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Defense Bar Angry Over Lab Scandal

Secrecy shrouds who's affected by the
FBI lab's mishandling of evidence.

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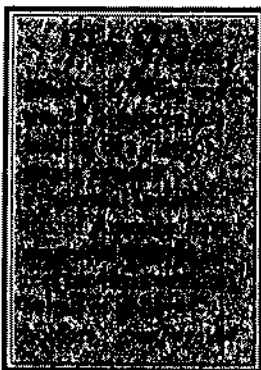
SPECIAL TO THE NATIONAL LAW JOURNAL

DEFENSE ATTORNEYS ACROSS the country find themselves stymied in trying to determine if their clients, including some on death row, might be deserving of new trials in the wake of reports of mishandled and contaminated evidence at the FBI forensics lab and slanted testimony by its agents.

Others, engaged in ongoing prosecutions, have been left wondering if prosecutors are holding back exculpatory evidence.

Many are demanding answers from the U.S. Department of Justice, which has refused to release the draft report on the inspector general's year-long investigation of the Washington, D.C., lab. And an angry group of defense attorneys filed suit

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Feb. 25 to make the report public.

Defense lawyers whose clients might benefit from its conclusions are finding it hard to determine whether their cases are affected because of the secrecy surrounding the report. The department has notified 25 federal and 25 state and local prosecutorial agencies so far that they may have affected cases. It has told those 50 agencies to decide on their own whether the report's disclosures must be released under the U.S. Supreme Court's 1963 ruling in *Brady v. Maryland*, 373 U.S. 83, which mandates disclosure of exculpatory evidence.

"The problem with *Brady* is, it's based on the fox guarding the chicken coop," says Howard R. Price, a prominent criminal defense attorney in Beverly Hills. "It's for the prosecutors to decide what would tend to exculpate the defendant, and they always have a very narrow view."

The lab, long considered the nation's premier forensics testing facility, has pro-

vided crucial evidence in many high-profile cases, including the World Trade Center bombing, pre-trial proceedings against accused "Unabomber" Theodore Kaczynski, pre-trial proceedings in the Oklahoma City bombing case, and the 1989 ouster by the U.S. Congress of Florida federal Judge Alcee Hastings.

The judge in the Oklahoma City case has ordered federal prosecutors to release the draft report on the lab's deficiencies to lawyers for defendant Timothy McVeigh, who is to be tried later this month in Denver. While those attorneys have called the report valuable, lead prosecutor Joseph Hartzler insists the government's case remains intact.

In Los Angeles, state prosecutors relied on the FBI lab in the case against the four police officers initially acquitted in state court of beating motorist Rodney King in 1992; in the trial of the two men convicted of beating trucker Reginald Denny in the ensuing riot; and in the 1995 murder trial of O.J. Simpson. Yet a

spokeswoman said the District Attorney's Office was not among the 50 agencies put on notice by the Justice Department.

Crucial Evidence

Boston attorney Daniel P. Leonard notes that the FBI and its crime lab played a crucial role in the wrongful death trial in which a jury found Mr. Simpson liable in February, hitting him with \$33.5 million in damages. Yet the department has no plan to notify Mr. Leonard or other civil practitioners about possible FBI lab problems.

"The issue of the FBI lab, and in particular agent Roger Martz, will certainly be part of the Simpson appeal" no matter what the department does, says Mr. Leonard. Mr. Martz testified in O.J. Simpson's murder case regarding DNA evidence that was helpful to the defense. Although he was not called in the civil case, plaintiffs impeached his findings with testimony alleging systemic contamination in the FBI lab.

The investigation is based on the complaints of a whistleblower, former crime lab chemist Frederic Whitehurst, who recently was suspended with pay. Dr. Whitehurst claimed forensic evidence in bombing and murder cases was mishandled and contaminated at the lab by agents who also tailored their reports and their testimony to suit prosecutors' needs. As far back as 1980, a U.S. General Accounting Office report criticized lab procedures, and a 1988 FBI internal report found the lab, which does more than 600,000 forensic exams a year, to be inadequate, recommending its relocation.

The FBI claims none of the problems at the lab jeopardize any cases. But the Justice Department, of which the bureau is a unit, has admitted that the number of cases affected by lab conditions could mount as the probe continues. In fact, a U.S. district judge in Washington, D.C., who reviewed evidence against the lab concluded its failures could affect thousands of criminal prosecutions.

The ruling was issued last month by Judge Gladys Kessler when she ordered the release of Dr. Whitehurst's records under the Freedom of Information Act. "Since 1982, Dr. Whitehurst has made a number of serious allegations that call into question the scientific integrity of the FBI crime lab and the thousands of prosecutions that rely on evidence it has processed," Judge Kessler said in her Feb. 4 opinion.

Before the judge is the Feb. 25 lawsuit filed by the National Association of Criminal Defense Lawyers for release of the inspector general's draft report. The department had previously ignored the group's freedom of information request.

"Only defendants and their counsel can adequately assess the importance of the report's findings in a particular case," the association said in its request.

Thomas W. Hillier II, director of the Federal Public Defender's Office in Seattle, notes that in the recently concluded trial of a group accused of conspiring to

make destructive devices, parts of the inspector general's report that contained impeaching evidence were released to the defense after news of it broke during the trial. Mr. Hillier later learned that other data had been withheld, he says in his declaration in the NACDL lawsuit.

"It is my emphatic belief that discovery of the entire report and surrounding documentation at the earliest possible time is essential to lawyers who are preparing for trial or post-conviction relief," he says.

Time Running Out

While the Justice Department regards the draft report as an internal document not subject to FOIA requests, Washington attorney Jack King, public affairs director for the NACDL and co-plaintiff in its lawsuit, is concerned about the impact of the planned late April completion of a final report. The 1996 Anti-Terrorism and Effective Death Penalty Act, he notes, imposes a one-year limit on petitions for habeas corpus.

"There are people in prison, people on death row even, running up against an April 24 deadline" under that nearly year-old act, Mr. King says. "If their lawyers can't get the report [by then], they might be stone out of luck."

Cases affected by the FBI evidence do not qualify as exceptions to the statute of limitations under the new law, says Michigan attorney William W. Swor.

"Cases are often made or broken on scientific evidence, and the inspector general has apparently uncovered numerous instances in which scientific evidence at the FBI laboratory has been mishandled or handled so casually as to cast doubt on the validity of test results," says NACDL President Judy Clarke, a defense attorney in the Unabomber case. "There are many defendants facing execution or prison because of evidence analyzed in the FBI's lab. They and their counsel desperately need this report." ■