

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Criminal Division – Felony Division

UNITED STATES OF AMERICA

v.

DONALD EUGENE GATES

Criminal No. F- 6602-81

Judge Fred B. Ugast (Senior Judge)

S.H.: December 8, 2009

**MOTION TO VACATE CONVICTIONS ON THE GROUNDS OF ACTUAL
INNOCENCE**

Donald Gates, through undersigned counsel, respectfully moves this Court to vacate his conviction for felony murder while armed (rape) and carrying a pistol without a license and to dismiss the charges with prejudice. The results of DNA testing definitively exclude Mr. Gates as the source of sperm left in the victim by the perpetrator. This new evidence clearly and convincingly establishes that Mr. Gates is actually innocent of the June 22, 1981, rape and murder of Catherine Schilling for which he has served the last twenty-eight years in prison. His motion is made pursuant to the Innocence Protection Act, D.C. Code § 22-4131 *et seq.*

This motion proceeds in three parts. First, it explains the provisions of the Innocence Protection Act. Next, it describes the government's case against Mr. Gates in order to place the newly discovered evidence in context.¹ Finally, it details the newly discovered evidence and

¹ The trial transcript has not been located. The factual information regarding the trial is drawn from the records of the Superior Court, including pretrial, post-verdict and post-conviction motions, oppositions and orders filed in this case, and the records of the District of Columbia Court of Appeals, including all briefs and the Court's opinion, *Donald E. Gates v. United States*, 481 A.2d 120 (D.C. 1984).

describes how this evidence is conclusive proof of what Mr. Gates has *always* maintained: he is actually innocent.

I. The Innocence Protection Act

The District of Columbia's Innocence Protection Act, which became law in 2002, has two provisions that are relevant here. The first allows certain defendants to apply for post-conviction DNA testing. D.C. Code § 22-4133. The second describes the circumstances under which a defendant may move, and the court must grant, a motion to vacate a conviction or grant a new trial on the grounds of actual innocence. D.C. Code § 22-4135. The two provisions can work in tandem: the results of the DNA testing may serve as the newly discovered evidence that is the basis for vacating the conviction. Such is the case here.

Mr. Gates applied to this Court for post-conviction testing of the biological material that was "seized or recovered as evidence in the investigation or prosecution that resulted in conviction . . . or can otherwise be identified as evidence in the case." D.C. Code § 22-4133 (a)(1). His application contained his affidavit of innocence, identified material to be tested, explained why it had not previously been tested, and described how the DNA evidence would help establish his innocence. The United States agreed that testing was warranted under the Act, and assisted in locating the evidence. Slides containing biological material seized in this case, including the vaginal slides from which a DNA profile of the perpetrator was obtained, were located at the D.C. Medical Examiner's Office. As the United States wrote in its July 22, 2008, letter to counsel, a copy of which was filed in the court jacket, "a search at the D.C. Medical Examiner's Office has located slides that were created during the autopsy of the victim and

collection of biological material to be submitted to the Metropolitan Police Department. The Medical Examiner's Office was successful in locating 6 slides for case 81-06-489."

This Court granted Mr. Gates' application for post-conviction DNA testing under the Innocence Protection Act. In a series of orders issued on September 15, 2009, November 4, 2009, November 17, 2009, and November 18, 2009, this Court set forth the terms by which testing would be conducted.

Mr. Gates now moves this Court to vacate his convictions and dismiss the counts with prejudice based on the results of that DNA testing. The Innocence Protection Act provides that "[a] person convicted of a criminal offense in the Superior Court of the District of Columbia may move the court to vacate the conviction or to grant a new trial on grounds of actual innocence based on new evidence." D.C. Code § 22-4135 (a). The statute requires the movant to set forth "specific, non-conclusory facts:"

- (1) Identifying the specific new evidence;
- (2) Establishing how that evidence demonstrates that the movant is actually innocent despite having been convicted at trial or having pled guilty; and
- (3) Establishing why the new evidence is not cumulative or impeaching.

D.C. Code § 22-4135 (c). It also requires an affidavit of innocence. D.C. Code § 22-4135

(d)(1). Mr. Gates incorporates by reference the affidavit he submitted with his application for post-conviction testing.

Under the statute, this Court "may consider any relevant evidence" in determining this motion, but it "shall consider the following:"

- (A) The new evidence;
- (B) How the new evidence demonstrates actual innocence;

(C) Why the new evidence is not cumulative or impeaching;

(D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial[.]

D.C. Code § 22-4135 (g)(1).

The relief granted depends on the standard of proof that is satisfied. “If, after considering the factors listed [above], the court concludes by clear and convincing evidence that the movant is actually innocent of the crime, the court shall vacate the conviction and dismiss the relevant count with prejudice.” D.C. Code § 22-4135 (g)(2). If the court is persuaded that “it is more likely than not that the movant is actually innocent,” it must grant a new trial. D.C. Code § 22-4135 (g)(3). Mr. Gates more than satisfies the clear and convincing standard. Therefore, this Court must vacate his conviction and dismiss the counts with prejudice.

II. The Government’s Case Against Mr. Gates

Catherine Schilling, a twenty-one year old white Georgetown University student, was raped and murdered late in the evening of June 22, 1981, in Rock Creek Park. She had left the law firm in the Watergate office building where she worked as a paralegal around 9:30 p.m., but never made it back to the Georgetown home she shared with roommates. The next day, an attorney at the law firm organized a search party. As the District of Columbia Court of Appeals states, “Her body was found on a bank of the Rock Creek with five bullet wounds to the head and sperm in her vagina. Her purse lay nearby, apparently undisturbed.” *Gates*, 481 A.2d at 122. No witnesses were ever found.

The murder was committed by a single weapon – a .32 caliber revolver. Although the gun was never recovered, the five bullets that struck and killed Ms. Schilling were. “The

government's firearms expert, Raymond Vorhees, testified that the bullets recovered from the victim were .32 caliber lead bullets fired from a .32 caliber barrel rifled with six lands and grooves and a right-hand twist." Brief for Appellee to District of Columbia Court of Appeals, at 5 (Jan. 9, 1984) (hereinafter "Gov't brief") (transcript cites omitted).

The government put together a circumstantial case against Mr. Gates that had three components. First, FBI Special Agent Michael P. Malone, "an eight year veteran of hair examinations at the FBI," who testified that he "had conducted about 10,000 such examinations," Gov't brief at 8, n.9 (transcript cites omitted), testified that two "Negroid" pubic hairs combed from Ms. Schilling's body at the crime scene were microscopically identical to Mr. Gates' pubic hair. Second, Gerald Smith, a convicted felon and paid police informant, testified that Mr. Gates had confessed to him. Third, Nancy Benoff testified that Mr. Gates had tried to rob her of her purse nineteen days before the rape and murder of Ms. Schilling and in the same general location. The detective who arrested Mr. Gates at the scene smelled liquor on his breath (although Ms. Benoff did not). Gov't brief at 10. Mr. Gates had pled guilty to attempted robbery.

At the outset, it must be noted that each part of the government's proof pointed to Mr. Gates acting alone, if it pointed to him at all. The only foreign pubic hairs combed from the victim were said to be his. The police informant, who sold his testimony for money and the dismissal of several pending cases, claimed that Mr. Gates admitted that he, and he alone, committed the crime. The other crimes evidence would not have been sufficiently similar to be probative of identity if Mr. Gates was an aider and abettor to rape and murder. Mr. Gates, thus, either was, or was not, the sole perpetrator of this horrendous crime.

Each component of the government's case is fatally undermined by the results of the DNA testing that demonstrate that Mr. Gates was not the perpetrator. Moreover, the critical pubic hair evidence is fatally undermined even without the DNA results.

A. The Pubic Hair Evidence

The importance of the pubic hair "match" to the government's case is evident at every step of the proceedings against Mr. Gates. The government relied on Special Agent Malone's report to secure the warrant for Mr. Gates' arrest for felony murder. The affidavit, sworn by Detective Ronald S. Taylor, and approved by an Assistant United States Attorney, states:

Pubic hairs seized from Donald Eugene Gates were delivered to the Federal Bureau of Investigation and were compared with combed pubic hairs recovered from the decedent. The comparison revealed the pubic hairs of Donald Eugene Gates were microscopically similar to pubic hairs[,] unlike the decedent's, that were recovered from the decedent[.]

Affidavit in Support of Arrest Warrant for Donald Gates (November 5, 1981) (the capitalization has been corrected to reflect standard usage).

The government relied on the pubic hair evidence to gain admission of the other crimes evidence. In its motion for admission of other crimes evidence, the government included in its list of similarities between the attempted robbery of Ms. Benoff and the rape and murder of Ms. Schilling that "[b]oth assailants were black males with microscopically identical pubic hair." Government Motion for Admission of Other Crimes Evidence at 4 (Aug. 24, 1982). The government explained:

This is not a play on words. The assailant of Miss Benoff has been adjudicated to have been Donald Gates. The assailant of Miss Schilling will be shown scientifically to have been Donald Gates, or another person with pubic hair microscopically indistinguishable from that of Donald Gates.

Id. at n.3. This Court adopted the government’s rationale, finding that among the similarities was the fact that “both assailants were black males with what has been described as microscopically identical pubic hair.” Gov’t brief at 17. The United States urged affirmance in the Court of Appeals, arguing:

The fact that the perpetrator in both the Benoff and Schilling offenses was a black man with microscopically identical pubic hair is . . . , in short, highly relevant in a Drew analysis.

Gov’t brief at 26. *See also id.* at 25 (“[T]his factor is highly relevant, particularly on the question of identity.”).

And, of course, the government relied on the testimony of Michael P. Malone as direct evidence of Mr. Gates’ guilt. The government described his testimony as follows:

Michael P. Malone, an FBI Special Agent with the Microscopic Analysis Unit, testified about the results of a pubic hair analysis in which he compared pubic hair combings from the victim with pubic hair samples from appellant. Malone first sorted through the victim’s pubic hair combings, which had been obtained at the crime scene, to isolate hairs not belonging to the victim. He found two such hairs – of Negroid origin – from among the Caucasian hairs and compared those two hairs with pubic hair samples obtained from appellant. In conducting the comparison, Malone tested 20 individual microscopic characterizations, using a high powered microscope. The two Negroid hairs matched appellant’s hairs as to all 20 characteristics.

Malone explained that while a hair match differs from a fingerprint match in that it cannot be said that a hair comes from one person to the exclusion of all others, it is nonetheless “highly unlikely” that the hair found on the victim came from someone other than appellant. Malone indicated that in approximately 10,000 hair examinations he had performed over an eight year period, there were only two instances in which hairs from two different people were so similar that he could not differentiate them. He also stated that it is no more difficult to distinguish Negroid hairs from one another than it is to distinguish among Caucasian hairs.

Gov’t brief at 8-9 (transcript citations and footnotes omitted).

This testimony was invalid for two important reasons. First, forensic microscopic hair comparisons of this sort have been exposed as too subjective and too lacking in scientific support to be reliable. Second, Michael P. Malone has been exposed as a liar who testified falsely, who fabricated results, who testified outside of his expertise, and whose laboratory notes did not support the conclusions he offered in court.

1. The “Science” of Microscopic Hair Analysis

Before detailing the nature and scope of Mr. Malone’s deceptions, a word must be said about the nature of the field of microscopic hair analysis itself. The National Research Council of the National Academy of Sciences recently completed a major study of forensic science and produced a landmark report. With regard to the “science” of hair microscopy, it was particularly damning. The report states:

No scientifically accepted statistics exist about the frequency with which particular characteristics of hair are distributed in the population. There appear to be no uniform standards on the number of features on which hairs must agree before an examiner may declare a “match.” ***

An FBI study found that, of 80 hair comparisons that were “associated” through microscopic examinations, 9 of them (12.5 percent) were found in fact to come from different sources when reexamined through [mitochondrial] DNA analysis[;] [t]his illustrates . . . the imprecision of microscopic hair analyses . . . ***

The committee found no scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA.

Strengthening Forensic Science in the United States: A Path Forward, National Research Council, National Academy of Sciences [hereinafter NRC Forensic Science Report], 160-61 (2009).

A study of the trial transcripts of persons who were later exonerated by DNA evidence found that microscopic hair comparison analysis played a role in 65 trials out of the 137 trials examined. Of those, in 25 – or 38 % – of the cases the hair comparison testimony was invalid. Brandon L. Garrett and Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Conviction*, 95 Va. L. R. 1, 47 (2009). Most of these cases involved either overstatements of the degree of similarity in hairs, or invalid individualizing claims. Mr. Malone’s testimony included both types of inaccuracy.

First, Mr. Malone’s claim that the forensic hairs were “microscopically identical” to Mr. Gates’ pubic hairs was erroneous. It is well recognized within the forensic hair comparison community that “no two hairs are exactly the same in every detail,” even two hairs that come from the same person. Federal Bureau of Investigation’s Scientific Working Group on Material Analysis (SWGMA), Forensic Human Hair Comparison Guidelines, § 14.3 (cited in NRC Forensic Science Report at 157, n.69). Further, Malone’s testimony that it was “highly unlikely” that the hairs could have come from someone else was an invalid individualizing claim. While microscopic comparison of physical characteristics may be “useful for determining which hairs are sufficiently similar to merit comparisons with DNA analysis and for excluding suspects and assisting in criminal investigations,” the National Research Council’s review panel “found no evidence that microscopic hair analysis can reliably associate a hair with a specific individual.” NRC Forensic Science Report at 160; NRC, *“Badly Fragmented” Forensic Science System Needs Overhaul; Evidence to Support Reliability of Many Techniques Lacking* at 3 (“NRC Press Release”); *see also* Garrett and Neufeld at 52 (“No . . . systematic efforts to research the frequency with which particular microscopic features occur in any population have been conducted. Thus, there is not and never has been any statistical basis for hair comparison.”).

2. The Deceptions of Michael P. Malone

In April 1997, the Department of Justice Office of the Inspector General issued a Special Report entitled “The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases.” The report singled out by name thirteen forensic analysts for condemnation, including Michael P. Malone. The Inspector General concluded that Malone had testified falsely, under oath, before the Investigating Committee inquiring into the alleged misconduct of United States District Judge Alcee Hastings. He had falsely claimed to have conducted a forensic test that he had not performed. “[H]e also testified outside his expertise and inaccurately concerning the results.” OIG Report at Part Five, Section I. The transcript of his testimony demonstrates that he “resorted to fabrication rather than admitting he did not know the answer.” *Id.* at Section H12. Malone “seem[ed] to make up, based upon very limited amount of information, a sequence of events that just flat out didn’t occur.” *Id.*²

² Even before the OIG report, questions had been raised about Malone’s testimony, particularly in Florida where he had testified frequently. Florida courts had overturned capital murder cases for insufficient evidence where the state had relied on Malone’s testimony. In *Horstman v. State*, the court explained:

The state emphasizes that its expert, Agent Malone, testified that the chances were almost nonexistent that the hairs found on the body originated from anyone other than Horstman. *We do not share Mr. Malone’s conviction in the infallibility of hair comparison evidence.* Thus, we cannot uphold a conviction dependent on such evidence.

530 So.2d 368, 370 (Fla. Dist. Ct. App. 1988) (emphasis added). In *Long v. State*, 689 So.2d 1055 (Fla. 1997), another capital case in which Malone had testified, the Florida Supreme Court wrote, “[T]he critical evidence linking Long to the murder in this case, the two strands of hair and the carpet fiber, is not competent to support the conviction.” *Id.* at 1058. It explained: “Hair comparisons cannot constitute a basis for positive personal identification because hairs from two different people may have precisely the same characteristics.” *Id.*

In the wake of the OIG Report, the Justice Department's Federal Bureau of Investigation initiated a reexamination of cases involving the named analysts. The reexamination of Malone's work was led by forensic scientist Steve Robertson. Newspapers reported that the DOJ review had called into question many cases. See Sydney P. Freedberg, *Good cop, bad cop*, St. Petersburg Times, Mar. 4, 2001 ("By the fall of 1999, new reports trickled in from the Justice Department, showing Malone had made forensic errors in at least four Tampa Bay area homicide cases."); Sydney P. Freedberg, *Report highlights more tainted testimony*, St. Petersburg Times, May 3, 2001 ("In . . . State of Florida vs. Brett Bogle [a capital case where the defendant was on death row], a Justice Department review made public last year found that Malone misidentified a hair."); Cary Davis, *Flawed FBI work leads to request for new trial*, St. Petersburg Times, Oct. 6, 2001 ("Already, prosecutors in Hillsborough County have identified more than a dozen cases in which Malone gave opinions that were not justified by his tests.").

In the aftermath of the scandal, Malone admitted that he had testified falsely in a Florida capital case that resulted in the death penalty. In a post-conviction evidentiary hearing, held sixteen years after the trial, Malone testified that his trial testimony that the hair in the victim's hand was her own had been false. In fact, his notes revealed that the hair evidence had not been suitable for testing. *Rhodes v. State*, 986 So.2d 501, 506-07 (Fla. 2008). In another Florida case, the court ordered an evidentiary hearing into allegations of Malone's misconduct. *Moss v. State*, 860 So.2d 1007 (Fla. Dist. Ct. App. 2003). The aftershocks were not limited to Florida. In Rhode Island, a "judge called Malone 'some sort of a renegade or a rogue' and a 'prevaricator and a fabricator.'" Sherri M. Owens, Rich McKay and Jason Garcia, *Girl's convicted killer seeks freedom*, Orlando Sentinel, Sept. 14, 2003.

One sure sign that Malone was fabricating his testimony was his practice of repeating identical figures for the number of cases he had examined and the accuracy of his findings no matter the year that he testified. For instance, in *State v. Magouirk*, 539 So.2d 50 (La. Ct. App. 1989), Malone testified, “Basically over those twelve years, to go back, I’ve looked at hair for about ten thousand different divisions, I’ve only had two occasions out of the ten thousand where I had hairs from two different people that I could not tell apart.” *Id.* at 61. While in *Huf v. State*, 675 P.2d 268, 269 (Alaska Ct. App. 1984), Malone testified:

[I]t would be “highly unlikely” for the hair of two different people to have the same twenty characteristics in exactly the same arrangement. He explained that during the last seven years he had performed about 10,000 separate examinations of the hair of about 10,000 different people. In that time there were only two occasions in which the hair from two different people was so similar it could not be distinguished.

The Wall Street Journal conducted a review of more than a dozen of Malone’s trials and found that he repeatedly used the same figures regardless of the year. It reported:

[I]n trial after trial over a period of years, Mr. Malone gave nearly the identical assurances to juries about the reliability of his hair identifications. Regardless of the year, he routinely said he had examined the hairs of “10,000 people” in his career. Then he asserted that there had been only two occasions – later he said three – “in which the hair from two different people was so similar that it couldn’t be distinguished.”

Laurie P. Cohen, *FBI Fiber Analysis Emerges As New Issue in Murder Case*, The Wall Street Journal, April 16, 1997.

At Mr. Gates’ trial, Special Agent Malone parroted the same falsehoods apparently word for word. The government’s description of this part of his testimony bears repeating:

[I]t is nonetheless “highly unlikely” that the hair found on the victim came from someone other than appellant. Malone indicated that in approximately 10,000 hair examinations he had performed over an eight year period, there were only two instances in which

hairs from two different people were so similar that he could not differentiate them.

Gov't brief at 8.

3. The Failure to Disclose by the United States

On May 17, 1999, an official notice from the Office of General Counsel of the Federal Bureau of Investigation was placed on record and at the top of the FBI file relating to Mr. Gates' case. The notice is entitled "Findings of the Office of Inspector General (OIG) Department of Justice, Critical of Forensic Work Performed by Certain Lab Examiners." The notice states:

BE ADVISED, one or more of the Laboratory Examiners who performed scientific analysis in this investigation was criticized in the OIG's report issued on April 15, 1997. ***

If the forensic work contained in this file is used in any way in the future, both the OIG's findings and the forensic analysis of the examiners should be reviewed. In addition, legal advice should be obtained as to the FBI's disclosure obligations.

FBI Notice of Findings of the OIG (emphasis in original), attached as appendix 1.

As part of the Department of Justice's review of Malone's work, the FBI asked the Office of the United States Attorney for the District of Columbia to review Mr. Gates' case. Assistant United States Attorney Terrence J. Keeney completed a form entitled "FBI Laboratory State/Local Case Review." The form asked: "Was Malone's lab work material to the verdict?" FBI Laboratory Review (emphasis in original), attached as appendix 2. Mr. Keeney checked the box YES and signed the form on September 17, 2002. *Id.*

A reexamination of Malone's laboratory analysis in Mr. Gates' case was then conducted, apparently by Steve Robertson, the forensic scientist hired to conduct the FBI review. Independent Case Review Report (Dec. 4, 2003), attached as appendix 3. The examiner did not have access to the Gates' trial transcript or to the pubic hairs that Malone analyzed in this case.

His review was therefore limited to an examination of Malone's laboratory report and his bench notes. Even this limited examination was damning. The form asks: "Are the examination results set forth in the laboratory report(s) supported and adequately documented in the bench notes?" *Id.* at 2. The answer of the independent scientist was "No." *Id.* In the Comments section, he explains, in part:

The results are not adequately documented in the notes. The notes are not dated and are in pencil instead of ink. Abbreviations are used that are hard to interpret. * * *

Id. at 3.

In fact, while Mr. Robertson was only able to perform a limited review, a comparison of Mr. Malone's trial testimony as preserved in the government's appellate brief with Malone's bench note documentation of the tests he conducted leads to an even more damning conclusion. This comparison supports the conclusion that Malone testified falsely in this case regarding his results. According to the government, Malone testified that he "tested 20 individual microscopic characterizations" and that "two Negroid hairs matched appellant's hairs as to all 20 characteristics." Gov't brief at 8. However, a review of Malone's complete set of notes and reports connected with his analysis in Mr. Gates' case shows that in July 1981, Malone examined the forensic hair combed from the decedent and documented only two characteristics – dark brown and Negroid origin. Mr. Malone did not receive Mr. Gates' reference sample until August 1981. In the bench notes accompanying his analysis of Mr. Gates' reference sample, he lists 20 characteristics that he observed in Mr. Gates' pubic hairs. In these same notes, he again lists only two characteristics observed in the forensic pubic hairs, along with the notation that the forensic hairs were "similar" to Mr. Gates' hair. Mr. Malone conducted another forensic comparison of the pubic hairs combed from the victim and new samples taken from Mr. Gates in July 1982. Again, in his notes of this examination, there is no indication that Malone was able

to match or even attempted to compare the other 18 traits observed in Mr. Gates' pubic hair sample to the pubic hairs combed from the decedent which he described simply as dark and of Negroid origin. Thus Special Agent Malone's testimony regarding a match as to "to all 20 characteristics" appears to be false. At the very least, it is wholly unsupported by his laboratory notes.³

In December 2003, the FBI notified the Department of Justice of the results of its findings that Malone's notes did not adequately document his results in Mr. Gates' case. FBI Assistant General Counsel Amanda Ellen Choi hand-delivered the findings to Amy B. Jabloner, Esq., Department of Justice, Criminal Division. Ms. Choi wrote: "In furtherance of the ongoing FBI Laboratory Review Project, we are pleased to provide you with the results of the completed scientific review conducted by two independent scientists with regard to . . . United States v. Donald Gates." The letter ended with the following reminder of the government's *Brady* obligations:

It is our understanding that the Task Force will submit these results to the prosecutor responsible for each case for a determination of whether disclosure to defense counsel under Brady v. Maryland and its progeny is necessary.

Letter to Amy B. Jabloner (Dec. 19, 2003), attached as appendix 5.

The Department of Justice then notified this United States Attorney's Office. In a letter addressed to Terry Keeney, Criminal Chief, U.S. Attorney's Office, Ms. Jabloner wrote:

Enclosed are the results of the independent scientific review of the forensic work performed by the FBI laboratory examiner Michael Malone in the *Gates and* [deleted] cases. The review was limited to the laboratory file. Also enclosed for your information are a copies [sic] of the laboratory reports reviewed by the scientists.

³ Malone's relevant handwritten laboratory notes and the FBI laboratory work sheets are attached as appendix 4.

Please review the enclosed documents, the OIG report, and any other information you may have to determine whether the report of the independent scientist should be disclosed to the defendant or to the defendant's counsel pursuant to Brady v. Maryland and its progeny.

Letter from Jabloner to Terry Keeney (Jan. 22, 2004), attached as appendix 6.

On March 14, 2003, the Honorable Stephanie Duncan-Peters granted a new trial for Anthony Bragdon because of Mr. Malone's false testimony at Bragdon's 1991 Superior Court jury trial. In her order, Judge Duncan-Peters stated:

The Court concludes that in this case, false testimony was presented to the jury. The Court concludes that there is a reasonable likelihood that this false testimony affected their verdict.

United States v. Anthony E. Bragdon, F-4131-91, Order Granting Defendant's Petition to Set Aside, Vacate, and/or Correct Conviction and Sentence as to the Convictions for Assault with Intent to Rape while Armed and Possession of a Firearm During a Crime of Violence, at 14 (Mar. 14, 2003). The United States Attorney for the District of Columbia had conceded that Malone had testified falsely: "The government acknowledges that Mr. Malone provided some false testimony about the results of specific tests that were performed." Government Opposition to Defendant's Petition at 11 (Oct. 23, 2002). It argued that the false testimony was not material, and that the United States could not be charged with the knowing use of false testimony by its law enforcement expert witness. *Id.* at 17-19. Judge Duncan-Peters rejected these arguments, holding that Mr. Malone's testimony was material, and that knowledge of its falsity was imputed to the United States. Order at 13-14.

The United States never informed Mr. Gates of the OIG Report. The United States never informed Mr. Gates it had express knowledge – indeed it had conceded – that Michael Malone had testified falsely in a Superior Court prosecution, or that he had testified falsely in many other

cases. Nor did it *ever* inform Mr. Gates that the FBI's scientific review of Malone's cases had included a review of the laboratory notes and the conclusions of Malone in Mr. Gates' own case. Notwithstanding that Mr. Keeney had conceded that Malone's testimony was material to the jury's verdict in Mr. Gates' case, the government suppressed the results of the independent review. Neither Mr. Gates, nor his former trial and appellate counsel Hamilton Fox, nor appointed counsel on his earlier request for DNA testing, Roger Durban, nor undersigned counsel, has ever received any such notice from the United States.

Instead, as recently as November 3, 2009, the United States *touted* the pubic hair evidence in this case. At the hearing before this Court on Mr. Gates' Motion to Commence Post-Conviction DNA Testing, Assistant United States Attorney Joan Draper argued, "I just don't think you can ignore the fact that he comes before the Court as a person who was convicted with all of the evidence before the Court and *including a microscopically indistinguishable pubic hair.*" Transcript of status hearing at 20 (Nov. 3, 2009) (emphasis added).

B. The Paid Police Informant

The second component of the government's case was the testimony of Gerald Mack Smith, a paid police informant. "Our judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison." *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993).

The court explained:

By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath.

Id. As Judge Jackson observed more than a half century ago, “The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.” *On Lee v. United States*, 343 U.S. 747, 757 (1952).

The DNA test results prove that Gerald Smith was just such an informant. He was a convicted felon, with four prior convictions stemming from four separate criminal episodes over a period of several years: unlawful possession of stolen mail matter (1972); armed robbery (1972); violation of the National Firearms Act, in that he possessed an unregistered firearm (1975); and false pretenses (1975). Gov’t brief at 6, n.7. At the time that Mr. Smith provided information for money in this case he had at least *six* more cases pending. His agreement with the government was that a Superior Court larceny after trust case and three separate Maryland shoplifting cases would be dismissed in exchange for his testimony against Mr. Gates and his testimony in two other serious cases. *Id.* at 7.

Mr. Smith had been a paid police informant for the police department’s robbery squad for approximately eight months to a year before he falsely pointed the finger at Donald Gates. Brief of Appellant to the District of Columbia Court of Appeals at 3 (Oct. 28, 1983) (hereinafter “Def. brief”) (citing transcript); Gov’t brief at 7, n.8. He supported himself by shoplifting and by the money he obtained from the police in exchange for information. Def. brief at 3 (citing transcript). Smith initially received \$50 for his tip; he then received \$250 more and agreed to point out Mr. Gates to the police; after he testified in the grand jury he received another \$1,000 from “Crime Solvers.” Gov’t brief at 7, n.8. The government described Smith’s trial testimony as follows:

Smith knew appellant’s first and last names and recalled having a specific conversation with him near the end of June, 1981, during the morning hours, at the park at 25th and Pennsylvania Avenue. Appellant was “a little high” because the men had all been

drinking. Appellant told Smith during this conversation that “he went on a hell of a caper a couple [of] days ago. The caper consisted [of] robbing a pretty, white girl. All he had was intentions to rob her, but she resisted. And after she resisted, he raped her. And then after it dawned on him what he had done, he shot her.” Appellant told Smith that the crime had occurred in a park and that he had left the victim “cut and dry.”

Gov’t brief at 7 (transcript citations omitted) (alterations in original).

In fact, Ms. Schilling had not been robbed – her purse lay undisturbed – and the jury acquitted Mr. Gates of attempted robbery and felony murder predicated upon it, charges that rested entirely on Smith’s testimony, but were inconsistent with the physical evidence. With respect to the remainder of Smith’s testimony, Mr. Gates could offer his counsel no assistance because he did not know who Gerald Smith was, even when confronted with him at trial.

Defense counsel explained:

[W]hen government counsel supplied the name of the informant to defense counsel on the first day of trial, the defendant was unable to recognize the name. . . . [T]he defendant has continuously maintained that he does not know the informant who testified against him, even in the face of his own attorneys’ request for information about that person so that he could cross-examine him. Gates was able to supply no such information; *he did not know who the informant was.*

Sentencing Memorandum at 2 (Oct. 27, 1982) (emphasis added), attached as appendix 7.

C. The Other Crimes Evidence

Little need be said of the other crimes evidence. The Court of Appeals characterized it as raising a close question of admissibility, although the Court affirmed the conviction. *Gates*, 481 A.2d at 123 (“We conclude, admitting the closeness of the question in this case, that the trial court did not err in admitting the other crimes evidence.”). The DNA results demonstrate that the fact that Mr. Gates, after he had been drinking, had attempted to rob Ms. Benoff of her

handbag as she walked along a path in Rock Creek Park in broad daylight was not probative of the identity of the person who raped and murdered Catherine Schilling. That person's identity is still unknown. It was not Mr. Gates.

III. The Newly Discovered Evidence Exonerates Mr. Gates

Mr. Gates has always maintained that he was falsely accused. He took the same position at trial that he takes now. At trial and on appeal, "[t]he defense maintained that the other crimes evidence was too dissimilar to be admissible." Sentencing Memorandum at 2. At trial, and on appeal, the defense argued that Gerald Smith was not telling the truth. And at trial, and on appeal, "with respect to the hair sample, it [was] the position of the defense that the government has vastly overrated the reliability of such testimony." *Id.*

At his sentencing, Mr. Gates made the following impassioned plea:

I didn't kill her. I never saw her. I am sorry she died, because her death has ruined my life. That informer, I never saw him before. The homicide detective set him up to get this conviction. I would like – hope to return to society, raising a family, having a place of my own.

The 20 years is tough. It's hard to get up in the morning. It's hard to even want to live knowing that I have this much to suffer for something I didn't do. I think it's already a cruel misjustice. It's already a cruel misjustice. It's really hurt my feelings as far as trusting and believing in what I am – what I am trying to say – in human nature. The reason I didn't take the stand is because I never figured that anybody could put anybody in prison for as long as I am looking at now under what they had to go by. That's something I would never have done. I don't care who was involved. But I would like to – the hope of returning, the hope of returning to society. It would help me to get along with just – to get along in the penitentiary, to get out of bed in the morning and want to make it through the day. It's so tough over there now. It's hard to even want to live, to be punished like that severely like that for somebody I have never even seen. I would like to hope, the hope of returning to have a family.

Sentencing transcript at 8-9 (Nov. 4, 1982).

In 1988, when DNA testing was still in its infancy, Mr. Gates wrote to this Court requesting that such testing be conducted to show that he did not commit this crime. His letter states:

My name is Donald Gates. I was convicted in your courtroom of a murder rape, of a woman in Rock Creek Park, back in 1981.

I never did the crime sir

Now my point is, Your Honor, that today there are DNA labs around the country that can prove whether a man had anything to do with a rape case.

I have contacted a DNA lab in Germantown Maryland, "Cellmark Diagnostics," which is willing to run DNA prints on the pubic hair samples found at the rape scene. . . .

All I am asking is that the lab be allowed to make the DNA prints, so you can see, Your Honor, that the hairs weren't mine either.

I will pay the cost for the DNA of the pubic hairs. But I need an attorney to handle the transaction.

I'm without counsel, sir.

I never felt as if you wanted an innocent man sent to prison for that rape case in Rock Creek Park. ***

Allow me this sir. Once you see the result of the DNA, you won't want me in prison either.

Letter from Donald Gates to Judge Ugast (Oct. 13, 1988) (emphasis in original) (some errors in spelling and punctuation have been corrected), attached as appendix 8.

This Court responded to Mr. Gates' letter by both appointing Roger Durban as counsel and approving the request for DNA testing. Unfortunately, the DNA technology available at the time was too primitive to produce a result.

DNA technology has, of course, greatly advanced in the intervening years. As the Supreme Court recently stated, modern "DNA testing has an unparalleled ability both to

exonerate the wrongly convicted and to identify the guilty.” *District Attorney’s Office for the Third Judicial District v. Osborne*, 129 S.Ct. 2308, 2311 (2009). The Supreme Court explained:

Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR [short-random-repeat] technology. It is now possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue.

Id. at 2316 (citations omitted). *See also* NRC Forensic Science Report at 130 (“DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged. DNA enjoys this preeminent position because of its reliability and the fact that, absent fraud or an error in labeling or handling, the probabilities of a false positive are quantifiable and often miniscule.”).

National Medical Services of Willow Grove, Pennsylvania has obtained a DNA profile of the sperm on the vaginal slide from the crime scene and compared that profile to the DNA profile obtained from a saliva sample from Mr. Gates. Using two methods of modern STR technology – one devised to provide as much information as possible, the other devised to assess only the male (Y) chromosome – NMS has produced scientific results that exclude Mr. Gates as the perpetrator.⁴

PowerPlex 16 is a DNA test that attempts to produce a genetic profile at 16 different locations on the DNA chain (loci). Each locus includes two alleles, one obtained from a person’s mother, the other from his father. Using this DNA test, NMS obtained a full profile for Mr.

⁴ Attached as appendix 9 is National Medical Center’s preliminary report. This report was created to provide the Court and the parties with the results of DNA testing at the earliest possible time. NMS will produce a final report next week that may include additional exonerating information.

Gates at each of the 16 loci. It obtained results from the forensic sample – the vaginal slide containing semen left by the perpetrator – at seven loci. At six of the seven loci for which results were obtained for both the perpetrator and Mr. Gates, Mr. Gates' DNA profile was *inconsistent* with the profile of the perpetrator.

PowerPlex Y is a DNA test that acts only on the Y (male) chromosome, testing at 11 loci. Because a male has only one copy of the Y chromosome – from his father – each locus includes only one allele. As the National Research Council explained in its landmark report, “Sometimes the evidence dictates testing just for Y STRs, which assess only the Y (male) chromosome. In sexual assaults for which only small amounts of male nuclear DNA are available (e.g., a large excess of vaginal DNA), it is possible to obtain a Y STR profile of the male who left the semen.” NRC Forensic Science Report at 131. National Medical Services obtained a full Y chromosome profile for Mr. Gates. It obtained results from the male who left the semen on the decedent at four loci. At three of the four loci for which results were obtained for both Mr. Gates and the perpetrator, Mr. Gates' profile was *inconsistent* with that of the perpetrator.

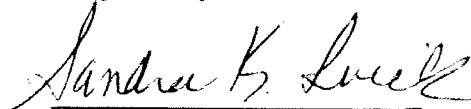
These results are powerfully exonerating.⁵ As is well-recognized in the scientific community, a single inconsistent locus excludes a person from being a donor of that DNA. Thus, according to the current Federal Bureau of Investigation DNA Protocol Manual, “A forensic exclusion is declared when upon comparison of the DNA profile from a reference specimen . . . to the DNA profile from a single-source Q [questioned] specimen, the profiles are found to be different at *one* or more loci.” FBI DNA Unit1 STR Protocol Manual at Section 7.7.1.1. (Oct. 2, 2006) (emphasis added); *see also Roberts v. United States*, 916 A.2d 922, 925 (D.C. 2007) (error to preclude defendant from arguing that result at a single locus was exculpatory).

The scientific results are dispositive: it is scientifically impossible for Mr. Gates to have left the sperm found on the vaginal slides. The conclusion is inescapable: Mr. Gates was not the perpetrator. The evidence is not merely cumulative or impeaching. It is resounding, substantive proof of innocence. It obliterates the false testimony of Michael P. Malone and Gerald Smith, and demonstrates that the other crimes evidence was far too slim a reed on which to take twenty-eight years of a man’s life.

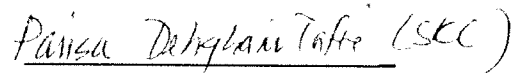
⁵ The government’s insistence that this Court await the outcome of DNA testing of oral slides that bear trace evidence of semen is unwarranted. The United States has *never* stated any reasonable basis to believe that the oral slides would inculcate Mr. Gates even as the vaginal slides exonerate him. The answer cannot be, as the prosecutor argued at the status hearing on November 17, 2009, that the sperm on the vaginal slide is the result of consensual sex with a boyfriend, for this is entirely inconsistent with the theory of prosecution. Ms. Draper stated, “I don’t know. We don’t know. There’s all kinds of speculations. Maybe this is Mr. Gates, maybe this is an old boyfriend, you know, I don’t know.” Transcript at 12-13 (Nov. 17, 2009). Yet the government relied on the presence of sperm in the decedent’s vagina to prove that she had been raped and that the perpetrator committed felony murder. *See Gates*, 481 A.2d at 121 (“Her body was found . . . with five bullet wounds to the head and sperm in her vagina.”). Without a reasonable, evidence-based theory for pursuing testing of the oral slides, the government’s position injects needless delay based on nothing more than “speculations.” Mr. Gates has more than satisfied the clear and convincing proof standard, D.C. Code § 22-4135 (g)(2); he is not required to indulge the government’s speculation.

WHEREFORE, for the foregoing reasons, it is respectfully requested that this motion be granted, and that this Court vacate Donald Gates' convictions for felony murder while armed (rape) and carrying a pistol without a license and dismiss the charges with prejudice on the grounds of actual innocence.


Respectfully submitted,



Sandra K. Levick # 358630
Chief, Special Litigation Division
Slevick@pdsdc.org
202-824-2383 (direct)
202-824-2983 (fax)



Parisa Dehghani-Tafti # 498136

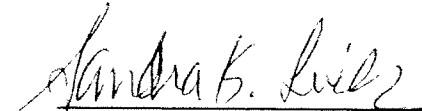


Katherine Philpott # 975910

Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Vacate Convictions on the Ground of Actual Innocence has been served by hand and by electronic mail on Robert Okun, Chief, Special Proceedings Division, and Joan Draper, Assistant United States Attorney, Special Proceedings Division, 555 4th Street, N.W., Washington, D.C. 20001, this 9th day of December, 2009.


Sandra K. Levick

APPENDIX 1

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE

Date: 05/17/1999

To: Information Resources

Attn: Dennis R. Weaver, Chief
Information Management Section

From: Office of the General Counsel
Civil Discovery Review Unit (CDRU), Room 5448
Contact: PLS Alison A. Mustapich, Ext 3556

Approved By: Kelley Thomas A. *KT*
Cignoli Paul C Jr. *PC*
Healy Nancy A. *NA*

Drafted By: Beers Elizabeth Rae:erb

Case ID #: 66F-HQ-A1211968 - 95

Title: FINDINGS OF THE OFFICE OF THE INSPECTOR
GENERAL (OIG) DEPARTMENT OF JUSTICE,
CRITICAL OF FORENSIC WORK PERFORMED
BY CERTAIN LAB EXAMINERS

Synopsis: To place this document on record in the Task Force control file and to place a copy on the top serial in every investigative file containing forensic work performed by any of the thirteen Laboratory Examiners whose scientific work was criticized by the OIG.

Reference: 66F-HQ-A1211968 Serial 82

Details: BE ADVISED, one or more of the Laboratory Examiners who performed scientific analysis in this investigation was criticized in the OIG's report issued on April 15, 1997. The OIG conducted a thorough review of allegations of wrongdoing and improper practices within certain sections of the FBI Laboratory. It issued a report which, among other findings, was critical of the scientific work performed by thirteen individual examiners assigned to the Lab. The allegations and criticisms concerning these individuals varies greatly and in some instances is case specific.

If the forensic work contained in this file is used in any way in the future, both the OIG's findings and the forensic analysis of the examiners should be reviewed. In addition, legal advice should be obtained as to the FBI's disclosure obligations.

The criticized examiners are, in alphabetical order:
(1) Richard Hahn, (2) Robert Heckman, (3) Wallace Higgins,

UPLOADED ON

DATE: 5/19/99
BY: *[Signature]*

Permanent Top Serial

To: Informat Resources From: Office the General Counsel
Re: 66F-HQ-A1211968, 05/07/1999

(4) Alan Jordan, (5) Lynn Lasswell, (6) Michael Malone, (7) Roger Martz, (8) J. Christopher Ronay, (9) Terry Rudolph, (10) J. Thomas Thurman, (11) Robert Webb, (12) Frederic Whitehurst, and (13) David Williams.

To: Informatic. Resources From: Office of the General Counsel
Re: 66F-HQ-A1211968, 05/07/1999

LEAD (s):

Set Lead 1: (Adm)

ALL RECEIVING OFFICES

Mark and place this communication as the Permanent Top Serial of each section of each investigative file identified for inclusion in the FBI Laboratory Review Project.

CC: 1 - Dr. D. M. Kerr, Room 3090
1 - T. A. Kelley, Room 7427
1 - Mr. R. W. Sibert, Room 3268
1 - Mrs. R. M. Contreras, Room 3437
1 - Mrs. D. A. O'Clair, Room 4913
1 - Ms. N. B. Hardy, Room 10790
1 - Ms. N. A. Healy, Room 7927
1 - Ms. E. R. Beers, Room 7927
1 - Mrs. M. E. Layton, Room 5448
1 - Ms. A. A. Mustapich, Room 5448
1 - Mrs. M. A. Bookstein, Room 5448

◆◆

APPENDIX 2



U.S. Department of Justice

Roscoe C. Howard, Jr.
United States Attorney

District of Columbia

Judiciary Center
555 Fourth St., N.W.
Washington, D.C. 20530
September 17, 2002

Ellis Gordon
Criminal Division
Office of Enforcement Operations
Task Force on the FBI Laboratory

FBI LABORATORY STATE/LOCAL CASE REVIEW

INVESTIGATION/CASE NAME: U.S. v. Donald Gates

COURT NUMBER(S) F-6602-81 FBIHQ FILE NO: 95-HQ-244137

PROSECUTOR: Terry Keeney, Esquire PHONE: (202) 514-6926

OFFICE/ADDRESS: U.S. Attorney's Office, 555 4th Street, NW

TITLE: Special Counsel to U.S. Attorney CITY/STATE: Washington, DC 20001

STATUS: TRIAL ON THE MERITS? GUILTY PLEA?
SENTENCE IMPOSED AND DATE(S): 11/4/82-1ST Degree Murder-20 YEAR +3 to 10 YEARS
IS DEFENDANT INCARCERATED? YES NO
APPEAL AND DATE(S): _____
POST-CONVICTION MOTIONS: _____
FBI LAB EXAMINER(S): Michael Malone
LAB EXAMINER(S) TESTIFIED: YES NO
DATE LAB REPORT(S): 7/22/81; 9/16/81; 10/13/81; 7/22/82
TRANSCRIPT: YES NO N/A

OFFENSE, DATE(S) OF OFFENSE(S) AND FACTS: 6/23/81 - Homicide of Catherine Schilling

FORENSIC ANALYSIS PERFORMED BY MALONE: Hair Comparisons

WAS MALONE'S LAB WORK MATERIAL TO THE VERDICT/PLEA? YES NO
If no, please attach a memo with the reason(s) for this determination.

Terry Keeney Terence J Keeney AUSA 9/27/02
Prosecutor's Signature Print Name Title Date

APPENDIX 3

Attachment to Independent Case Review Report
For CDRU #6321 Case file #95-244137.

Material Examiner: Malone (RQ)

Remarks:

Case resulted in a trial, testimony transcript not provided.

INDEPENDENT CASE REVIEW REPORT

Independent Review conducted by:

Area(s) of Expertise: Hair and Fiber

Review commenced at: 12:30 PM (Time), 12/04/03 (Date)

File #: 95-244137

Laboratory #(s): 10630100
10811060
20714017

Examiner(s) & Symbols

	Reviewed	Not Reviewed	Reviewed	Not Reviewed
RQ	X <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
TR, TM, SQ	<input type="checkbox"/>	X <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Materials Reviewed

Trial testimony transcript(s) of: None

Testimony Date(s): _____ Pages: _____

Laboratory Report(s):

Laboratory Number: 10630100 Date: July 22, 1981
Laboratory Number: 10630100, 10811060 Date: Sept. 16, 1981
Laboratory Number: 20714017 Date: July 22, 1982

Examiner Bench Notes of: RQ

Laboratory Number: 10630100
10811060
20714017

Signature: *SUP*

Was any other material reviewed? Yes No

If yes, please identify and/or describe the material: submitting agency letters dated 6/29/81, 8/11/81 and 7/14/82.

Results of Review

File #: 95-244137 Item or Specimen # Reviewed: Q1-Q7, Q15-Q20, K1-K4, Q21-Q26, K6-K8

Review of Laboratory Report(s) and Bench Notes:

Note: Numbered comments are required below or on additional pages for any "No" or "Unable to Determine" Responses

- 1) Did the examiner perform the appropriate tests in a scientifically acceptable manner, based on the methods, protocols, and analytic techniques available at the time of the original examination(s)?
 Yes No Unable to Determine
- 2) Are the examination results set forth in the laboratory report(s) supported and adequately documented in the bench notes?
 Yes No Unable to Determine

Review of Testimony:

Note: Numbered comments are required below or on additional pages for any "No" or "Unable to Determine" Responses

Transcript not available.

- 3) Testimony consistent with the laboratory report(s)? Yes No Unable to Determine
- 4) Testimony consistent with the bench notes? Yes No Unable to Determine
- 5) Testimony within bounds of examiner's expertise? Yes No Unable to Determine

Page 2 of 3

Initials: SM

Comments

(Set forth by above question #, if applicable.
Use "Additional Comments" Sheet, if needed)

File #: 05-244137

#1: With microscopic hair comparison, one cannot determine from the notes that the examination was conducted in a scientifically acceptable manner.

#2. The results are not adequately documented in the notes. The notes are not dated and are in pencil instead of ink. Abbreviations are used that are hard to interpret. There is documentation that hairs were recovered from suspect clothing, but there is no documentation that hairs were recovered from the victim's items. Documentation is lacking that explains if the examiner looked only for Negroid hairs on Q1-Q4 or if there were other hairs on them. If other hairs were detected, then one must wonder if they are the victim's hairs.

b6
b7c

Review completed at: 1:15 PM (Time), 12/04/03 (Date)

Total time spent conducting review (to nearest 1/4 hour): 0.75 hrs.

I hereby certify that I conducted this review in an independent, unbiased manner and that the results of my review are fully documented on this report consisting of a total of 3 pages.

b6
b7c

(Signature)

Dec. 4, 2003

(Date)

Initials: JAC

APPENDIX 4

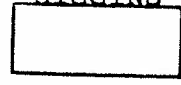
7/29

RECORDED
7/7/81
ar*

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

6/30/81
MALONE
HIGGINS

Laboratory Work Sheet



To: Chief of Police
Metropolitan Police Department
Washington, D. C. 20001

Attention: Mr. Charles E. Rinaldi
Assistant Chief of Police
Technical Services Bureau
Re: - SUSP;
CATHERINE SCHILLING - VICTIM;
HOMICIDE

FBI FILE NO. 95-244137-1X
LAB. NO. 10630100 S RQ TR TM
YOUR NO. MCL#81-14501
CCR#323-208 SO
b6
b7c

6 pillboxes
31 slides

Examination by:

Q1, Q2 to TR 7/7/81, net'd 8/27
Q1-Q3, Q9-Q17 6 TR 7/7/81 net'd 7/17
Q5 to SQ 7/7/81 net'd 7/17

Examination requested by: Addressee
Reference: Letter dated June 29, 1981
Examination requested: Microscopic Analyses - Chemical Analyses - Firearms
Specimens received:

Specimens personally delivered by on June 20, 1981:

b6
b7c

ITEMS FROM VICTIM

- ✓ Q1 Slacks (Item 2)
- ✓ Q2 Panties (Item 3)
- ✓ Q3 Blouse (Item 4)
- Q4 Combed pubic hairs (Item 6)
- Q5 Combed head hairs (Item 8)
- Q6-Q7 Head hair sample (Items 24, 25)

1-12
10-13 31
4-24 21

- Q8 Swab from thumb (Item 26)
- ✓Q9-Q10✓ Oral swabs (Item 34)
- ✓Q11-Q12✓ Vaginal swabs (Item 35)
- ✓ Q13-Q14 ✓ Rectal swabs (Item 36)

ITEMS FROM [REDACTED] [REDACTED]

- ✓ Q15 Shirt (Item 18)
- ✓ Q16 Slacks (Item 19)
- Q17 Washcloth (Item 20)
- Q18 Combed pubic hair (Item 22)

MISCELLANEOUS ITEMS

- Q19-Q20 Sheets (Item 32)
- K1 Pubic hair sample from victim (Item 5)
- K2 Head hair sample from victim (Item 7)
- K3 Pubic hair sample from [REDACTED] (Item 21)
- K4 Head hair sample from [REDACTED] (Item 23)
- K5 Blood sample from victim (Item 33)

b6
b7c

b6
b7c

K₁ - public hair sample from victim received sealed in a manila envelope. Hairs up to 2 1/2"

K₂ - lock hair sample from victim received sealed in a manila envelope. Hairs up to 1 1/2" Hairs remain.

K₃ - public hair sample from suspect received sealed in a manila envelope. Hairs up to 2 1/2"

K₄ - lock hair sample from suspect received sealed in a manila envelope. Hairs up to 3"

HAIR

10630100 EPA

K₁ (Vict.) - Num. g. - 2 l. P.H's, C.O., pt. tip, d.d.u.

K₂ (Vict.) - Num. g. NN's, C.O., cut tip → 11 1/2"

[redacted]
K₃ (Susp) - Num. dh. g. - l. P.H's, N.O., pt. tip

b6
b7c

[redacted]
K₄ (Susp) - Num. dh. g. - l. P.H's, N.O., l.h.

Q₁ - Q₂ - NNH

Q₃ - NNH

Q₄ - 2 dh. g. P.H's, N.O., dissim. to K₃ (S)

Q₅ - NNH

Q₆ - Q₇ - NNH

Q₈ - Q₁₁

HAIR

C15 - A few la No. Co. Division to K2 (V)

C16 - A few la No. Co. NSAC

C17 - la. No. Co. Division to K2 (V)

C18 - NCH.

C19-C20 - NNH

9/9

RECORDED
8-20-81
djt*

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

MALONE
HIGGINS
8/11/81

Laboratory Work Sheet

To: Chief
Metropolitan Police Department
Washington, D. C. 20001

Attention: Mr. Charles E. Rinaldi
Assistant Chief of Police
Technical Services Bureau

FBI FILE NO. 95-244137-3

LAB. NO. 10811060 S RQ TR

Re: UNKNOWN SUSPECT;
CATHERINE SCHILLING - VICTIM;
HOMICIDE

YOUR NO. MCL#81-14501

CCR#323-208

Examination by:

Examination requested by: Addressee

Reference: Letter dated August 11, 1981

Examination requested: Microscopic Analyses Chemical Analyses

Specimens received:

Specimens personally delivered by [redacted]
on August 11, 1981:

ITEMS NEAR SCENE:

- Q21 Pants (Item 37)
- Q22 Pants (Item 38)
- Q23 Panties (Item 39)
- Q24 Canvas bag (Item 40)
- Q25 Towel (Item 47)

OTHER ITEM:

- Q26 Pubic hair combings from DONALD E. GATES
(Items 48 and 49)

To TR Q21-Q25, K7, A/S
Ret'd 9/29/81
9/14/81

5 pboxes
15 slides

Dist. [redacted]
227-4347

Page 1

1- Rick Otto, Esq.
Asst. United States Atty.
Wash D.C.

(over)

K6 Pubic hair clippings from DONALD E. GATES
(Items 50 and 51)

K7 Saliva sample from DONALD E. GATES (Item 52)

ALSO SUBMITTED:

Control sample paper (Item 53)

10811060

Q26 came in 2 taped yellow envelopes, public
hair combings from Donald E. Gates,
1 envelope w/ black comb (#48); 1 w/ brown comb (#49)

K6 came like Q26, also in 2 envelopes, clipped public hair samples
from Donald E. Gates

HAIR

10811060 S R Q TR

K₆ (Gates) - Num. d. l. - l. P.N.'s, N.O. pt tip, d.d.v.

M₁ ab. - cont., lt. indist, lt. dist., d. dist., coarse

cut - med. - thin, scales indist, ssp., cl.

P. med - hvy, coarse med, sm. sth, sm. gap, sm. clump, cuticle, d.

*
Q₄ - (10630100 S R Q TR TM SQ) - 2 d. l. P.N.'s, N.O.
sim. to K₁ (Gates) 1 f. rem, (fall top), 1 to end l.

Q₂₁ - 2 l. H's, C.O., NSFC

Q₂₂ - Sw l. H's, C.O., NSFC

(103) 1 l. H., C.O., dissim. to K₂(V)

Q₂₃ - 1 l. H., NSFC

Q₂₄ - A few l. H's, NSFC

Q₂₅ - a few l. H's, C.O., dissim. to K₂(V)

a few l. H's, C.O., NSFC

Q₂₆ - NCH.

RECORDED
7/16/82
rjm*

7/14/82
MALONE

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

Laboratory Work Sheet

JUL 20 11:44

To: Chief
Metropolitan Police Department
Washington, D. C. 20001

Attention: Mr. Charles E. Rinaldi
Assistant Chief of
Police
Technical Services
Bureau

Re: DONALD E. GATES - SUSPECT;
CATHERINE SCHILLING - VICTIM;
HOMICIDE

FBI FILE NO. 95-244137 *8*

LAB. NO. 20714017 S RQ

YOUR NO. MCL #81-14501

b6
CCR #323-208 b7c

Examination by:

*1 pl
oppt*

Examination requested by: Addressee

Reference: Letter dated July 14, 1982

Examination requested: Microscopic Analyses

Specimens received:

Specimens personally delivered by Officer on July 14, 1982:

b6
b7c

K8 Pubic hair sample from DONALD GATES (Items #55, #56)

RESUBMITTED FROM 10630100 S RQ TR TM SQ:

Glass microscope slides containing hairs

Items R.V. on 8/4/82 by

b6
b7c

*7-12
7/22/82
M.P.A. No*



FBI LABORATORY
Washington, D. C.

Date 7-14-82
Time 9:30 AM

EVIDENCE ACKNOWLEDGMENT

Received from

[Redacted]

of the

M PDC
(Name and Title)

(Department or Agency)

300 INDIANA AVE NW

727-4118

(Address)

(Phone Number)

1 box(es), bag(s), envelope(s), vial(s), object(s)

of sealed evidence for examination in connection with case number MCL 81-14501

entitled Compl. Schilling
Det. DONALD GATES

This evidence will remain in the custody of the FBI Laboratory while the examinations are being conducted. Following completion of the examinations, a report containing the results of the examinations and the disposition of the evidence will be forwarded to your department. If evidence is picked up personally, your representative should identify it with the Laboratory case number(s) assigned in the FBI Laboratory report.

Director
Federal Bureau of Investigation
FBI/DOJ

K₂ P.H. sample from Gates, rec'd sealed
in small manila envelope, unopened

NOTES

20714017SR0

Ke (Gates) - Num. dl. h. - Kl. P.N's, No. pt. tip, d.d.v.

M. - abt. cont, dl. dest, et. dest, et. indent, crain

Cuf - med, scales indent, sep, cl.

P. med - lay, crain - med, sm. stib, ang. gopp, on clump

106301005 RQTRM SA:

Qu - *2 dl. h. P.N's, N.O., = Ke (Gates)
(1 F. sea, 1 lo. end lbr.)

APPENDIX 5

369

December 19, 2003

"HAND DELIVERED"

Amy B. Jabloner, Esq.
Department of Justice
Criminal Division
Office of Enforcement Operations
10th & Constitution Avenue, N.W.
Keeney Building
Washington, D.C. 20530

Dear Ms. Jabloner:

In furtherance of the ongoing FBI Laboratory Review Project, we are pleased to provide you with the results of the completed scientific reviews conducted by two independent scientists with regard to seven cases. The Independent Case Review Reports completed by the independent scientists are enclosed for the following cases:

1. United States v. [redacted] FBI HQ file number [redacted] CDRU number [redacted]

2. Mariana Islands v. [redacted] FBI HQ file number [redacted] CDRU number [redacted]

3. United States v. [redacted] FBI HQ file number [redacted] CDRU number [redacted]

b6
b7c

~~United States v. Donald Gates, FBI HQ file number 95-244137, CDRU number 6321;~~

- 1 - [redacted] QT-Lab, Rm 3210
- 1 - [redacted] QT-Lab, Rm 1200
- 1 - [redacted] PA-310
- 1 - [redacted] PA-310

① HQ file 95-244137-9

LJO:ljo (13)

Amy B. Jabloner, Esq.

5. United States v. [redacted] FBI HQ file
number [redacted] CDRU number [redacted] and

6. United States v. [redacted]
number [redacted] CDRU number [redacted] and FBI HQ file

7. State of South Carolina v. [redacted]
[redacted] FBI HQ file number [redacted] CDRU number

b6
b7c

It is our understanding that the Task Force will submit these results to the prosecutor responsible for each case for a determination of whether disclosure to defense counsel under Brady v. Maryland and its progeny is necessary. Please advise this office of the results of the Brady assessments and any resulting disclosures.

If you have any questions, please contact me at (703) 632-7015.

Sincerely,

Amanda Eller Choi
Assistant General Counsel

Enclosures (7)

NOTE: The original documentation is being maintained in file 66F-HQ-A1211968 captioned, FBI/DOJ TASK FORCE TO REVIEW LABORATORY CASES.

APPENDIX 6



U.S. Department of Justice

Criminal Division
Office of Enforcement Operations
Task Force on the FBI Laboratory
10th & Constitution Avenue, N.W.
Keeney Building
Washington, D.C. 20530

Telephone (202) 616-2505

Facsimile (202) 616-1012

January 22, 2004

Terry Keeney, Criminal Chief
U.S. Attorneys Office
555 4th Street
Washington, D.C. 20001

Re: Results of Independent Scientific Review
United States v. Donald Gates

[] b6/b7c

Dear Mr. Keeney:

As you are aware, in April 1997 the Department of Justice Office of the Inspector General (OIG) completed an investigation of the Federal Bureau of Investigation (FBI) Laboratory and issued a report entitled *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases*. The Justice Department's Criminal Division and the FBI are conducting a comprehensive review of cases that resulted in a conviction in which 13 examiners criticized in the OIG report performed laboratory examinations. The FBI has contracted with qualified independent forensic scientists to conduct reviews in certain cases.

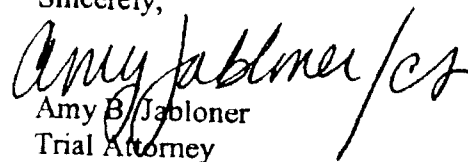
Enclosed are the results of the independent scientific review of the forensic work performed by FBI laboratory examiner Michael Malone in the *Gates and []* cases. The review was limited to the laboratory file. Also enclosed for your information are copies of the laboratory reports reviewed by the scientists. The OIG report is available on the OIG's web site at www.usdoj.gov/oig/igspecr1.htm. A hard copy of the OIG report is also available upon request. In regards to the sections of the OIG report relevant to Malone, please review Part Five (section on individuals) and Part Three, section H12: Tobin Allegations (Alcee Hastings Matter).

Please review the enclosed documents, the OIG report, and any other information you may have to determine whether the report of the independent scientist should be disclosed to the defendant or to the defendant's counsel pursuant to *Brady v. Maryland* and its progeny.

CRM - 3976

Please contact the Task Force at (202) 616-2505 if you have any questions or need assistance with issues related to the investigation of the FBI lab and the results of this scientific review.

Sincerely,

A handwritten signature in black ink that reads "Amy B. Jabloner /cs". The signature is fluid and cursive, with a large initial "A" and a long, sweeping underline.

Amy B. Jabloner
Trial Attorney

Enclosures

APPENDIX 7

J. Ugras

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :
 :
 v. :
 : No. F-6602-81
 DONALD E. GATES :
 _____ :

PKG

SENTENCING MEMORANDUM

Defendant Donald E. Gates, having been convicted by the jury, of first degree felony murder while armed, rape while armed, and carrying a pistol without a license, is scheduled to be sentenced by the Court on October 28, 1982. Defendant Gates is 31 years of age. The minimum sentence that he can receive for these offenses is 20 years' to life imprisonment. Should the Court choose to sentence Mr. Gates consecutively, as opposed to concurrently, his minimum sentence could run twice as long. In all likelihood, the Court can structure its sentence so that Donald Gates will never again be a free man. On the other hand, should the Court impose concurrent sentences, Donald Gates, when he is 50 years old, and assuming that he can survive almost 20 years in prison, has at least the possibility of once again becoming a free man. The defendant would urge the Court to leave that possibility open and to sentence to concurrent terms.

While it is not the Court's function to second-guess the jury's verdict, it does seem relevant to the Court's sentencing determination that this was not a strong case for the government. The case turned on three factors:

- (1) the other crimes evidence;
- (2) the testimony of an informant; and
- (3) a hair sample.

The defense maintained that the other crimes evidence was too dissimilar to be admissible. The Court has rejected that contention, but the defendant would submit that the Court must at least recognize that this is a close issue and that, given the strength of the government's evidence, there is at least some danger in this case that the prejudicial nature of this evidence, independent of its probative value, may have influenced the jury to convict in a case where there was otherwise reasonable doubt.

With respect to the informant, counsel for Mr. Gates has sought from the outset of this case to learn from Mr. Gates his opinion as to who the informant against him might be. The defendant was consistently unable to assist counsel with this information. He speculated about people with whom he had had petty disputes, such as one individual with whom there had been a dispute about a small, unpaid loan, but he was never able to come up with the name of the person who testified. Moreover, when government counsel supplied the name of the informant to defense counsel on the first day of trial, the defendant was unable to recognize the name. Finally, the defendant has continuously maintained that he does not know the informant who testified against him, even in the face of his own attorney's request for information about that person so that he could cross-examine him. Gates was able to supply no such information; he did not know who the informant was.

Finally, with respect to the hair sample, it is the position of the defense that the government has vastly overrated the reliability of such testimony. Attached to this Memorandum are the two scientific articles that discuss the probabilities of matching. Both of these articles are based on one study which was conducted

in Canada, and which involved Caucasian hair only. The author of the study pointed out that Negroid hair was more similar than Caucasian hair, so that the results of the study would not apply. Moreover, the more recent study, a copy of which is also attached, demonstrates that the statistical analysis and probability work that was done in the Canadian study did not justify the results that the study claimed. In short, the only scientific analysis that has ever been made of this particular issue suggests that it is much less probative than the government expert testified. Moreover, while the government expert exaggerated the significance of the hair comparison, it is the position of the defendant that the government serology expert, an FBI agent called by the defense to testify, underplayed the significance of the results of her scientific study, the thrust of which was to exonerate the defendant.

Again, the defendant is not asking the Court to second-guess the jury. But to the extent that there are weaknesses in this case, and to the extent that there is a possibility that a grave error of justice has occurred and that an innocent man has been convicted, the defendant asks the Court to take that fact into consideration in determining whether or not to impose consecutive or concurrent sentences.

The other factor which the Court should take into determination is that Donald E. Gates is a human being who--probably more than most defendants to stand before this Court--has the makings of a valuable and contributing member of society. Mr. Gates was born in 1951 and graduated from Buchtel High School in Akron, Ohio, in 1969. He is still close to members of his family, as the letters

from his aunt and sister, attached to this Memorandum attest.*/
He attended Akron University for a year and a half. He dropped out of school because he was short of money. He then went to work at a rubber factor in Akron until 1974 when he enlisted in the Air Force. Mr. Gates enlisted in the Air Force for four years, with the hope of traveling and having a new experience. But he discovered that the Air Force offered him limited opportunities and that he was essentially trapped in a dead end job. Mr. Gates ended up as a cook, far from home for the first time in his life, in South Carolina, and subjected to military discipline which was a new experience to him. After about two years of this life, he began to go AWOL, always returning to his job, being subjected to discipline, and resuming his position. Finally, he went AWOL and was arrested before he returned. He was then tried for desertion and sentenced to a term of imprisonment for approximately seven months. This occurred in 1978 when Mr. Gates was about 26 years of age and it was his first brush with the law. He had never been arrested or charged with any offense prior to that time.

In March of 1979, Mr. Gates was released and left the Air Force. He then lived in North Carolina and the District of Columbia for a short time, while he looked for work and worked a number of temporary jobs. In early 1980, he moved back to the

*/ The author of the pre-sentence report finds inconsistencies in Mr. Gates' statements about his mother. Of course, Mr. Gates is a full grown, emancipated man who is hardly likely, under any circumstances, to begin living with his parents. But the inconsistency is not altogether apparent. It seems on both occasions that Mr. Gates displayed an estrangement toward his mother, who deserted the family. Defendant would also note that the probation officer never contacted his attorney or any members of the defendant's family to verify the information he provided. Indeed, the writer of the pre-sentence report seems to have done nothing other than interview the defendant and the prosecutor five days before the report was due.

District of Columbia. He worked for a period of time on a construction job in Virginia but was laid off in the winter of 1980. Following that time, Mr. Gates lived in shelters for homeless men around the city, and worked odd jobs for various temporary employment agencies. Although economic times were difficult, Mr. Gates at all times sought work. He developed, however, a bit of a problem with alcohol, although he does not believe that he is an alcoholic.^{*/} Mr. Gates believes that he was drinking more than he should have, because he was living under the economic pressures of being unable to find steady employment. It was also this economic pressure, coupled with an over indulgence with alcohol, that caused Mr. Gates to have the brushes with law enforcement which he had prior to the instance case. In each previous instance, Mr. Gates had inflicted no physical injury on any victim, and was involved only with attempts to take pocketbooks.

Mr. Gates has been incarcerated in Lorton since the summer of 1981. He lived within the rules and was scheduled to be paroled in November of this year. While in prison, he enrolled in the alcohol education program conducted at Lorton by Stepping Stones, and successfully completed that program. A certificate to that effect is attached. Moreover, Mr. Gates reports that even though alcohol is available at Lorton, he has not had anything to drink while he has been there. Ironically enough, the combination of abstention from alcohol, as well as regular exercise, has been immensely beneficial to Mr. Gates' physical health.

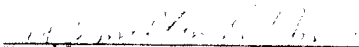
^{*/} In this regard the pre-sentence report's assertion that Gates does not admit any problem with alcohol is wrong. He does admit a problem but denies that it is so severe that he can be classified as an alcoholic.

The picture that emerges of Donald Gates, prior to the instant offense, is that of an individual who has had more education than the usual defendant, and who, despite having problems with unemployment and with alcohol, has always remained a willing worker. His first brushes with law enforcement were at a much older age than the normal defendant. He has not been a habitual criminal all of his life; he went through the more difficult younger years when most persons who turn to crime choose to do so, without being arrested. He is the kind of person on whom it is normally worth taking a chance, and given the fact that Mr. Gates' minimum sentence must be 20 years' to life, it is more likely than in most cases, that if he can emerge from prison at about the age of 50, he can and will become a law abiding citizen, who poses no threat to society.

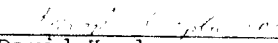
There remains the nature of the offense of which Mr. Gates has been convicted. It is, of course, a horrible offense, which has brought tragedy not only to its victim but to the victim's family. The person who commits such an offense should be punished, and the jury has said that Donald Gates has committed this offense. The Court has a duty to punish Mr. Gates, and it has a statutory duty to impose a 20 year to life sentence. But the defendant submits that 20 years to life is enough. Such a sentence will cut the heart out of his life. It will take away from him those years when most of us experience our peak of earning power, health, and enjoyment of life. It may well deny to him for all time the possibility of every marrying and having a family. And, given the fact that he will serve those 20 years in Lorton, it is beyond dispute that he will be punished. So Donald Gates will be punished; the issue is whether or not this Court will leave him even the slightest glimmer of opportunity to have some years of his life, when he is a man in his fifties, where he can once again be free. Every man, even a prisoner, needs some hope in his life. If this Court imposes maximum, consecutive sentences on Donald Gates, it will take all the hope out

of his life. It will leave him no incentive to live by the rules of the institution where he will spend at least the next 20 years. It will leave him nothing to strive for, nothing to dream about. The defendant urges the Court to leave him that glimmer of hope, and to sentence him to concurrent terms.

Respectfully submitted,




Hamilton P. Fox III
1140 19th Street, N. W.
Seventh Floor
Washington, D. C. 20036
466-4330
Bar Number: 113050



David Kaplan
1140 19th Street, N. W.
Seventh Floor
Washington, D. C. 20036
223-5120
Bar Number: 333815

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Sentencing Memorandum was hand-carried this 27th day of October, 1982, to Brooks Harrington, Esq., Assistant United States Attorney, United States Courthouse, 500 Indiana Avenue, N. W., Washington, D. C., 20001.



Hamilton P. Fox III

APPENDIX 8

Dear Judge Ujart,

10-17-88

DET IT 11 15 1988

How are you your Honor, please

My name is Donald GATES I was convicted in your court room of a Murder Rape, of a woman in Rock creek park, back in 1981.

I never did the crime Sir, but you said if I ever wanted to appeal my case, I could do so.

If you can remember back in June 1981, The woman was found to have Type O sperm cells in her body. The FBI had clearly stated that I am Type A positive.

Now my point is, your Honor, that today there are DNA Labs arounds the country, that can prove wheather a man had anything to do with a Rape case.

I have contacted a DNA Lab in German Town Maryland, "Cellmark Diagnostics", which are willing to run DNA prints on the pubic hair samples found at the Rape scene. No need to test the sperm cells.

If you remember my case, It was the FBI's (similar pubic) microscopic comparison of the pubic hairs that greatly weighted my conviction.

And I am asking you if the lab is allowed to run DNA prints on your case, or your friend, that the ones who are doing it know.

I am asking you if you can help me get a DNA print on my case, or your friend, that the ones who are doing it know.

The DNA Lab says, they will run the test if I
can get an attorney to do the "leg work"

My original Attorney Hamilton Fox hasn't answered
a letter or phone call from me in almost
2 years.

I'm without counsel, Sir.

I never felt as if you wanted an innocent
man sent to prison for that Rape case
in Rock Creek park.

If you can Remember, without the Pubic
Hair Sample, and the Sperm sample being that
of another blood Type.

The D.A. would
have no case against me.

Allow me this Sir,

Once you see the Results of the DNA,

you want want me in
Prison either.

Yours Truly,

Samuel J. [unclear]

100 [unclear]

100 [unclear]

100 [unclear]

100 [unclear]

~~100 [unclear]~~

Sir, I realize that DNA Finger Printing has not been used in the D.C. courts, but if you personally saw the results, wouldn't that make a difference?

If I had the hair samples done, I could begin thinking of taking my case to another court who would accept the results.

Like the Supreme Court, or somewhere?

Some how, Some bodies got to know, it wasn't my sperm or pubic hairs.

There was a man in Virginia today, ~~123~~ who was wrongfully convicted of a terrible rape & murder.

It was the same "Cellmark Lab in German Town Maryland, who ran the DNA prints on the sperm cells found at the crime scene, to find the man innocent.

This is all I'm asking, Your Honor

I need an Attorney.

Sincerely,

Donald Atkins

APPENDIX 9



**CRIMINALISTICS DEPARTMENT
FORENSIC BIOLOGY UNIT**

Fax Report

TO: PUBLIC DEFENDER SERVICE FOR THE
DISTRICT OF COLUMBIA
ATTENTION: PARISA DEGHANI-TAFTI

UNITED STATES ATTORNEY'S OFFICE
ATTENTION: JOAN DRAPER

DATE: 12/08/09
NMS LABS' WORK ORDER NUMBER: 09218233
AGENCY NUMBER: CRIMINAL #F-6602-81
BODE CASE #CCA0968-0130

SUBJECT(S): GATES, DONALD

Differential extraction is a means of separating semen stains into two fractions, based on structural differences between spermatozoa and other types of cells. Differential extraction of the samples from the vaginal slide designated "B" produced two fractions, designated as "alpha" and "beta". The alpha fraction (also known as the "non-sperm fraction") usually contains epithelial cells and the beta fraction (also known as the "sperm fraction") usually contains sperm cells.

These extracts from the vaginal slide were compared against Donald Gates' reference samples by deoxyribonucleic acid (DNA) analysis of short tandem repeats (STRs) using PowerPlex[®] 16, which includes the thirteen core loci as specified by the FBI, and PowerPlex[®] Y kit, which includes eleven male-specific loci.

DNA ANALYSIS

SUMMARY TABLE OF STR RESULTS																
EXHIBIT NUMBER	D3S1358	TH01	D21S11	D18S51	Penta E	D5S818	D13S317	D7S820	D16S539	CSF1PO	Penta D	Amelegenin	YWA	D8S1179	TPOX	FGA
EX02.1-1 (Gates)	16, 17	9	31, 35	16, 19	8, 13	11, 13	10, 12	10, 12	12, 13	7, 11	7, 11	X, Y	17, 18	14	9, 10	21, 27
EXB-1B (slide)	15, 16	9				12	12	9			11	X, Y	16, 17			

"NR" = no results

SUMMARY TABLE OF Y-STR RESULTS											
EXHIBIT NUMBER	DYS391	DYS389I	DYS439	DYS389II	DYS438	DYS437	DYS19	DYS392	DYS393	DYS390	DYS385
EX02.1-1 (Gates)	10	13	12	30	11	14	15	11	14	21	16
EXB-2B (slide)	11	13			12				13		

"NR" = no results

The following conclusions were drawn from the summary tables above:

- The reference buccal sample from Donald Gates produced an STR profile and a Y-STR profile.
- The beta fraction ("sperm fraction") of the vaginal slide produced a partial STR profile and a partial Y-STR profile.
- The partial STR profile and the partial Y-STR profile from the beta fraction of the vaginal slide are inconsistent with the STR profile and Y-STR profile for Donald Gates. Hence, Donald Gates can be EXCLUDED as the source of the DNA in the beta fraction.

THIS FAX AND ITS ATTACHMENTS ARE INTENDED SOLELY FOR THE EYES OF ABOVE NAMED INDIVIDUAL. THIS COVER LETTER AND ITS ATTACHMENTS ARE CONFIDENTIAL DOCUMENTS AND NOT INTENDED FOR PUBLIC USE.

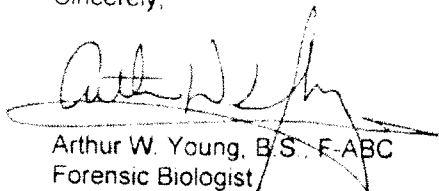
CONFIDENTIAL

CLOSING REMARKS

This laboratory is continuing its analyses, in order to try and obtain as much data as possible from the samples in its possession. Upon completion, a full laboratory report will be issued.

This fax report has not undergone the rigorous peer review process of final reports, but the results and conclusions stated herein are not anticipated to change.

Sincerely,



Arthur W. Young, B.S., F-ABC
Forensic Biologist

THIS FAX AND ITS ATTACHMENTS ARE INTENDED SOLELY FOR THE EYES OF ABOVE NAMED INDIVIDUAL. THIS COVER LETTER AND ITS ATTACHMENTS ARE CONFIDENTIAL DOCUMENTS AND NOT INTENDED FOR PUBLIC USE.

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