

SPECIAL REPORT:
FALLOUT FROM
AN FBI SCANDAL

Reviews of cases went nowhere

■ The reason: The process for investigating flawed cases is flawed. Florida cases get lost in a bureaucratic morass.

By SYDNEY P. FREEDBERG
Times Staff Writer

When the U.S. Justice Department found sloppy forensic work in the FBI's crime lab four years ago, then-Attorney General Janet Reno vowed to set things straight.

She set in motion a procedure to flag prosecutions that might have been tainted by bad lab work so the defendants could get a chance for a new hearing.

U.S. prosecutors identified 3,000 federal and state cases, from burglaries to serial murders to white-collar crimes, with potential flaws. Two hundred and sixty-three of those federal and state cases came in Florida.

Yet almost nothing came of it.

Not one conviction has fallen anywhere in the country because of tainted FBI evidence.

Not one defendant has been freed.

Not one FBI lab examiner suspected of twisting scientific facts has been criminally charged.

And some of Florida's questionable cases have fallen into a bureaucratic black hole, a review by the *St. Petersburg Times* shows.

The key reason: The system for investigating flawed convictions was flawed.

■ Defense lawyers, judges and watchdogs were usually shut out of the review process.

■ Decisions were left to the same local prosecutors who had relied on questionable lab work to win convictions. Although those prosecutors were in the best position to expose flawed evidence, they also had a self-interest in preserving their convictions.

■ Some prosecutors did an inadequate job of following up on possible forensic errors.

■ When experts hired by the Justice Department found tainted evidence, local prosecutors sometimes sat on the information for months before disclosing it to defense attorneys.

Attorney General John Ashcroft has yet to say what, if anything, he will do about the review of FBI lab cases.

In the past, Reno's aides defended the review and dismissed the notion that it is stacked against defendants.

But critics say the procedures used were bad public policy and might violate defendants' right to a fair trial. They



Doubt cast on Fla. cases

Sloppy FBI lab work might have compromised several homicide cases, including some in the Tampa Bay area. **8A**

WEATHER: High 65, low 54.
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want the government to turn over the lab reviews to defense lawyers who handled the questionable cases.

"They're doing damage control to limit the depth of the problem," said Terri Backhus, a Tampa lawyer who represents a death row inmate convicted in part by sloppy lab work.

Time-consuming and costly

The federal review was triggered by an 18-month investigation by the Justice Department's former inspector general, Michael Bromwich. He found that 13 FBI examiners had made scientific errors in 18 of the bureau's biggest cases in recent years.

Reno created a task force to review other cases in which those same examiners analyzed evidence.

The task force identified 7,600 FBI lab exams performed in about 2,000 state and local cases and 1,000 federal cases. The exams covered everything from chemical analyses of smoke bombs to pieces of glass left at crime scenes.

Next, the task force sent copies of those lab reports, as well as the inspector general's report, to local prosecutors who had handled the cases.

They were asked to look at the new documents and decide if they were "material" to the conviction. Was there a "reasonable probability" that information known now would have led to a different outcome — an acquittal or a lesser sentence?

Prosecutors have concluded that potentially faulty lab work compromised at least 126 convictions nationwide. The Justice Department won't disclose the names of those defendants or say in which county their cases were heard.

From the start, the review process in Florida was a morass — time-consuming, costly and confusing to some local prosecutors.

Packets of case-review papers sometimes arrived from Washington addressed to prosecutors who no longer worked there.

The local case files, dating back 22 years, were sometimes missing or destroyed. Specimens that might have cleared defendants had been destroyed. Some defendants who might have been hurt by bad lab work had been released from prison. At least one — a Pinellas County woman convicted at age 75 of vehicular homicide in 1980 — was dead.

The review process

It is impossible to assess with any precision the response of Florida prosecutors, since few if any of Florida's 20 state attorneys kept a list of the cases the task force marked for review.

When the *Times* sought records under Florida's Public Records Law, prosecutors produced documents involving only about 75 defendants — far fewer than the number of defendants whose cases are potentially flawed.

The Palm Beach state attorney's office disclosed part of only one letter, saying it couldn't find the rest of the letter or any other records about case reviews. The Miami-Dade state attorney produced no records.

"This office has no tracking mechanism in place for researching this," said Donald R. Ungarait, the county's administrative assistant state attorney.

The available documents show that the local review process was mixed. It varied from county to county, prosecutor to prosecutor.

For starters, some prosecutors said they were confused about the meaning of "material" evidence.

In Broward County, documents show that prosecutor Ralph J. Ray Jr. changed his mind on the materiality issue three times during his review of the 1994 murder conviction of Paul Hamwi. The case is weak, and Hamwi, who was sentenced to life for



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having his ex-wife killed, has maintained his innocence since his arrest.

After thorough reviews, some prosecutors concluded that defendants were not hurt by potentially flawed evidence or testimony. There was plenty of other evidence, the prosecutors said, to find the defendants guilty.

Other reviews were more cursory.

In a Pinellas murder case, Assistant State Attorney Garry Potts wrote that a hair exam performed by FBI examiner Michael Malone was "inconclusive." Thus, it played no role in the conviction of Samuel H.

Stevens, now 74, sentenced to life for beating, choking and smothering his wife to death with long strips of duct tape.

A review of the trial transcript shows Potts allowed Malone to give speculative, overstated testimony about a hair analysis, tailored in a way to make it look incriminating.

Potts acknowledges Malone's testimony helped win a conviction, but he says there was plenty of other evidence to win the case. Stevens never denied committing the murder but said he was drunk.

review, many involving work done by examiner Malone. A few of those reviews have taken more than a year to complete.

"This was a big-time drain to pick up all these old cases," said Doug Crow, Pinellas' executive assistant state attorney. "We tried to respond to every inquiry, but maybe we didn't do it as promptly as we'd like."

In some cases with potential flaws, prosecutors sought to brush off the Justice Department. In interviews, they explained that reviews of lab cases might delay justice for crime victims or block executions that were in the pipeline.

In Hillsborough, then-State Attorney Harry Lee Coe III explained in a letter to the Justice Department that his office didn't have the manpower or time to research potential problems in cases involving 30 defendants. "Our attorneys handle thousands of cases each year and are severely overworked as it is," he wrote.

But in his first week in office, new State Attorney Mark Ober reversed the old administration. He decided to notify every defendant and his or her lawyer that bad evidence might have been used.

"It's just the right thing to do," Ober said, adding that it is not his job to review the potentially tainted evidence. The decision, he said, should be made by someone "neutral" — a judge who weighs the information after hearing from prosecutors and defense attorneys.

Under a Supreme Court ruling, *Brady v. Maryland*, defendants have a right to know every piece of "material" information that might help their case.

In most Florida cases, however, prosecutors kept the case-review reports to themselves.

After a long delay, Hillsborough prosecutors eventually notified three convicted murderers flawed evidence was in their cases.

In *Florida v. Jay Vernon Moss and Joseph Hayden Johnson*, an Orange County murder case, Assistant State Attorney Chris Lerner wrote a memo to his boss saying he thought the case-review reports should be turned over to the defendants, even though Lerner didn't think FBI testimony was material to the convictions.

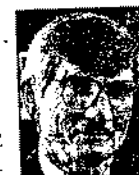
But Lerner's boss, William C. Vose, decided not to notify the defendants.

Other prosecutors, however, began rethinking their decisions to keep the reports from defense lawyers after the *Times* requested information about the potentially flawed cases. In Broward, for example, they immediately turned over paperwork to attorneys representing Hamwi, the convicted murderer.

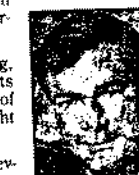
And in Pinellas, prosecutor Crow said his office is weighing whether it, too, will track down all the defendants and hand over the lab information "and let them do with it what they want."

Bromwich, the former inspector general whose investigation prompted the broader review, is puzzled by the lack of fallout.

"I'm surprised that no convictions have been overturned," said Bromwich, now a private lawyer in Washington. "The number zero surprises me."



Coe, above, said his office didn't have time to research problems. But Ober decided to notify defendants.



Sloppy lab work casts doubt on some Florida cases

Here are some of the Florida cases that might have been compromised by sloppy FBI lab work.

Brett Allan Bogle

Bogle, 31, is on death row for bludgeoning his ex-girlfriend's sister, Margaret Torres, with a concrete block in 1991. The nude body of the 89-pound, 4-foot-11 victim was found outside a drive-through market in Gibsonton.

The key evidence was a strand of hair that Hillsborough County detectives said they found on Bogle's white pants. FBI examiner Michael Malone testified that the hair "microscopically matched" the victim's pubic hair. "There were no dissimilarities at all," he said.



And former Hillsborough prosecutor Karen Cox told the jury that the pubic hair could not have gotten there by casual contact. It helped prove Bogle raped the woman, and if he was the rapist, he was the murderer.

New Justice Department research suggests, however, that the hair was consistent with Torres' head hair, not her pubic hair, and that there were other possible problems with Malone's work.

Terri Backhus, Bogle's attorney, says her client is innocent. She calls the case against him "a crushing combination of state deception and lies" and questions whether a hair exists.

Malone says he made a "silly clerical error" in his notes, inadvertently writing that a pubic hair was a head hair. "There's no way to confuse a head hair and a pubic hair," he says. "That's so basic, it's unbelievable. . . I wouldn't give that a second thought."

Felix Cruz Torres

Torres, a former commander of a northwest Hillsborough Veterans of Foreign Wars post, served 8½ years for the

1990 stabbing death of Gregory Carl Jenisch in Tampa. His body was found floating in a canal near Pistol Range Road.

At the trial, Malone testified that fiber found in the hatchback part of Torres' car matched fiber on a rope that was looped around Jenisch's neck and used to bind his hands and feet. Malone said he used an instrument called a microspectrophotometer to identify the dye in the fiber.



Malone's testimony sealed Torres' fate. "He would've gotten away with it if it wasn't for science," prosecutor Cass Castillo said at the time.

But an independent review by the Justice Department indicates that Malone got it wrong. He "incorrectly testified" outside his field of expertise, giving an inaccurate description of the microspectrophotometer, among other things. (The instrument can't identify dye; it registers color for dyes used in fibers). According to the review, Malone's testimony also overstated the significance of his hair and fiber exams.

Torres, now 63, was released from prison about two years ago. He maintained all along that he was framed. "They knew I didn't kill that man," he said. Living and working in North Florida, he says he is trying to find a lawyer to sue the government for wrongful arrest and incarceration.

Malone says he didn't overstep and contends that the Justice Department critique represents two views among experts. "It's their opinion against my opinion," he says. "And the only opinion that counts is the opinion of the guy in the black robe."

Robert Milford

Milford, a former fast-food worker, is serving a life sentence for stabbing 78-year-old Louette Hackney to death in March 1991, beating her husband, Mor-

ton, and setting their Vairico house on fire.

The murder and beating charges against Milford, now 37, were built on a questionable eyewitness identification and a strand of hair, broken at the root, that Hillsborough County sheriff's deputies said was embedded in the murder weapon, a lamp shade at the crime scene. Malone testified the hair was a "perfect match" to Milford's pubic hair.



"It would be highly unlikely for . . . anybody else to have hairs exactly like the hairs of Mr. Milford," he said.

But a Justice Department review says that Malone did not perform his tests in a scientifically acceptable manner. What's more, the report indicates, he overstated the evidence when he testified to statistical probabilities about hair comparisons. There is no statistical database to determine the likelihood that a specific hair comes from one person and not from someone else.

Milford, who had a lengthy arrest record, acknowledged all along that he stole the couple's van. But he denied the homicide and the beating. From Tomoka Correctional Institution in Daytona Beach, he says Malone provided "a corrupt and deceptive report against me at my trial."

He says he has received little information about the new evidence and doesn't know what to do because he has no money to hire a lawyer to get his case reopened.

Malone says Milford's public defenders should have challenged him at trial if they had a problem with his testimony. He cites his "experience" as a lab examiner to support his hair statistics. The Justice Department expert who reviewed his work, Malone adds, made "nit-picky" criticisms.

Augustine Delgado Perez

A Pasco County jury convicted Perez, now 48, of kidnapping 38-year-old Kay Devlin from a Tampa street corner in July 1990 and shooting her to death. Six days later, the prostitute's body was found staked under water in a retention pond in a Central Pasco orange grove.

In 1991, Circuit Judge Maynard Swanson went against the recommendation of a jury and sentenced Perez to death. But the Florida Supreme Court overruled the judge, citing a paperwork problem, and gave Perez a life term without parole.



Malone offered fiber evidence about a rope that authorities said was found in Perez's van. The rope was consistent, he said, in "color, construction, composition and diameter" with rope used to bind the victim. Malone also performed hair comparisons.

But a new Justice Department report says Malone's hair tests were not adequately documented in his notes. The report also says he should have used a "more specific" and "preferred" scientific method to analyze the rope.

Perez, serving his sentence at Sumter Correctional Institution, says he never received copies of any case-review reports and adds that he doesn't even have a lawyer.

His former court-appointed lawyer, T. Philip Hanson, argued at the time that Perez, a Cuban immigrant who spoke poor English, was victimized by a dubious eyewitness identification and questionable police tactics.

Malone says his exams and notes met FBI standards, adding that he preferred the type of fiber test he performed to the one suggested by the Justice Department. And he says his notes "could have been written in hieroglyphics" adding that he wrote them for himself, so he could testify in court, not for other scien-

tists who might review his work 20 years after the fact.

George Trepal

Trepal, 52, a chemistry buff and onetime computer programmer, was sentenced to death in 1991 for killing a neighbor, Peggy Carr, by spiking her Coca Cola with thallium nitrate, a rat poison. Polk County deputies said Trepal was fed up with the Carr family's loud music and their dogs, which chased his cats. The case became known as the "Mensa murder" because Trepal was a member of the Mensa high-IQ club.

FBI lab examiner Roger Martz testified at the trial that, based on chemical tests of three Coca Cola samples, thallium nitrate had been added to the Coca Cola. But at a 1999 hearing, testimony by Martz and other scientists established that Martz had failed to label tests correctly, improperly documented



his results, misrepresented results to the jury and testified falsely about specific tests performed on one of the samples.

In a ruling last October, retired Circuit Judge E. Randolph Bentley called Martz's conduct "outrageous and shocking." The judge also said portions of testimony by two other FBI examiners were "not credible."

Bentley refused to grant Trepal a new trial, however. According to the judge, it is doubtful that information known now would have led to a different verdict or sentence because other evidence, he said, amply demonstrated Trepal's guilt.

But Bentley also acknowledged that he was disturbed by the conclusions the law led him to, saying he is "not comfortable with the outcome which the current law requires." He urged the Florida Supreme Court to "carefully review the law in this area."

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