SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Criminal Division

UNITED STATES OF AMERICA

\I ,

Criminal No. F-\_ Judge Burgess (Closed)

\_ -96

JOHN DOE

MOTION FOR LEAVE OF COURT TO CONDUCT DISCOVERY AND DISCOVERY REQUESTS

John Doc. through undersigned counsel, moves this Court, pursuant to Ruic 6 of the Superior Court Rules Governing Proceedings under *D.C.* Code§ 23-110. to grant him leave to conduct discovery in support of his pending motion to vacate his convictions and grant a new trial. Good cause exists to discover information and evidence from the United States in support of Mr. Doe's claim under *Napue* ,,. *llli11ois.* 360 U.S. *264* ( 1959). that the United States knew or should have known that the testimony of FBI Special Agent Robert Fram was false or misleading

and of Mr. Doe's claim under *Brady v. Maryland,* 373 U.S. 83, 87 ( 1963), that the United States suppressed favorable evidence that would have exposed Agent Fram·s testimony to be false and misleading.

In support of this motion, counsel states:

I. Factual Back!!round

On December *20.2013.* Mr. Doe filed a motion to vacate his convictions and grant a new trial under D.C'. Code§ 23-110 because his convictions were obtained in violation of the Due Process Clause. This Court ordered the government to respond by March 3. 201-t.. (Order. Jan.

2-+, 2014). The Unite d States has sought an enlargement of time until May 2, 2014, in which to respond.

As is more fully set forth in his§ 23-1 JO motion, Mr. Doc alleges that the United States secured his convictions for armed robbery. second-degree burglary while armed, possession of a firearm during a crime of violence, assault with intent to commit second-degree sexual abuse while armed and aggravated assault, by presenting scientifically invalid microscopic hair comparison testimony that the government knew or -;hould have known was false or misleading. In particular, for the purposes of this motion, Mr. Doe alleged that FBI Agent Fram exaggernted the probative value of the purported match of hairs from the crime scene to a sample or Mr.

Doe's hair. testifying that it was ··very rare·· for hairs to share the same microscopic characterbtics and not come from the same source. To demonstrate just how rare such an occurrence was. the United State!-i elicited, and then championed in closing argument and rebuttal argument. testimony from Agenl Fram regarding his own experience and that of all other agents in the hair and fiber unit of the FBI laboratory.

Agent Fram testified that during his seven years assigned to the hair and fiber unit, a normal day consisted of "examining hairs and fibers and making comparisons." Tr. I 0/ 18/96 at

356. "Yearly," he testified. ''it's thousands and thousands or hairs and libers that I look at." Tr.

I 0/18/96 at 357. By the time of his testimony in 1996, he had worked on "somewhere around two to three thousand" cases. *Id.* He told the jury that in none of those cases was there ever an nccasion when he could not distinguish between hairs from known sources. Tr. I 0/ 18/6 at 362. Indeed. it was such a rare occurrence for any examiner to see hairs from known sources that he or she could not distinguish. that the examiner would mark the occasion by showing the hairs to

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everyone else in lhe lab. This had happened only lwice during Agent Frnm's seven-year tenure.

*Id.* He testified:

I haven't compared everybody's hair in the world, and on very rare occasions, you may see two hairs that are so close, that you can't significantly say it cmne from that person, as opposed to that person. It's very rare, though. I have seen it, I think, two times in my career, and neither of the two times have hecn in my own cases. It·s a rare enough thing that if anybody in our unit gets a hair. two hairs that look so close, lhey'll show it around. I've never had that in my case. bul it's very rare to find two people whose hairs I can't distinguish between.

Tr. I 0/18/96 at 362. At the prosecutor's prompting, Agent Fram elaborated:

Q. These two cases that you have mentioned, are you saying that people were able to bring you two hairs of two known people, two different people, and you weren't able to distinguish them?

\* \* \*

A. Yes. These were two known samples that were so close. Now, when you're looking at hairs, you look at a known sample from an individual, there is a slight degree of variation between the hairs on one person's head. If I took a hair from the back of my head, and a hair from a side of my head, there may be some slight differences.

But. when you get a known sample from that individual. you see what that range of variation is, and you expect that range or

variation to be small enough that it doesn· t overlap t[o] other people.

Now. there are times, and these two times were the rare times. where there was a little bit of an overlap.

Tr. I 0/18/96 at 362-63.

In his motion to vacate his convictions, Mr. Doe called into question the truth of this testimony. He wrote:

It may well be that Agent Fram·s testimony in John Doe·s case in which he provided the number of cases on which he had worked as a microscopic hair analyst - "somewhere around two to three thousand cases" - had as little basis in fact as Agent Malone's oft­ repeated ·• I 0,000 cases.'' IL may well be that no numbers were actually kept of the frequency with which the FBI analysts were

unable to distinguish between two known hair samples. On information and belief, the frequency of a match of known hairs to known hai rs was not so small as to have happened only twice in the seven years that Agent Fram had worked in the FBI hair and 11ber unit.

Motion at *20.*

Mr. Doe now seeks leave of this Court to conduct discovery to prove that the testimony was indeed false as a matter of fact.

IL The Discovery Sou!!ht

The United States Attorney's Office for the District of Columbia has undertaken a review of all District of Columbia cases in which FBI microscopic hair analysis was conducted in the era before DNA testing made :-; uc h analysis effectively obsolete. The review is a direct result of the exonerations of Donald Gates, Kirk Odom and Santae Tribble. The initial review came at the request of Judge Ugast who presided over Mr. Gates' exoneration. It included only one hair examiner, Special Agent Michael Malone, who had testified again s t Mr. Gates. On March 16.

201l1. United States Attorney Ronald C'. Machen announced an expanded hair review that would

include all examiners and all cases for which records could be found. He made the announcement to a local TV slation, which reported it on its website as follows:

"We arc announcing today that we are going lo go back and do a sweeping review of cases going hack decades," -;aid U.S. Attorney Ron Machen, "Some in the 70s and 80s and even earlier if we can find the records of cases where hair analysis was used in part to secure convictions."

The U.S. Attorney"s Office just completed another review of more than 200 cases called into question by the wrongful conviction of

1 The date is two days after Kirk Odom tiled his motion to vacate his convictions on the grounds of actual innocence and two months after Santae Tribble filed his. Both motions set forth, *iwer alia,* the results of mitochondrial DNA testing of hairs used to convict. In both cases the res ults were completely exonerating: they showed to a scientific certainty that the hairs could not have come from the defendants.

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Donald Gates, a man who went to prison in part due to the hair analysis testimony of an FBI agent.

[http://www.mvfoxdc.com/dpp/news/local/lbi-lab-c.ese -revcal-dubious-dna-evidence-031612.](http://www.mvfoxdc.com/dpp/news/local/lbi-lab-c.ese-revcal-dubious-dna-evidence-031612)

Michael A. Ambrosino, Special Counsel to the United States Attorney. reported at a recent meeting of the Ad Hoc Committee (u committee established by Chief Judge Satterfield in

the wake of the exoneration or Donald Gates, and of which undersigned counsel is a member), that the USAO had received over :woo reports from the FBI relating to hair and fiber examinations in District of Columbia cases through 1999. A team of Assistant United States

Allorneys has been reviewing the reports and its work is almost completed. Transcripts, case

files, and other records are also being compiled. According to Mr. Ambrosino. in only abom ten per cent of the approximately ::woo FBI reports had there been a "positive association" between a questioned hair and known hairs from a suspect. That the overwhelming number of FBI reports

reviewed resulted in no positive association begs the question: for how many or the approximately 90'M or 1800 cases was no positive association made because the known samples from victim and suspect could not be distinguished?

Mr. Doe seeks leave of the court to conduct discovery from the United States Attorney of all FBI lab repons! on microscopic hair analysis through 1999 compiled as a part of its review of hair cases and all transcripts of the testimony of FBI special agents who testified as experts in hair microscopy that have been gathered pursuant to the same review. These records will he examined to determine:

1. The number of times in which FBI hair examiners were unable to distinguish between hairs from different known sources;

*1* The FBI reports may be redacted to conceal the names of victims and sus pects.

1. The number of times in which FBI hair examiners compared hairs from known sources to hairs from known sources;
2. From transcripts of tc timony of FBI hair examiners, the agent's assertions regarding the number of times he or <;he was unable to di tinguish hairs from different known sources and the number of times that other agents in the unit were unahlc to distinguish between hairs from di ffcrent known sources;

..J.) From transcripts of testimony of FBI hair examiners, the number of cases the examiner claimed to have worked on during his or her tenure in the hair and fiber unit.

The Le!:!al Standard

Rule 6( a) of the Superior Court Rules Governing Proceedings under D.C. Code s 23-1 I 0 provides in pertinent part:

A party may invoke the processes of discovery available under the Superior Court Rules of Criminal Procedure or Rules of Civil Procedure (Civil Rules 26-37) or elsewhere in the usages and principles of law if, and to the extent that, the judge in the exercise of his or her discretion and for good cause shown grants leave to do so, but not otherwise.

This Ruic, and the federal habeas corpus rule on which it is modeled, are codifications of the Supreme Court·s decision in *Harris v. Nelson,* 394 U.S. 286 ( 1969 ). In *Harri.,·.* a habeas petitioner alleged that the informant whose tip had led to his search and arrest had been unreliable. The trial court ordered an evidcntiary hearing on the petition, and the petitioner Jirccted interrogatories to the warden seeking to discover facts to support his claim of unreliability. The question before the Court was whether such discovery was allo wed . The Court held that in light of the fundamenlal importance of the "great writ" of habeas corpus and lhe duty of courts to "the careful processing and adjudication of petitions for writs of habeas corpus:· courts had the authority to allow petitioners discovery to support their claims and to use

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criminal and civil discovery rules for that purpose. 39-t U.S. at 293. But the authority was to be exercised in the court's discretion rather than on the petitioner's own initiative, guided by the following Lest:

(W]here specilic allegations before the court show reason to believe that a petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief. it is the duty or the court to provide the necessary facilities and procedures for an adequate inquiry. Obviously, in exercising this power. the court may utilize familiar procedures, as appropriate, whether these are found in the civil or criminal rules or elsewhere in the ·usages and principles of law.'

*Harris,* 394 U.S. at 300 (footnote omitted).

In *Bracy\'. Gramley.* 520 U.S. 899 ( 1997). the Supreme Coun reversed the lower court for abusing its discretion in denying leave to conduct discovery under this test and Habeas Ruic 6(a) (now Rule 6(a) of the Rules Governing Section 2254 Case" in the United States District Courts and Rule 6(a) of the Rules Governing Section 2255 Proceedings for the United States District Courts). In *Bracy* the habeas petitioner had been tried before a judge later convicted of taking bribes from other criminal defendants. Bracy sought access to the scaled record of his trial judge's own trial, reasonable access lo the prosecutor's materials reluting to his trial judge·s case, the opportunity to depose persons associated with the judge, and a chance to search his rulings for a patlern of bias in order to advance his theory that his auorncy might have been appointed in order lo camouflage the bribe negotiations in a different case. Although Bracy's theory was not supported by any solid evidence that his lawyer, a former law derk of the corrupt

judge, had participated in such *u* plan, the Supreme Court held that it was an abuse of discretion not to permit discovery to attempt to gain such support. In a unanimous opinion, the Court explained:

We conclude that petitioner has shown "good cause" for discovery under Ruic 6(a). In *Harris* ["· *Ne/soil,* 39-t U.S. 286 ( 1969)1 we

stated that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, he able to demonstrate that he is ... entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." 39 U.S. al 300. Habeas Corpus Rule 6 is meant to be "consistent" with *Harris.*

*Bracy,* 520 U.S. at 909. Acknowledging that the allegations may ultimately not be borne out. the Court held that a showing sufficient to warrant discovery had been made:

ft may well be, as the Coun of Appeals predicted, that petitioner will be unable to obtain evidence sufticicnt to support a finding of actual judicial bias in the trial of his case, but we hold that he has made a sufficient showing, as required by Habeas Corpus Ruic 6(a), to estahlish "good cause·· for discovery.

*Id. See also Drake v. Portuondo,* 321 F.3d 338 (2d Cir. 2003) (holding that discovery should have been ordered lo allow habeas petitioner to support his *Napue* claim that the government knew or should have known that its expert falsely testified concerning his qualifications); *Reed* 11• *Q11merma11,* 504 F.3d 465, 473 (5th Cir. 2007) (holding that habeas petitioner was entitled to a certificate of appealability on the denial of his request for discovery to support his *Napue* claim); *Jackwn* I'. *Marsha ll ,* 500 F.Supp.2d I. 6 (D. Mass. 2007) (holding where the recorc.l "does not rule out the possibility that the prosecutor lied to the jury about not having an agreement with [a government witness]," discovery would be ordered, and reasoning, "[i]f it is true that there was an agreement in place despite the prosecutor's assumnces to the conlrnry, serious constitutional questions would be raised about the fairness of Jackson·s trial"').

The District or Columbia Court of Appeals, in a decision that predated enactment or the

rules pe11aining to post-conviction proceedings. relied on *Harris 11. Nelson* to hold that the trial court had abused its discretion in denying post-conviction discovery. *Gihson* ,,. *United States,* 566 A.2<l 473 (D.C'. 1989). Gibson sought discovery to support a new trial motion based on

newly discovered evidence that another person had committed the assault with intent to commit

rape while armed and related offenses of which he had been convicted. The source of Lhe informalion lhal a man named Holl was responsible was a vclcran detective who had conducted an investigation of Holt and noted many similarities between Holt's modus operandi and the crimes attributed lo Gibson. The government responded thal it had reopened Lhe case and thoroughly investigated the claim and was convinced there was no evidence linking the Holl to the crimes. Quoting *Harri.,·* I'. *Nelso11.* 394 U.S. al 300, the Court of Appeals held that ··the trial courl may order post-conviction discovery procedures as appropriate, ·whether these arc found in the civil or criminal rules or elsewhere ... *:* in order that the new trial motion receive fair and meaningful consideration.'' *Gih.wm.* 566 A.2d at 478. It analogized Gibson's request to Rule 16 discovery, and held that the lrial court had abused its discretion in denying Gibson"s discovery motion. *Id.* at 479. Although the defendant had couched his argument in the language of *Brady,* the Court of Appeals "emphasized that, as in a pretrial discovery motion, concepts of

·constitutional materiality,' have no place in a post trial discovery motion.'' *Id.* at 480 (quoting *United State,\· v. Bagley,* 473 U.S. 667,682 ( 1985). Instead, "lo]nce the appropriate discovery has been given, the standard governing mling on" the post-conviction motion - in Gibson's case a motion for a new trial based on newly discovered evidence - "controls." *Id.*

lit. Good Cause Exists

Good cause to conduct discovery is more than satisfied here. Mr. Doc has made specific allegations to demonstrate a reason to believe that, if they are borne out, Mr. Doe will be entitled to relief. He alleges that the testimony of Agent Frum was untrue as a matter of fact and that the United States knew or should have known of its falsity.

Undersigned counsel has a good faith basis to believe that the numbers that Agent Fram m,crihcd LO his own experience and lo that of all of the other examiners in the hair and fiber unit

were not grounded in fact. Instead, they were part or a pauern of false testimony designed to exaggerate the probative value of purported matches of crime scene hairs to the accused in criminal trials in which FBI agents appeared as part of the prosecution team.

First. according to the sworn deposition testimony of former Special Agent Michael

Malone, no records were kept of the number of cases on which he worked or the number of ti mes he compared known samples to known samp les . Agent Malone had testified against Donald Gates, and in countless other cases, that in the 10,000 cases that he had worked, there were only two (in later years he said three) instances in which he could not distinguish between known

hairs from di ffercnt sources. Motion at 14-15. In his recent deposition, he admitted that his testimony had been based on nothing more than his own "guesstimates" or "estimates." No records of the number of cases he had worked had been kept. The colloquy was as follows:

Q. [Y]ou didn't keep any records of how many cases you handled in each of those years?

A. That"s correct.

Q. And you didn't keep any record of how many knowns there were in each case?

A. That's correct.

Q. In fact, you said there wus one case where you had us muny as 50?

A. That's correct.

Q. Okay . But you didn't keep any record on how often it was two, how often it wus four, how often it wa'i six, how often it was ten, et ceteru, et cetera, correct?

A. That's correct. That's what an estimate is.

Q. That's your definition of an estimate definition?

A. Yes.

Q. Tell me all the basis for you lo have that estimate in 1983, okay. that you had looked al hair from 10,000 different people?

A. I <lon'l recall what ( based chc ligure on.

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A. Well, it had lo have been an cstimace.

Q. An<l why is that'?

A. How else am I going lo come up with a figure?

Q. One might conclude that you came up with it out of thin air, Mr. Malone; is that a possibility?

A. No. h's based on my experie nce .

Q. Yct you have no record of what your experience was'?

A. That's correct. ... I can't recall how I came up with chat number.

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Q. And you used it [the I 0,000 cases number] throughout your entire 20-ycar history with the FBI; correct?

A. Absolutely not. The last few years I <lid not use it.

Deposition of Michael Malone al 287-89 (Jan.10, 2013) (relevant pages attached as Exhibit I).

Agent Malone also acknowledged that "over a number of years" he told juries that he had only been unable to distinguish known samples in two cases out of those I 0.000 cases, and that he did so in order to convey to juries that it was highly unlikely that the hair came from anyone other than the defendant. Deposition at 293-296. He acknowledged that he had not conducted "pairwise comparisons" of each known sample against each known sample across cases to cscablish the probability of a coincidental match. Deposition at 296-97. Thus, Agent Malone admitted chat in all but the last years of his long tenure, he repeated the same numbers to describe his experience, numbers that were not grounded in fact because no records were kept , and chal

were use<l to impress upon jurors a significance to his conclusion that science did not support.

Second. as illustrated in Mr. Doe·s motion. many. if not all, FBI special agents used the same invalid formula used by Special Agent Malone to make it appear at trial as if the results of the microscopic hair examination linking the accused to the questioned hair were extraordinarily probative of guilt Motion at 17-18. Agent Fram used the same formula here. He. i.md others, ascribed a large number, or range of numbers. to his overall experience of cases worked. and

then a very, very small number to his experience of being unable to distinguish known hairs from known hairs. Indeed, Agem Fram testified that for him, the lauer number was zero, and for the unit as a whole during his seven years it was two. There is reason to believe that Agent Fram·s experience, and that of the unit. derived from the same thin air as Agent Malone's.

Third. undersigned counsel's own experience belies the claim that a coincidental m 1tch of hairs from two different known sources was so rare as to happen almost never. Counsel has sought, on behalf of clients, the FBI laboratory results of microscopic hair analysis in only six cases. In three of those cases - Donald Gates. Santae A. Tribble. and Kirk L. Odom - the FBI examiner concluded that the questioned hair matched the defendant's hair and each defendant was convicted. All of these men have been exonerated when DNA testing excluded them as the donor of the hair and/or other biological evidence. In the fourth case, Cleveland Wright's hair was found noL to match the questioned hair, bul the purported match of Lhc quesLioncd hair to his co-defendant Santae Tribble was introduced at Mr. Wright's trial. Mr. Wright, too. has been

exonerated after Mr. Tribble was declared actually innocent. Mr. Doe's case is the lifth case.

Bul it is lhe remaining case thal is the most lelling for these purposes. Johnnie Moore, Jr. was charged wilh two sexual assaults in 1982 when he was just seventeen years old.1 *United Stal£',\'* I'. *Jolm11ie Moore. Jr.,* F-2630-82. Pubic hairs were combe<l from one of his viclims, an African American like Mr. Moore. The hairs were submitted to the FBI for forensic examination along with a known sample of the victim's pubic hair and of Mr. Moore's. The comparison could not he conducted because the known hair -;amplcs were indistinguishable. The FBI report states:

Dark brown pubic hairs possessing Negroid characteristics were found in QI [pubic hair combings] and Q3 (pubic hair combings]. Specimens KI [pubic hair sample from the victim] and K6 [pubic hair sample from Mr. Moore] are so nearly alike in microscopic characteristics that il was not possible to distinguish one sample from the other. Therefore. it was not possible to conclude that the above-described pubic hairs could have come from one of these known sources to the exclusion of the olher.

Report of the FBI Laboratory Re: Johnnie Moore (relevant pages attached as Exhibit 2).

At Mr. Moore's trial. the following stipulation was read:

ll is agreed and stipulated that on April 30th of 1982, the pubic hair of Miss S. was combed. Pubic hair combings were obtained from the defendant. Those combings were ent to the Federal Bureau of Investigation Laboratory and compared by Special Agent A.T. Rohillar<l. Agent Robillard found lhat the puhic hairs of Miss S. and the defendant, Johnnie Moore[,] were so nearly alike in microscopic characteristics that it was not possible lo distinguish Miss s:s pubic hair from the <lefendant's pubic hair.

*Moore* Trial Transcript at 11 - 13 (substituting an initial for the victim's full name and correcting the misspelling of the agent's name).

1 Un<lcrsigned counsel lile<l a Motion for Post-Conviction DNA Testing under the Innocence Protection Act for Mr. Moore on May *24. 101* I. Ju<lge Nash denied the motion without prejudice on February 21, 2013. after excensi ve efforts to find the biological evidence were unsuccessful.

It could be, of course, that Mr. Moore's case is the one case in tens or thou:-.ands of cases where two known samples could not he distinguished. It could be that it is -;imply an extraordinary coincidence that it was among the six cases for which coun:-.el has obtained FBI

bhoratory reports. It may also be that Mr. Moore's case is illustrative of a much larger number

of cases than Agent Fram, and other agents in the hair and fiber unit, acknowledged to exist. and that Agent Fram's testimony to the contrary was false. As the District of Columbia Court or Appeals has often remarked, '"Coincidences happen, but an alternative explanation not based on happenstance is often the one that has the ring of tnllh.·• *Pou/not v. District <f Columhia,* 608 A.2d 134, 139 ( D.C. 1992). Mr. Doe is entitled to discovery sufficiently robust for him to obtain facts to support his specific allegation that the lauer explanation is the one mostly likely to be true.

For these reasons, leave to conduct discovery in the manner described herein must be ordcred.-t

Respectfully submitted,

Sandra K. Levick # 358630 Chief, Special Litigation Division Public Defender Service

633 Indiana Avenue, N.W. Washington, D.C. 20004

SI \ ick <!1 ' pdqk .orn

202-824-2383 (direct)

-1 Although it does not appear to be required under the Superior Court Rules Governing Proceedings under D.C. Code 23-110, as it is under Rule 16-11 of lhe Superior Court Rules of Criminal Procedure, undersigned counsel sought the government's voluntary compliance with these discovery requests before filing this motion.

\*

CERTIFICATE OF SERVICE

l hereby certify lhat a copy of lhe foregoing Motion to For Leave of Court to Conduct Discovery and Discovery Rcque ts has been served by hand on Timothy Lucas, Special Proceedings Division, United States Auorney's Office, 555 -hh Street, N.W., Wa hington, D.C'. 20530, this 14th day of March, 201-1..

Sandra K. Levick



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|  | MICHAEL P. MALONEGATES vs. DISTRICT OF COLUMBIA | January 10, 20131 |
| l2 | UNITED STATES DISTRICT COURTFOR THE DISTRICT OF COLUMBIA |  |
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| 4 | - - - - - - - - - - - - - - X |  |

DONALD EUGENE GATES,

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Plaintiff,

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v.

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DISTRICT OF COLUMBIA; RONALD:

1. S. TAYLOR; NORMAN BROOKS; JOHN HARLOW; GERALD M. SMITH:
2. a/k/a "BEAR"; and JANE DOES

ftl-10,

10

Civil Action No.:

l:ll-CV-00040-RWR

Defendants.

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1. Deposition of Michael P. Malone
2. Chesterfield County, Virginia
3. Thursday, January 10, 2013

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24 Reported by: Sasha Ulloa, RPR

25 Job No. 396419

(.)ESQUIRE *800.211 DEPO (3376)*

MICHAEL P. MALONE

GATES vs. DISTRICT OF COLUMBIA

### MS. FROST: Objection.

#### BY MR. NEUFELD:

January 10, 2013

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1. Q

### jury?

1. A
2. Q

### Did you ever disclose that to a

No.

Take a look at page 232 of this

1. transcript from 1983?
2. A Yes.

### Q And you are giving a lengthy

1. answer. I'm not going to read the whole answer. But
2. did you testify under oath to the following, the
3. first full paragraph, beginning on page 232?
4. A
5. Q

### Yes.

Okay. And I am going to quote

### and read it into the record. Did you testify to the

1. following, Mr. Malone, quote, Now, this uniqueness
2. does not extend to the point of a fingerprint where
3. you can say positively a hair comes from one person
4. and could not have come from anybody else.11
5. A
6. Q

### Yes.

11 But they're certainly unique

1. enough that a trained hair examiner will have no
2. trouble separating the hairs out of different people.
3. I myself over the last eight years have done hair
4. exams from about 10,000 people; and over that time,

0ESQ1}IRE *800.211.DEPO (3376)*

MICHAEL P. MALONE

GATES vs. DISTRICT OF COLUMBIA

January 10, 2013

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### I've only had two occasions where I had hairs from

1. two different people that were so close that I
2. couldn't separate them. Twice out of 10, 000 times, 11
3. end of quote.
4. Is that your testimony?
5. A Yes.

### Q Okay. Now you were actually

1. providing this testimony and this number, 10,000, to,
2. if you would, to bolster the conclusion that a
3. particular hair found in the case, a questioned hair,

### came from a particular source; correct? That's why

1. you offered this 10,000 number?
2. A First of all, when I said I had

### two occasions where I had hairs from two different

1. people who were so close that I couldn't separate
2. them, I am telling the jury that a hair is not a

### fingerprint. It's another way of saying that.

1. Q

### Right. I understand that. But

1. the other thing you're saying here is that that
2. phenomena was only observed by you in about 10,000

### cases or 10,000 people?

1. A
2. Q

### It was a guesstimate.

Well, the -- but you don't say

1. it•s a guesstimate there, do you?
2. A No.

ESQUIRE *800.211.DEPO (3376)*

MICHAEL P. MALONE

GATES vs. DISTRICT OF COLUMBIA

January 10, 2013

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|  |  |  |
| --- | --- | --- |
| 1 | Q | You don't even say it's an |
| 2 | estimate there? | You say it's about 10,000 people? |
| 3 | A | No, but it was an estimate. |
| 4 | Q | And did you ever tell the jury |

s where you got that number 10,000 from?

1. A No. That's what they invented
2. defense attorneys for.
3. Q So you didn't think you had an
4. obligation when you came up with the number 10,000 on
5. direct examination to explain to the jury, number
6. one, that you didn't keep any logs of the number of
7. cases you handled each year?
8. A
9. Q

#### No, did not.

You didn't think you had any duty

1. to explain to the jury that you didn't even keep
2. track of the number of knowns that you compared, did
3. you?
4. A
5. Q

#### Correct. That's correct. Now, you believed that to the

1. extent that that number was simply a guess on your
2. part --
3. A
4. Q

#### Correct.

-- that it was up to the defense

1. attorney to bring out that that was a guess?

#### A During cross.

{)ESQUIRE *800.211.DEPO (3376)*

MICHAEL P. MALONE

GATES vs. DISTRICT OF COLUMBIA

1

During cross?

Q

2

MS. FROST: Object to the mischaracterization of the testimony that's recorded here.

MR. NEUFELD: Fine. Thank you.

Q But do you believe that you didn•t have an ethical obligation to inform the jury that the 10,000 number was a guess on direct

examination?

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###### 10

It was a guesstimate.

*Jl.*

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MS. CORNWALL: Objection.

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It was a guesstimate" I think

Q

13

your word was?

A I use both words. Estimate, guesstimate, same thing.

14

15

16

Well, no, a guesstimate 1s a

Q

17

guess, is it not?

A

Q

18

No, it was an estimate.

Okay. But you didn1 t keep any

19

20

records at all of how many cases you had handled in

each of those years?

###### 21

22

That's correct.

And you didn't keep any record of

A

Q

23

###### 24

how many knowns there were in each case?

25

That's correct.

A

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1

In fact, you said in some cases

Q

2

there could be two knowns; right?

A As little as two.

Q .And you said there was one case where you had as many as SO?

3

4

5

6

That's correct.

A

7

Q Okay. But you didn't keep any record on how often it was two, how often it was four, how often it was six, how often it was ten, et

cetera, et cetera; correct?

8

9

10

11

That's correct. That's what an

**A**

12

estimate is.

Q

13

That's your definition of an

14

estimate definition?

**A** Yes, it is.

Q Tell me all the basis for you to have that estimate in 1983, okay, that you had looked

at hair from 10,000 different people?

15

16

17

#### 18

19

I don't recall what I based the

**A**

#### 20

figure on.

21

As you sit here today? Correct.

And since you don 1 t recall as you

Q

**A**

Q

22

23

24

sit here today what you based the figure on, how do

you know whether it was an estimate or a guess?

25

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|  |  |
| --- | --- |
| 12 | **A** Well, it had to have been anestimate. |
| 3 |  |  | Q | And | why is that? |  |
| 4 |  |  | **A** | How | else am I going to come | up |
| 5 | with | a | figure? |  |  |  |
| 6 |  |  | Q | One | might conclude that you | came |

* 1. up with it out of thin air, Mr. Malone; is that a
	2. possibility?
	3. A
	4. Q

#### No. It's based on my experience. Yet you have no record of what

* 1. your experience was?
	2. **A**
	3. Q

#### That's correct.

And you can't, as you sit here

* 1. today, recall what your experience was?
	2. A

#### that number.

* 1. Q

#### I can•t recall how I came up with

Well, in 1998, which is long

* 1. after you even left the laboratory, you came up with

#### that number; you knew it then, right?

* 1. A
	2. Q

#### 1998?

I'm sorry, 1983. 1983 you knew

* 1. what it was; you knew about this 10,000 number?
	2. A
	3. Q

#### Yes, I used it several times. And you used it throughout your

* 1. entire 20-year history with the FBI; correct?

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#### A Absolutely not. The last few

* + 1. years I did not use it.
		2. Q Okay. Do you remember earlier
		3. this morning we talked about if you're going to rely
		4. on some kind of hard data to explain a probability or
		5. to suggest a probability, that you have to follow
		6. certain basic laws of science? Do you remember that?

a A Yes.

9 Q Do you remember there was a

#### discussion about the meaning of empirical, arriving

1. at a number empirically?
2. **A**
3. Q

#### Yes.

Okay. And we agreed this morning

1. that one of the ways that one does that is that one
2. keeps accurate records so the number that you are
3. relying on actually is an accurate reliable number.
4. Do you remember that?
5. A
6. Q

#### Yes.

And as you sit here today, you

1. have no reason to conclude that that number, 10,000,
2. was either accurate or reliable, do you, as you sit
3. here today?
4. A

#### Yes. In other words, I don't

1. know if it was or not. I don't recall.
2. Q Okay. Now, take a look at, also,

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#### in 1983 -- I'm sorry, let1 s go back and look at 1982,

* 1. at the Gates case. Okay. Since we don't have a
	2. transcript, what I want you to look at is the
	3. representations made by the U.S. Attorney in the
	4. appellate brief where they summarize your testimony?
	5. A I've got to find it, hold on.
	6. MS. CORNWALL: I'm sorry. Is this within
	7. the exhibits that Mr. Malone already has? Or is this
	8. a completely new exhibit?
	9. MS. BUCH: I don't know what Mr. Malone

## has.

#### MR. NEUFELD: Let me see if I can find it

* 1. for you.
	2. MS. BUCH: If he just has the FBI file,
	3. probably not.
	4. MS. CORNWALL: So this is a completely new
	5. exhibit?
	6. MR. NEUFELD: New exhibit, yeah.
	7. (Malone Deposition Exhibit No. 14 was marked.)
	8. BY MR. NEUFELD:
	9. Q Now, I will represent to you that

#### Exhibit 14 is a brief filed by the United States

* 1. Attorney when Mr. Gates appealed his conviction. And
	2. in this brief, there's a section of the brief called

## the Statement of Facts, okay, or a summary of the

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#### evidence that was presented at trial.

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#### MS. CORNWALL: Does it have a page? Are we

1. at a page number here? It doesn 1 t appear to have

#### page numbers.

###### MS. BUCH: Yeah, they got cut off.

1. MR. NEUFELD: The page that begins at the
2. very top of the page, "In the latter part of

8 August 1981." Well, on your page it doesn't matter,

1. it would be the first new paragraph beginning,
2. "Michael Malone." It's about approximately eight
3. pages in. Do you see a paragraph that says, "Michael
4. P. Malone 11 ?

#### MS. CORNWALL: I found it. Michael P.

1. Malone, an FBI special agent11?
2. MR. NEUFELD: Yeah.
3. BY MR. NEUFELD;

#### Q Take a look at that page, sir,

1. and take a look at the last paragraph on that page.
2. Do you see that?
3. A
4. Q

## Yes.

#### In that testimony, in that

1. summary, okay, in the brief, the U.S. Attorney
2. represents that you testified that it was highly

#### unlikely that the hair found on the victim came from

1. someone other than Donald Gates . Do you see that?

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* 1. **A** Correct. Yes.
	2. Q Do you have any reason to doubt
	3. that that's what your testimony actually was?
	4. **A** No.
	5. Q Okay. And, moreover, it states
	6. that you indicated that in approximately 10,000 hair
	7. examinations you had performed over an eight-year
	8. period, there were only two instances in which hairs
	9. from two different people were so similar that you
	10. could not differentiate between them?
	11. A
	12. Q
	13. ring to you?
	14. A

Correct.

Okay. Does that have a familiar

Yes.

* 1. MS. CORNWALL: I don•t see that on here.
	2. MS. BUCH: It's the copy.
	3. MR. NEUFELD: Do you have another copy?
	4. MS. BUCH: No, but I will get you a copy.
	5. MS. CORNWALL: Just so he can see it.
	6. MR. NEUFELD: Sure.
	7. BY MR. NEUFELD:
	8. Q

In fact, to make it easier, take

* 1. a look at the Footnote 9, which you can see, where
	2. they say explicitly, "Malone, an eight-year veteran
	3. of hair examinations at the FBI, had conducted about

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10,000 such examinations (Transcript 92 to 94)."

**A** Yes.

Q Okay. Now, this is the kind of testimony that you gave in a number of cases; correct?

**A** Correct.

Q Okay. Over a number of years?

**A** Correct.

Q Right. And when you -- one of the reasons that you concluded, okay, that it was highly unlikely, right -- that's a probabilistic term, is it not?

A Yes.

Q That it was highly unlikely that the hair found on the victim came from someone other than Donald Gates is because of your personal experience, that in comparing the knowns of 10,000

people; right?

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Correct.

That there are only two instances

A

Q

20

21

where you were unable to microscopically distinguish

two people?

22

23

That's correct.

A

24

Q Okay. And that was the basis for

your suggesting that the probability that the hair

25

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### came from anyone else was highly unlikely?

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1. A Yes.

### Q Okay. So in fact, you were using

1. that 10,000, that two in 10,000 number to bolster the
2. conclusion in the juror's mind that the fact that you
3. found a microscopic match in the Gates case was
4. powerful evidence that the hair, in fact, came from
5. Mr. Gates; correct?
6. A
7. Q

### Could have come from Mr. Gates. Sir, you did more than say it

1. could have come from Mr. Gates. You said it was
2. highly unlikely that it came from anyone but

### Mr. Gates; correct?

1. A
2. Q

## Yes.

### And you agreed earlier in this

1. deposition that the term "highly unlikely" is a
2. stronger term than simply saying "could have come
3. from" Mr. Gates; correct?
4. A
5. Q

### Correct.

But what you used to get to that

1. conclusion, to convey to the jury that it was highly

### unlikely that the hair came from anybody but

1. Mr. Gates was the fact that you had only had two
2. instances out of 10,000 known hair comparisons where
3. you were unable to microscopically distinguish two

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#### knowns?

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#### A Correct.

* 1. Q Okay. Now, remember earlier we
	2. talked about how if one actually wanted to create a

s probability, okay, of the likelihood of a

1. coincidental match, one would have to do all those
2. pairwise comparisons that we described? Remember
3. that discussion earlier?
4. A
5. Q

#### Right.

Okay. So if one wanted to

1. establish a probability of a coincidental match,
2. meaning that the hair, in fact, doesn't come from
3. Mr. Gates but, in fact, is just a coincidental match,
4. you would have to do pairwise comparisons; correct?
5. A
6. Q

#### Correct.

And when you described to the

1. jury about the reason it's so unlikely that the hair
2. came from anyone other than Mr. Gates is because in

#### the 10,000 instances where you compared a known

1. against a known, there were only two instances where
2. you couldn1 t differentiate them, you didn't do
3. pairwise comparisons for everybody in that group of

23 10,000, did you?

1. A
2. Q

No.

## That would be an unbelievable

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##### REPORT

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K6 Pubic hair (Itara t7)

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K7 Saliva (Xtea 19)

K8 Blood (Ite111 t9)

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BAP A, ,\K 1-1, Up i-1, CA U l-1, PepA 1-1•

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