis used in their cases."

- Regarding the OIG's fifth recommendation, the Department is, and will continue to, track "notice to specific defendants or defense counsel and the steps taken to provide constructive notice to categories of defendants whose identities are unknown or unidentifiable."

The Department will continue to cooperate with, and update, the OIG regarding the Department's progress in complying with all of the recommendations.

OTHER CORRECTIVE ACTION

I. The Department Is Conducting a Comprehensive Review of Hair Comparison Analysis

As noted in the *2014 OIG Assessment*, a disproportionate number of problem cases involved hair and fiber analysis or testimony – in particular by examiner Michael Malone (Malone). And, following several reports of exonerations based in whole or in part on the introduction at trial of faulty hair comparison analysis or testimony, in 2012, the FBI, in coordination with the Department, initiated 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 Lab.[6] The purpose of this review, which is ongoing, is to ensure that analysis or testimony by FBI Lab 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.

Unlike the 1996 Task Force review, 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.

[6] The Criminal Division has provided the FBI with copies of all case files that were captured by the 1996 Task Force review that involved hair comparison analysis in which Examiner Malone was the primary or confirming examiner.

II. The Department Is Committed to Promoting the Use of Reliable Forensic Evidence in the Criminal Justice System

Both the *1997 OIG Report* and resulting Task Force review were prompted by concerns that unreliable forensic analysis or testimony may have compromised defendants' fair trial rights. The Department recently demonstrated its continued commitment to promoting the use of reliable forensic evidence in the justice system by partnering with the National Institute of Standards and Technology (NIST) at the Department of Commerce to lead a government-wide effort to strengthen and enhance the practice of forensic science.

Through this partnership, the Department established the National Commission on Forensic Science, which is co-chaired by the Deputy Attorney General and the Acting Director of NIST. The Commission's members are drawn from federal, state, and local forensic science service providers; research scientists and academics; law enforcement officials; and defense attorneys, prosecutors, and judges. The Department has also consulted in the creation of the Organization of Scientific Area Committees, which will support the development of best practices, guidelines, and standards to improve quality and consistency of work in the forensic science community.

CONCLUSION

The Department appreciates having been afforded the opportunity to respond to the *2014 OIG Assessment*. The Department will continue to work in cooperation with the OIG to effectuate compliance with its recommendations.

APPENDIX J:
OIG ANALYSIS OF DEPARTMENT RESPONSE

The Office of the Inspector General (OIG) provided a draft of this report to the Department of Justice (Department), which coordinated its review of the draft with the Federal Bureau of Investigation (FBI). The Department's and the FBI's consolidated response is attached to this report as Appendix I. The OIG's analysis of the Department's response and the actions necessary to address the recommendations are discussed below.

The OIG recognizes the difficulties the Department faced in responding to a review that examined events that occurred many years ago and actions of some persons with important roles who are no longer available. Accordingly, we appreciate the significant effort and resources the Department committed to facilitate our review, and its detailed responses to our draft report. The Department's expressed commitment to take swift action in response to the information we brought to its attention during our review was an early indication of the Department's determination to fulfill the original mission of the Task Force: ensuring that no defendant's right to a fair trial was compromised by the unreliable analysis or testimony of one or more FBI Laboratory (Lab) examiners. The Department's concurrence in each of our recommendations further demonstrates its commitment to that objective.

We do not agree, however, with the Department's criticisms of our report, as described in its response.

First, the Department highlights in its response the measures it took at different times to stress to prosecutors the importance of making constitutionally required disclosures to defendants. As we discuss on pages 20-23 of the report, we found this to be true with regard to federal prosecutors, but not consistently so with state prosecutors, even taking into account that the Department had no authority over the actions of state prosecutors. The Department also stated in its response that it raised to prosecutors the importance of high-level supervisors being involved in case-specific disclosure decisions. During our review, we found that this was the case in 1996 when the Department was initially addressing the Whitehurst allegations. However, we did not find the same emphasis in the Task Force's communications with prosecutors after the 1997 OIG Report was issued and after the Department modified the mission of the Task Force to focus on 13 criticized examiners.

Most essential to the success of the Task Force mission was the disclosure, where appropriate, of the independent scientists' reports finding problems with the Lab analysis or testimony to defendants whose

convictions may have been tainted by such unreliable analysis or testimony. As explained on pages 78-79 of the report, the Department's planning for the communication to prosecutors about the disclosure of the independent scientists' reports was not sufficiently clear and prescriptive. Consequently, some prosecutors failed to disclose independent scientists' reports to defendants whose convictions were potentially tainted by problematic Lab analysis or testimony that the prosecutor had determined to be material to the defendants' convictions. As we concluded, the Department failed to give adequate consideration to the problematic scenarios that it could reasonably have anticipated would arise and that, in fact, did arise when it came to prosecutors' obligations to disclose the independent scientists' reports to defendants.

Second, the Department maintains that it provided sufficient information and guidance to enable prosecutors to satisfy their constitutionally mandated disclosure obligations. The Department further contends that it was appropriate for both federal and state prosecutors alone to make the materiality and disclosure determinations. We agree that it was appropriate for the Task Force to rely on the prosecutors to determine whether Lab analysis or testimony was material to the defendants' convictions, and we did not suggest otherwise in our report.

However, as stated on pages 78-79 of our report, we believe the Department should have been much more direct in its communications with both federal and state prosecutors when it was clear that the independent scientists' reports should be disclosed to the defendants. Specifically, the Department should have been more explicit in cases where the prosecutor had already determined and informed the Task Force that the Lab analysis or testimony was material to the defendants' conviction and the independent scientists' report concluded that material Lab evidence was unreliable. We do not agree, as the Department suggests, that there was always a fluid exchange of communications between the Task Force and the prosecutors, or that all prosecutors would readily and immediately take note of an independent scientist's report that revealed deficiencies in a Lab examiner's analysis or testimony and disclose it as required. Indeed, we found evidence to the contrary, as described in our report at page 43.

Moreover, although we agree that the Task Force's failure to track disclosures by prosecutors to defendants does not mean that prosecutors did not disclose the independent scientists' reports, it is indisputable that in one case (*Gates*), as we highlight on pages 79-80 of our report, the U.S. Attorney's Office did not timely disclose the independent scientist's report to the defendant, whose conviction was tainted by FBI Lab analysis and who was later exonerated after spending 27 years in

prison. In another case (*Huffington*), the state prosecutor never disclosed the independent scientist's report to the defendant, notwithstanding repeated requests by the defendant's counsel for exculpatory information concerning hair analysis conducted by the FBI. See page 43 of the report for additional discussion of these cases.

Third, the Department states in its response that it was reasonable for the independent scientists to conduct file reviews without retesting physical evidence. The Department posits that its decision was reasonable and effective in identifying deficiencies in Lab examiners' work by virtue of having "conformed to ASCLD/LAB [American Society of Crime Laboratory Directors/Laboratory Accreditation Board] accreditation criteria for technical review at that time." Despite our request during the review for the publicly unavailable documentation that would support this position, the Department did not produce to us the ASCLD/LAB accreditation criteria for technical review that existed at the time. More importantly, as we discussed on page 27 of the report, even if the Department's approach had been consistent with the ASCLD/LAB accreditation criteria for technical review, we found that the approach was not uniformly viewed by the FBI Lab as appropriate for the nature of this case review. Also, as we explained on pages 77-78 of the report, the approach was short-sighted.

We appreciate that the Department has concurred in each of our recommendations and has begun to implement those recommendations. We respectfully request that the Department update the OIG on its progress within 90 days of the date of this report and include a timeline for completing its work on each recommendation.

We also note that the Department describes a "comprehensive review of hair comparison analysis" it began in the summer of 2012. As we state in our report at page 6, footnote 12, that review is distinct from our examination of the Task Force's work. We credit the Department for recognizing the need to undertake this separate review. However, because the Department's hair comparison analysis review is outside the scope of our review and report, we are not in a position to evaluate the Department's efforts at this time.