

methodologies. In its filings, the government makes reference to a report issued by National Academy of Sciences [NAS] through the National Research Committee [NRC] in 1996 concerning DNA evidence. The final report [NRC II] was the product of both study and reviewing committees. Through the amended subpoena defendants seek:

all communications, assessments, reviews or like documents which pertain to the development of each successive draft and final edition of the report now known as The Evaluation of Forensic DNA Evidence: An Update [NRC II], including, but not limited to, all reviews of all drafts, whether said reviews were done by persons internal or external or by the sponsoring agency (Department of Justice), and all responses to those reviews generated by the authoring panel or other organs of the Academy.

The requested materials are internal, unpublished documents reflecting the deliberative process of the study committee and review panel.

The issue before the Court regarding the admissibility of DNA at the February 7, 2003 Frye hearing will concern whether there is consensus *vel non* amongst members of the relevant scientific community. Controversy in the scientific community is generally reflected in published peer-reviewed articles in journals or scientific articles in other types of publications. Such controversy is public in nature and does not typically consist of unpublished documents, internal drafts, notes or other documents reflecting confidential internal deliberations. If it were this Court's role to adjudicate the merits of the science involved, the relevance of the materials would be more apparent. It is, of course, not this Court's role to so adjudicate.

There is the additional concern that exposing NRC's deliberative process to discovery could hinder the exchange of ideas. NRC's study committees and review panels subject scientific issues to a robust, searching inquiry, which is furthered by open and frank communication between participants. NRC II was written with the expectation that

the deliberative process would remain confidential; its deliberative process likely reflects that shared understanding.

If the material sought by the defense could materially further their Frye position, it may well require that the confidentiality be breached. Here, however, the material sought, unpublished dissenting views to an official report, would have minimal relevance to the Court's inquiry. Balancing the respective interests, it is clear that the subpoena should not be issued.

Therefore, it is, this 4th day of February, 2003, hereby **ORDERED** that the defendants' Motion for the Issuance of a Subpoena *Duces Tecum* is **DENIED**.



JUDGE ROBERT I. RICHTER

Copy to:

Valinda Jones, Esq.
Cynthia Schnedar, Esq.
S. Elisa Poteat, Esq.
Assistant United States Attorneys
Office of the United States Attorney
Sex Offense/Domestic Violence Section
Judiciary Center - Room 4229
555 - 4th Street, N.W.
Washington, D. C. 20530

Terence J. Lynam, Esq.
Akin Gump Strauss Hauer & Feld
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Audrey Byrd Mosley, Esq.
Deputy General Counsel
National Academy of Sciences
2101 Constitution Avenue, N.W.
Washington, D. C. 20418

Christopher Flood, Esq.
Heather Pinckney, Esq.
Christine Smith, Esq.
Edward Ungvarsky, Esq.
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004