April 19, 2012

The Honorable Eric H. Holder, Jr.
United States Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Dear General Holder:

As the president and chair of the board of directors of The Constitution Project, an organization dedicated to upholding constitutional safeguards in our criminal justice system, we were shocked to read the stories from today and yesterday in the Washington Post concerning the Department of Justice's investigation into the flawed forensic reports and testimony of the Federal Bureau of Investigation that have led to the wrongful conviction of innocent individuals, and even the apparent wrongful execution of one individual. While the DOJ admirably undertook this investigation upon learning of potential flaws in the work of 13 FBI analysts, it is unconscionable that in "fewer than half of the 250-plus questioned cases" in which a scientific review of the evidence was completed, did the defendants or their defense counsel receive notification of the potential flaws.

The Post's investigation reveals further examples in what appears to be a culture of nondisclosure as evidenced by a continuing pattern of federal prosecutors' failing to disclose favorable evidence to the defense in direct violation of constitutional, legal and ethical requirements. These examples are added to a litany of unconstitutional nondisclosures by federal prosecutors, from the prosecutions of the late Senator Ted Stevens to W.R. Grace Corporation and its executives, and very recently, Lindsey Manufacturing Corporation and its executives. These are a few of the numerous examples, and we know that they are just the tip of the iceberg—most nondisclosures go undiscovered by the defense, who generally have no access to information that the prosecution has not provided.

DOJ has repeatedly claimed over the past decade that it can fix this problem internally, and it repeatedly claims that it has done so—until the next problem is revealed. While we admire the steps you have taken as Attorney General, it is readily apparent that this problem cannot be remedied through changes to DOJ's internal policies. Too many prosecutors are not getting the message that these disclosures are not optional. Moreover, even the overwhelming majority of prosecutors who operate in good faith may have difficulty determining what information must be disclosed in the face of inconsistent and opaque standards for criminal discovery.

Legislation is urgently needed to clarify the obligations of federal prosecutors to disclose favorable evidence. The Constitution Project has assembled more than 140 criminal justice experts—more than 100 of whom have served as federal prosecutors during the course of their careers—who agree that, "*Brady* violations, whether intentional or inadvertent, have occurred for too long and with sufficient frequency that Congress must act. Self-regulation by the DOJ has been tried and has failed. It is ultimately not a solution to the injustices that continue to occur." We attach their letter calling for legislative reform in the face of this problem.

We are further concerned that in response to the Washington Post investigation, the DOJ claims that the notifications that have occurred up to this point "met legal requirements." The duty to disclose favorable evidence to the defense is ongoing and extends past a conviction to subsequent stages of the judicial process; a prosecutor's failure to disclose potentially exculpatory evidence amounts to a violation of *Brady v. Maryland*. The Washington Post was able to locate defendant names and other significant details in 137 of the 250 cases for which a scientific review of the potentially flawed evidence was undertaken. Of these 137 cases, there are 24 federal prosecutions in which no documentation of disclosure to the defendants of the potentially exculpatory evidence exists. In only two federal cases of the 137 did federal prosecutors document that they had disclosed the results of the investigation to the defendants. Particularly troubling among these 24 cases is the case of Donald Gates, who spent 12 additional years in prison for a crime he did not commit due to prosecutors' failure to notify him of the results of the DOJ task force's investigation.

Further, as the former inspector general who helped to lead the investigation of the FBI lab stated, the DOJ task force that undertook the investigation had an independent obligation to ensure that the defendants were notified. Appallingly, the DOJ chose to keep the findings of the investigation secret and to disclose the results of the investigation only to the prosecutors in the affected cases, leaving it up to the individual prosecutors whether to disclose the information to affected defendants. According to the Post, the DOJ set "strict rules" about what would be disclosed in an effort to protect convictions, and also abandoned initial plans to ensure that state and local prosecutors had provided the results to defendants in appropriate state cases. While the DOJ claims that they met their legal and constitutional obligations by notifying only the prosecutors, certainly the DOJ cannot claim that their hiding these results from the public, and in particular from the defendants, served the interests of justice.

Finally, we know now that there are problematic cases beyond the scope of the task force's investigation that must be reviewed. While the DOJ's investigation focused on one particular FBI scientist, there were clear indications that the problems are much more widespread. The cases of Santae Tribble and Kirk Odom in the District of Columbia—both discussed in the Post's report—involve flawed hair comparison techniques, but were not part of the task force's review because the evidence had been analyzed by experts who were not the subject of its investigation. Thus, Mr. Tribble and Mr. Odom spent needless years apparently wrongfully incarcerated.

We encourage the DOJ to undertake an investigation into those additional cases involving potentially faulty evidence or flawed testimony that were not part of the task force's review. This investigation cannot be done by DOJ alone. Independent experts, along with the defense bar, the ABA, ethics authorities, and others, must work side by side with DOJ as it conducts this work. Further, we call on the DOJ to take the necessary steps to ensure that each and every defendant whose case has been implicated by the previous investigation or any future investigation, along with his or her defense counsel, receives immediate notice that evidence in the defendant's case has been or is being reviewed, for what reasons, and where known, with what results.

Moreover, we call on the DOJ to work with Congress on legislative efforts to reform the broader systemic problem of *Brady* violations. We hope the DOJ will build upon its internal efforts by recognizing the need for a new law that would clarify the obligations of all federal prosecutors to disclose favorable evidence. The bipartisan legislation introduced by Senator Lisa Murkwoski (R-AK) is deserving of the DOJ's support. DOJ has an unprecedented opportunity to show its commitment to fairness and accuracy in our criminal justice system by endorsing criminal discovery reform. The articles in the Washington Post bring shame to our criminal justice system and to the Department supposedly devoted to justice—not just to convictions.

Sincerely,

Virginia E. Sloan

Stephen F. Hanlon