

# NACDL NEWS

National Association of Criminal Defense Lawyers

## FBI Crime Lab: Cleanup or Coverup?

Despite pressure from NACDL and the court, the Justice Department continues to fight the association's Freedom of Information Act (FOIA) requests for the working papers and preliminary drafts of its report criticizing the FBI lab.

Meeting in chambers April 23 with NACDL representatives and U.S. District Judge Gladys Kessler (D.D.C.), Justice Department attorneys indicated that public policy questions raised by NACDL regarding reforms and oversight of the lab are issues solely for the Justice Department and the FBI and are not appropriate subjects for mediation with the defense bar, which is seeking to restore integrity to America's criminal justice system. The case is *National Asso-*

*ciation of Criminal Defense Lawyers, G. Jack King Jr., and Dr. Frederic Whitehurst v. United States Department of Justice*, D.D.C., Civil No. 97-372 (GK).

It was precisely because of the "greater public policy questions" that Judge Kessler says the FOIA suit raises that she strongly encouraged both sides to enter the U.S. District Court's mediation program. Department lawyers said they would be willing to enter into a trial mediation period of 60 days with FBI whistleblower Frederic Whitehurst, but not NACDL.

The judge then set a briefing schedule for summary judgment motions for all parties except plaintiff Whitehurst. Ordinarily, FOIA suits are decided by the court on the briefs, without discovery or trial. The burden is on the withholding agency to identify all records that arguably fill the FOIA plaintiff's request, and prove to the court's satisfaction that each particular record withheld falls within a statutory exception to the FOIA.

Records which the court decides were not intended by Congress to be exempt from disclosure must then be released. Records may sometimes be partially exempt and partially disclosable — the classic "blackened out" FOIA document familiar to the public.

"The Inspector General's public report indicates that problems at the lab go very deep," NACDL President Judy Clarke said in a statement from her office in Spokane, WA.

"Our attorneys are working very hard to get the work products that produced the final draft of the lab report — interim drafts, interview transcripts, memoranda and other related agency records — in order to begin determining how many and whose cases have been affected by shoddy work by FBI lab examiners. But the Justice Department is keeping these records covered up. They rejected our offer to mediate our suit and instead are going to keep it tied up in litigation as long as they can. Keeping the problems in the dark does nothing to restore the

*Case for the Government*  
The FBI Laboratory:  
An Investigation into Laboratory  
Practices and Alleged Misconduct  
in Explosives-Related and Other Cases



Michael R. Bronsweig  
Inspector General  
April 1997

## Update: Congress Oversees Lab Plight

Science should favor neither the prosecution nor the defense in its search for the truth. FBI lab whistleblower Frederic Whitehurst told the House Judiciary Committee's Subcommittee on Crime May 13. Appearing at an oversight hearing on problems at the FBI lab, NACDL's FOIA counsel Daniel Alcorn called for establishment of an independent center for forensic science.

"Should the lab be within the FBI at all?" Alcorn asked. "Is a law enforcement agency the appropriate place for objectively seeking the truth?"

Whitehurst also recommended revamping the lab, calling accreditation by the American Society of Crime Lab Directors' Laboratory Accreditation Board (ASCLD/LAB), an entity that accredits state forensic laboratories, "a good start." Beyond that, he proposed that Congress create a permanent oversight panel of scientists, possibly drawn from the National Academy of Sciences and the National Research Council.

"But beyond oversight, I want to know who's been hurt," Whitehurst told the panel. "I have indications that people have been hurt."

Several committee members shared the concerns of Alcorn and Whitehurst that innocent persons are currently incarcerated as a result of past lab practices, such as a lack of reliable testing protocols and exaggerated testimony. "Over a 10-year period, an examiner can work 1000-3000 cases," Whitehurst noted. "Tens of thousands of lives may be affected." At the very least, "hundreds of lives" have been affected, he concluded.

Alcorn also urged the panel to consider amending federal criminal procedure rules to provide for more open discovery to improve the truth-seeking process, and help courts and persons accused of committing a crime uncover instances of hidden lab misconduct that would otherwise go undetected. ■

public's faith in the FBI lab," Clarke said.

"They want to litigate the FOIA claim exclusively, but these broader policy issues will keep arising because the system is fundamentally flawed," said Dan Alcorn, NACDL's counsel in the case.

"It is regrettable that DOJ does not want to explore the larger issues of identifying persons who did not receive a fair trial because of exaggerated or untruthful testimony by certain lab personnel and how to prevent that kind of injustice in the future. We feel the Freedom of Information Act is clearly on our side and that we will prevail on the merits of the case. The American public needs to know the extent of the lab's problems in order to assure that the integrity of the lab and its personnel will be restored," he added. Alcorn is a veteran litigator and one of the nation's foremost authorities on FOIA litigation. (See sidebar)

NACDL Second Vice-President William Moffitt of Asbill, Junkin & Moffitt in Washington, DC, said the litigation must continue because the final version of the Inspector General's report on allegations of misconduct at the lab, released April 16, focused on only a very few high-profile cases in just three of the lab's analysis units. Moreover, he said, the IG's office concedes that it was highly selective in its investigation, and in the information it included in the final report.

"The final draft of the Inspector General's report has been sanitized so much it makes it virtually impossible for anyone to get any relief. What is it they're still hiding that they don't want the public to see?" Moffitt asked.

"The lab is still closed from any public scrutiny. They clearly don't want sunshine. An offer was made to open discussion on ways to make the lab better and the Justice Department emphatically rejected that offer. For too long, the FBI tolerated sloppy work and false testimony and covered it up. Now they slam the door on a genuine offer by the National Association of Criminal Defense Lawyers to work together to help assure the integrity of a lab that all Americans can trust," Moffitt noted.

"This has been a very important victory for openness in the government and shows why we need more openness," added Alcorn.

At an NACDL press conference on April 17 with Dr. Whitehurst, whose accusations became the focus of the OIG report, Moffitt called on Congress to "do the people's business" and conduct a full investigation of the entire FBI lab.

Whitehurst told reporters that tens of thousands of closed cases need to be reviewed to see which ones must be reopened. "This

[the OIG report] is a minor tip of the iceberg," Whitehurst observed.

Whitehurst said that there was a "culture" of pro-prosecution bias at the lab, and that examiners were sometimes pressured into rewriting their reports to fit the prosecution's theory of the case. A gag order imposed by the FBI prevents him from discussing particular cases. (See interview, page 12)

"One guy told me, 'You either rewrite your report or we'll get a bright college student in here to replace you,'" Whitehurst said. "I will not work well with a man who points a finger in my face and suggests I lie in a court of law. I don't think anybody would fault me for that."

King served the original FOIA request on the Justice Department February 4. After DOJ lawyers made it clear to the court that they would not agree to mediation and would litigate, King filed another FOIA request on behalf of the Association on DOJ Inspector General Michael Bromwich and one on Associate Deputy Attorney General David Margolis April 24 for more FBI lab documents.

"We don't see any evidence that they are willing to change," King told *The Champion*. "We don't see any evidence that the FBI or DOJ is really willing to clean up the lab and instill objectivity by changing the current prosecution-oriented bent of findings and testimony by lab personnel. The defense bar would like to have the FBI lab become a national center for forensic excellence, where the experts are truly experts and *truly independent*. Sadly, we'll have to continue this fight in court. And in light of the revelations that did come to light in the public report, NACDL will be filing more FOIA requests to get to the bottom of how badly the lab has been corrupted."

"The FBI lab is the 'Peter Principle' at work," said Moffitt. "The end result of their sloppy and biased work was citizens' liberty being robbed without due process, without a fair trial. What we've got is a corrupt lab, not a science lab — a lab whose culture is, and for too long has been dedicated to convicting a defendant at any cost, regardless whether he or she is actually guilty or innocent. That cuts against the mutual goal of law enforcement and the defense bar alike to make sure that innocent people do not go to jail while guilty parties remain at large."

"It's not just the FBI lab that has been compromised by this," Moffitt concluded. "The whole criminal justice process has been gravely compromised."

Briefing is scheduled to be completed by both sides by June 23. A status hearing before Judge Kessler is scheduled for July 7. ■

## FOIA Specialist No Stranger to Exposing Coverups



NACDL's FOIA counsel Daniel S. Alcorn of Fensterwald & Alcorn in Vienna, VA, has a reputation for prying secrets from the government. Besides going after the U.S. Department of Justice Inspector General's working drafts of the FBI lab report along with underlying interviews, Dan represents the Assassination Archives and Research Center in Washington. He works with the federal Assassination Records Review Board to release government records relating to the assassination of President John F. Kennedy. He is also counsel for the Coalition on Political Assassinations in Washington, which seeks release of information on American political assassinations, including JFK, Martin Luther King, Jr., and Robert F. Kennedy.

Alcorn has also represented FBI domestic surveillance whistleblower Frank Varello who exposed the FBI's domestic spying program against political opponents of U.S. Central America policies in the 1980s. And he represented Salvadoran Army death squad whistleblower Cesar Vielman Joya Martinez in his extradition proceedings. Recently he represented civil rights activists protesting alleged CIA/Contra involvement in crack cocaine trafficking after their arrests outside CIA and DEA headquarters.

Born in Popular Bluff, MO, Alcorn received both his B.A. and J.D. from the University of Virginia. He has served as special counsel to the Virginia Attorney General's Office, and as a director and vice-chair of the Metropolitan Washington Airports Authority. An NACDL member since 1983, Alcorn's main areas of practice are Freedom of Information Act law, international law, and employment and security clearance litigation. Presenting him to the NACDL Board in Boston in early May, Executive Director Stuart Stalter cited Alcorn "as a lawyer's lawyer." ■