THE
PUBLIC
DEFENDER
SERVICE
for the District of Columbia

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April 14, 2010

The Honorable Lee F. Satterfield, Chief Judge
Superior Court of the District of Columbia
500 Indiana Avenue, N.W., Suite 3500
Washington, D.C. 20001

Dear Chief Judge Satterfield,

I write in response to the March 12, 2010, letter of Patricia A. Riley, Special Counsel to the United States Attorney for the District of Columbia. Ms. Riley's letter represents the government's initial report on cases involving FBI forensic examiners who were criticized in the April 1997 Department of Justice Office of the Inspector General Special Report entitled *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (the OIG Report).

Ms. Riley's letter was occasioned by the exoneration of Donald Eugene Gates. In his motion to vacate his convictions under the Innocence Protection Act filed on December 9, 2009, Mr. Gates presented the results of DNA testing that proved he did not rape and murder Catherine Schilling. He also demonstrated the critical role of Special Agent Michael Malone, an FBI hair and fiber analyst criticized in the 1997 OIG Report, in securing his wrongful conviction. Not only did Agent Malone have a history of false testimony, but the "science" that Malone purported to practice has been thoroughly discredited.

At a hearing on December 15, 2009, at which Judge Ugast ordered Mr. Gates' release from prison, Judge Ugast did not mince words. He began by stating that the "allegations . . . made . . . in Mr. Gates's memorandum today are appalling, absolutely appalling to me." Tr. at 4. Expressing concern for Mr. Gates and for others who might have suffered a similar fate, Judge Ugast made the following statement and request:

> 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. *See also id.* 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."); *id.* at 28 ("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[.]").

As Judge Ugast recognized, the exoneration of Mr. Gates represents an opportunity as well as a tragedy. It represents an opportunity to learn what went wrong and to avoid repetition of the same mistakes. It also represents an opportunity to determine whether other innocent men and women have been unjustly convicted on the basis of suspect FBI forensic evidence.

In this spirit, I write to urge a more transparent and a much broader investigation than the government has undertaken. The government's commitment to reexamine cases that were the subject of the Department of Justice Task Force, though welcome, does not go nearly far enough.

I. The investigation must examine all cases in which FBI hair and fiber evidence played a role.

The United States must broaden its investigation to include all persons in the District of Columbia whose convictions were affected by the work of FBI hair and fiber analysts during the pre-DNA era. Hair microscopy has been proven to be simply too unreliable to serve as a basis for a criminal conviction. Any claims it once had to science (however tenuous) have not survived the advent of DNA testing or the intense scrutiny of the National Academy of Sciences. Its practitioners need not have been intentional liars, as Special Agent Malone apparently was, to have caused the same harm that Mr. Malone caused in the trial of Donald Gates: the conviction of an innocent man with powerfully inculpating, but unreliable, pseudo-science.

The National Research Council (NRC) of the National Academy of Sciences recently completed a landmark report on the forensic sciences, including hair and fiber analysis. *See Strengthening Forensic Science in the United States: A Path Forward,* National Research Council, National Academy of Sciences (2009). With regard to the "science" of hair microscopy, it was particularly damning: The NRC committee "found no scientific support for the use of hair comparisons for individualization [matching a piece of evidence to a specific individual] in the absence of nuclear DNA." *Id.* at 161 (emphasis added). As the Committee explained:

> 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 . . . .

Id. at 160-61. As a result, "In cases [like Mr. Gates'] where there seems to be a morphological match (based on microscopic examination), it must be confirmed using mtDNA analysis; microscopic studies alone are of limited value." *Id.* at 161 (emphasis added).

Similarly, the NRC Committee concluded that none of the characteristics of fibers are "suitable for individualizing fibers (associating a fiber from a crime scene with one, and only one source) and that fiber evidence can be used only to associate a given fiber with a class of fibers." *NRC Report* at 161. In the context of fiber analysis, "a 'match' means only that the fibers could have come from the same type of garment, carpet, or furniture," not which garment, rug, or piece of furniture. *Id.* at 163 (emphasis added).

Microscopic hair comparisons have been called "lethal nonsense." Barry Scheck, Peter Neufeld, Jim Dwyer, ACTUAL INNOCENCE, at 214 (2003). 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 (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).

The lack of "science" behind microscopic hair comparisons is particularly devastating to innocent defendants because of the unparalleled persuasive power of an FBI special agent's conclusion that hair seized from a defendant is "microscopically indistinguishable" from a hair left by the perpetrator at the scene. For example, in an email to undersigned counsel, Brooks Harrington, the Assistant U.S. Attorney who prosecuted Mr. Gates, explained the significance of the hair evidence in that case:

> The hair "match" was the key. . . . This hair opinion was the link and the corroboration to every other evidence. Certain things fell for the prosecution at trial, but without that emphatic hair testimony from the examiner, I doubt we would ever gotten a conviction. This sounds self-serving, but without [it] I would not have been convinced that Mr. Gates was the murderer."

The possibility, raised by Judge Ugast, that there are "other innocent people possibly being still imprisoned," Tr. at 23, must include innocent people convicted on the basis of unreliable hair or fiber analysis – and not just those convicted on the basis of false testimony. Therefore, the investigation must encompass all cases in this jurisdiction where hair and fiber analysis played a role.

II. The investigation must involve greater transparency, defense counsel participation, and court oversight.

The United States has provided an initial report on twenty cases that were subject to the Department of Justice's post-OIG report review procedures. It states that it is now reviewing an additional approximately 100 cases involving the discredited examiners. This investigation, though welcome, risks repeating the failure of the Department's FBI Task Force. The process must include greater transparency, an enhanced role for defense counsel, and judicial oversight.

A. Mr. Gates' case illustrates why the investigation must be transparent and allow for defense counsel involvement and court oversight.

The conduct of the U.S. Attorney's Office in Mr. Gates' case demonstrates why an investigation can not be conducted solely by the government, without any transparency or outside input.

In 1997, the Department of Justice Task Force began providing prosecutors with the names of cases in which the FBI analysts criticized in the OIG Report played a role. It is still not clear when Mr. Gates' case was identified by the Task Force. It may have been as early as 1997. Certainly, it was no later than May of 1999 when a document warning that Mr. Gates' case involved the work of a criticized examiner was placed permanently on the top of his FBI file and in the control file of the Task Force.

In either September or October of 2000, Mr. Gates' case was listed on one of two letters containing twenty-one cases sent from the Department of Justice to the U.S. Attorney's Office for review. The letters enclosed case review forms and the relevant FBI lab reports and requested that "AUSAs review these materials, the Office of the Inspector General's (OIG) report on the FBI laboratory, and any other information your office may have related to these cases to determine if the work of an examiner criticized in the OIG report was material to the conviction."[1]

The answer to the question was readily at hand. The reported opinion of the District of Columbia Court of Appeals made patently clear the importance of Agent Malone's testimony. Had the government notified Mr. Gates, defense counsel, or Judge Ugast, it is difficult to imagine that immediate steps to reopen Mr. Gates' case would not have been taken. Instead, two more years passed.

On September 17, 2002, Assistant U.S. Attorney Terrence J. Keeney completed a form entitled "FBI Laboratory State/Local Case Review," stating that Mr. Malone's lab work was material to the verdict against Mr. Gates. A forty-five-minute independent scientific review of the FBI paperwork in Mr. Gates' case was then conducted and a report critical of Malone's work was prepared by Steve Robertson on December 4, 2003. By now, another year had elapsed. On December 19, 2003, the FBI notified the Department of Justice of the scientific review of Mr. Malone's work in Mr. Gates' case. The letter from the FBI to the Department of Justice enclosing the Independent Case Review Report ended with the following reminder of the government's *Brady* obligations:

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[1] The Public Defender Service shared its copies of these letters, dated September 21, 2000, and October 21, 2000, and addressed to Carolyn Crank at the United States Attorney's Office from Amy B. Jabloner of the Department of Justice Task Force with the United States in January 2010, to assist the government in conducting its investigation. Although PDS's copies had been redacted so as not to include case names or enclose FBI lab reports or case review forms, the government was subsequently able to access the unredacted versions.

> 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.

On January 22, 2004, the Department of Justice notified the U.S. Attorney's Office of the results of Robertson's scientific review. 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. ***
>
> 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.

The Public Defender Service obtained a copy of the scientific review in November 2009 as a result of its own investigation. The U.S. Attorney's Office does not attempt to justify its failure *ever* to notify Mr. Gates, defense counsel or the Court of this report. But it does not appear to recognize that the seven years between the OIG report and the 2004 letter enclosing the report were also lost because of its secret proceedings.[2] As the *Washington Post* editorial board recognized, the "better question" is not why the U.S. Attorney's Office did not disclose the 2004 letter but "why the government – as a matter of policy – didn't alert the defense to doubts raised in 1997, when the inspector general concluded that Mr. Malone had provided false testimony, or in 2002, when it determined his work was material to Mr. Gates' conviction."[3]

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[2] Ms. Riley includes the following note in her letter to this Court:

> DNA [associated with the crime] was severely degraded and could not have been analyzed completely using earlier methodologies. One of the tests used, Power-Plex 16, was developed only seven years ago; the other, the Mini-STR filer system, came on line only three years ago.

This note is misleading in two respects. First, DNA technology was sufficiently advanced in 1997 to test the biological material in this case and produce reliable results which would have demonstrated that Mr. Gates could not have been the perpetrator. A number of short tandem repeat (STR) tests were commercially available including Profiler Plus and Powerplex that would have exonerated Mr. Gates. *See* J. Butler, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS, 2d Ed. (Elsevier Academic Press 2005) at 97-98. Second, the problems with Malone's veracity, with his testimony in other cases, and with the state of the "science" of hair microscopy were sufficient, in themselves, in 1997 to have entitled Mr. Gates to a new trial even if DNA results could not have been obtained.

[3] "Justice Delayed," *The Washington Post*, December 18, 2009, A32.

B. The problems of secrecy and inexcusable delay were not limited to Mr. Gates' case.

The Department of Justice Task Force was widely criticized for its secrecy and its insularity. When the Task Force identified cases in which a criticized examiner played a role it did not notify the public, the affected defendants or their counsel, or the courts. Instead, the Task Force told only the local prosecutor's office responsible for the conviction. It created a cumbersome review process that allowed local prosecutors, if they participated at all, to determine whether the FBI examiner's work was material to the plea or conviction. Only if the answer was yes did the Task Force conduct its own scientific review. If the review of the paperwork raised concerns about the quality of the examiner's work in the individual case, the Department of Justice would return the results of the scientific review to the local prosecutor for his or her action, or inaction.

Because the process had been entirely secret and one-sided, when it failed to do what even the government acknowledges it was obligated to do in Mr. Gates' case – disclose the results of the independent scientific review – there was no one with sufficient knowledge and interest to expose and correct its mistakes. Apparently, the Department of Justice Task Force had closed up shop years before, without issuing a final report and without ensuring that the review process which it had put in place actually worked. Notwithstanding its repeated formal warnings to prosecutors that they fulfill their disclosure obligations, the Department of Justice took no steps to ensure that disclosures were made, even when the local prosecutors were Assistant United States Attorneys.

The problems with this secret and one-sided process have been widely recognized. Former Inspector General Michael Bromwich is reported to have said that "the task force should have allowed defense attorneys to participate in case reviews. 'The least effective way' to determine if any cases were compromised, Bromwich said, 'is to have the prosecutors review them.'"[4] As Neal Sonnet, a formal federal prosecutor and past-chairman of the American Bar Association's Criminal Justice section observed: "That's like asking the fox to guard the hen house."[5] As Sonnet pointed out:

> If there is a possibility that evidence has been tainted, then the Department of Justice or prosecutors should not be the arbiter of whether it's material. . . . It should be the defense attorney who makes a decision whether it's worth filing a motion with the court and then a decision made by an impartial arbiter, not an advocate for the other side.[6]

The lessons from this experience must be that transparency, full participation by the defendant through counsel, and meaningful oversight by the court are necessary ingredients to any review process where the stakes are as high as they were for Donald Gates.

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[4] "FBI Lab's Trial and Errors/Probe into sloppiness overturns no cases," *Los Angeles Times,* A29 (Aug. 19, 2000).

[5] "3,000 Cases Possibly Tainted by FBI Lab," *The Philadelphia Inquirer*, A06 (March 17, 2003).

[6] *Id.*

The government's initial report is not sufficiently transparent. It was not filed on the public docket. It does not provide a case-by-case description of how and when the U.S. Attorney's Office responded to the Task Force's notification and what transpired after each response. Instead, it provides a statistical summary that is difficult to penetrate. The report therefore fails to meaningfully answer one of Judge Ugast's concerns: what the Department of Justice and the Office of the U.S. Attorney for the District of Columbia has done with respect to each case in which a criticized examiner played a role.

Moreover, by providing the list of all twenty cases under review only to this Court, the government escapes meaningful oversight. It can hardly expect the Court to investigate the cases to ensure that the government's representations are factually correct and that it has exercised sound judgment on all issues raised by the review.

III. Specific recommendations for the investigation.

We therefore urge the Court to take the steps described below with regard to the government's initial report on the first twenty cases, and any subsequent reports:

1. Broaden the scope of the investigation to include identifying and reporting on all District of Columbia cases in which FBI hair and fiber examiners played a role in obtaining a conviction by guilty plea or at trial.

2. Appoint the Public Defender Service to act as defense counsel to the investigation.[7]

3. Allow the Public Defender Service to review the list of cases and all of the records relating to each case that is the subject of the government's initial or subsequent reports to this Court, including all records collected by the U.S. Attorney's Office in the course of its investigation.

    (a) One purpose of the Public Defender Service's review will be to confirm or challenge the government's conclusion that no disclosure must be made.

    (b) A second purpose of the Public Defender Service's review will be to assist the Court in determining whether counsel should be appointed in individual cases.

4. Place the government's redacted report and this response in a publicly-accessible court file. Hold any hearings relating to the investigation and reports in a public forum.

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[7] The FBI's commitment to work with the Innocence Project to review all cases in which the discredited "science" of comparative bullet lead analysis played a role represents an important precedent. *See* "FBI Laboratory to Increase Outreach in Bullet Lead Cases," FBI Press Release (November 17, 2007); "Three Freed, and FBI Continues to Review Ballistic Cases," Innocence Blog (January 19, 2010).

IV. Innocence Commission.

Finally, we encourage the Court to establish the "Innocence Commission" called for by the *Washington Post* editorial board, that "bring[s] together judges, police, prosecutors, defense attorneys and victim's advocates in an attempt to identify the practices that lead to wrongful convictions and to recommend reform."[8] Detective James Trainum, the Metropolitan Police Detective who located the autopsy slides that made Mr. Gates' DNA exoneration possible, has recently joined in this call.[9]

The transparent investigation discussed herein, conducted with the participation of defense counsel and with court oversight, will identify cases where the integrity of the convictions is called into doubt by the use of discredited "science" or criticized examiners. An Innocence Commission will complement that work by identifying best practices and recommended reforms. The Public Defender Service would gladly serve on such a commission.

Thank you.

Sincerely,

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

cc: The Honorable Fred B. Ugast
The Honorable Russell F. Canan
Patricia A. Riley, Esq.
United States Attorney's Office

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[8] "Innocents in prison," *The Washington Post*, A22 (Dec. 27, 2009).

[9] James Trainum, "Throwing a lifeline to the next Donald Gates," *The Washington Post*, C05 (March 28, 2010) ("[T]hese commissions are designed to draw upon the experience of prosecutors, defense lawyers, law enforcement officers, judges, legislators, scholars, forensic experts and crime victims and their advocates. . . . [they] are a win-win for everyone. When we study our criminal justice system and work to make it better, we not only reduce the chances of convicting the innocent but we also increase our chances of convicting the guilty. We also show the public that the system is strong enough to recognize and fix its own mistakes.").