

THE
PUBLIC
DEFENDER
SERVICE
for the District of Columbia



Avis E. Buchanan
Director

Peter A. Krauthamer
Deputy Director

September 1, 2010

The Honorable Lee F. Satterfield,
Chief Judge

The Honorable Russell F. Canan,
Presiding Judge, Criminal Division

The Honorable Robert E. Morin,
Deputy Presiding Judge, Criminal Division

The Honorable Fred B. Ugast,
Senior Judge

Superior Court of the District of Columbia
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Dear Judges:

I am writing to request that this Court act promptly to assign a judge to provide judicial oversight of an investigation into all cases in which FBI microscopic hair or fiber analysis or the work of discredited FBI forensic examiners played a role in securing a conviction in the District of Columbia. As you are all aware, Judge Ugast issued a clarion call for an investigation into all cases which relied upon the work of Special Agent Michael Malone, or any other FBI forensic expert whose integrity was called into question in the April 1997 Department of Justice Office of the Inspector General Special Report on the FBI Laboratory. The Public Defender Service called for an expanded investigation to include all cases in which unreliable hair or fiber microscopy may have contributed to the conviction.

The context for this request is, of course, the exoneration of Donald Eugene Gates, who was wrongly convicted in part on the strength of a scientifically invalid and unreliable “match” of a pubic hair combed from the decedent to a sample hair from Mr. Gates.

Mr. Gates’ prosecutor, former Assistant United States Attorney (now Reverend) Brooks Harrington, made absolutely clear the power of the FBI hair testimony in Mr. Gates’ case:

The hair “match” was the key. . . . This hair opinion was the link and the corroboration to every other evidence. . . . [W]ithout that emphatic hair testimony from the examiner, I doubt we would ever have gotten a conviction.

E-mail from Brooks Harrington to undersigned counsel read at the December 15, 2009, hearing, Tr. at 6-7.

This request is motivated by the fear that others may have been wrongfully convicted based upon faulty trace evidence or the testimony of similarly tainted FBI examiners. Judge Ugast called for an investigation out of precisely such a concern:

Well, I’m deeply concerned and disturbed that the Office of the United States Attorney. . . [n]ever advised this Court about this matter or the investigation or the OIG’s report in ’97. . . . Because had I known from you all or anybody else, I would have ordered an investigation to tell me and to the Chief Judge of this Court, what your office and the Department of Justice had done vis-à-vis the allegations regarding the forensic analysts in connection [with] any other cases in which convictions were returned – whether or not they ever had been reviewed by either the Department of Justice or your office. And I’m going to order it now.

Tr. at 22. Judge Ugast explained:

It sounds like the forensic analyst[s] of the FBI are the ones . . . whose conduct has contributed completely to what’s happened in this case and I hope not in others. But I think it’s important that we know[.]

Tr. at 28. *See also* Tr. at 23 (“[T]he Superior Court, not just this judge, should know what has been done in connection with any other case[. . . to avoid any other innocent people possibly being still imprisoned.”).

The investigation that the United States has thus far conducted (at least insofar as is known to undersigned counsel) has not been adequate to the task. It has been too narrow in scope, too one-sided in execution, and the results have been too slow in coming. Moreover, as more fully set forth in our letter of April 14, 2010 – to which the government has *never* responded – the investigation and its initial results lack transparency and an opportunity for meaningful adversarial or judicial oversight.

First, the government’s investigation remains incomplete even by its own narrow terms. The United States reported on March 12, 2010, that there were “more than one hundred additional names about which the USAO was notified [by the Department of Justice Task Force on the OIG Investigation] starting in 1997.” Letter from Patricia A. Riley to Chief Judge Satterfield at 9.

There has been no further word from the United States about its review of those hundred or more cases although more than nine months have elapsed since the exoneration of Mr. Gates and more than five months since the government's "Initial Report."

Second, the United States has not responded to our request for a broader investigation to include all cases where the prosecution relied on FBI microscopic analysis of hair or fiber without DNA testing to obtain a conviction. As is more fully set forth in our letter of April 14, 2010, hair or fiber microscopy has been proven too lacking in a scientific basis and too unreliable to support the kind of testimony that was used to convict Mr. Gates and, it is feared, many others. This is so whether or not the individual examiner's integrity has been called into question as was Mr. Malone's.

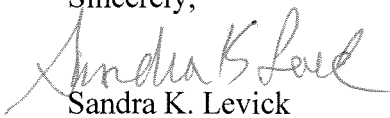
Third, the United States has not responded to our request for a more transparent investigation and a greater opportunity for adversarial testing and judicial oversight. As is discussed at length in our April 14, 2010, letter, the United States risks repeating the failures of the DOJ Task Force and the United States Attorney's Office to apprise Mr. Gates of the results of the OIG Report by yet again resorting to a secret inquiry with respect to others who may have been affected.

To the specific recommendations listed in our April 14, 2010, letter, we therefore now add another:

Assign a Superior Court judge to preside over all cases where the work of discredited FBI forensic examiners or the results of FBI hair or fiber microscopic analysis contributed to the conviction.

Thank you for your consideration.

Sincerely,



Sandra K. Levick
Chief, Special Litigation Division
Public Defender Service

cc: Patricia A. Riley, Esq,
United States Attorney's Office

encl.: March 10, 2010 letter from Patricia Riley to Chief Judge Satterfield (without Appendix C)
April 14, 2010 letter from Sandra Levick to Chief Judge Satterfield